Evolving Institutions and Transatlantic Relations

Toward a European Law

by Gil Carlos Rodríguez Iglesias

The institutions of the European Community[1] integrate as well as innovate, incorporating the policies of member states and establishing new policies applicable to them. While much has been made of the great efforts required to establish a common currency, a study of the important task of establishing a community law is also in order. What is most interesting is that this is a legal order that has its roots in international law but also resembles many aspects of the national European legal systems. Moreover, it presents its own very specific features—one of the most striking being its particularly dynamic development.

This evolution is also of significance to the relationship between the United States and Europe. Common Market law plays an ever increasing role in those transatlantic relations. As regards judicial contacts, a delegation that included four members of the U.S. Supreme Court paid a two-day visit to the European Court of Justice in 1998, a visit that was returned two years later in Washington.

This paper explores some of the challenges inherent in the "europeanization" of European national laws and, in particular, the function of European Community law in this process. It explains how the Court of Justice moves from a starting point of national constitutions and general principles, employs comparative law, and then emerges with a legal order befitting a community of states, peoples, and citizens.

Defining European Law

Community law is independent, uniform in all the member states of the community, and separate from, yet superior to, national law. It is built on all the legislation adopted by the European institutions, together with the founding treaties. The term "European law," however, also includes other meanings that must be considered.

On the one hand, "European law" refers to the legal system of the European Communities. In this sense, it comprises a concept of law that has a real scientific and legal content. Thus, in terms of legal theory, one would define the legal system of the European Communities as a positive legal order with clearly defined rules that have the force of law and that derive from clearly determined sources.

But "European law" can also be used as a means of conceptually categorizing the points common to the different legal systems in Europe. Thus the expression would include the laws common to the national legal systems as well as the laws of the

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supranational legal systems such as the European Convention on Human Rights. In this way, this meaning refers both to a situation and to a process of europeanization of the national European legal systems. These two meanings of "European law" are closely linked since the European Community plays a central role in the process of the europeanization of national laws.

A New Legal System of States and Citizens

Since *Van Gend en Loos* in 1963, the Court of Justice of the European Communities[2] has defined European Community law as a "new legal order of international law." In that judgment, the court gave the following reasons to justify the definition of this order as new:

> The objective of the EEC Treaty, which is to establish a Common Market . . . implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting states. This view is confirmed by the preamble to the Treaty which refers not only to governments but to peoples. It is also confirmed more specifically by the establishment of the institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens. . . . The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields and the subjects of which comprise not only Member States but also their nationals.[3]

This judgment is of major historical significance since it conceives of the European Community not only as a community of states but also a community of peoples and of citizens. The court made this declaration on the basis of reasoning that refers to the stated purpose of the treaties, the institutional structure of the European Community, and its judicial organization—in particular the system of cooperation between national member-state courts and the Court of Justice provided for in the treaties known as the *preliminary reference procedure*. Presently, this concept constitutes an essential component of the *acquis communautaire*—the expression used to describe the whole range of principles, policies, laws, practices, rights, obligations, remedies, and objectives that have been agreed to or that have developed within the European Community, and that all member states that have joined the European Community since the first enlargement in 1973 are obliged to incorporate into their own law. In 1993, when the European Community Treaty was amended, the concept of the community as one of states, peoples, and citizens was further confirmed and widened by the addition of new provisions on European citizenship.[4]

The three fundamental principles that characterize the community legal system, in particular the principles governing the relationship between the system and the member states, also stem from this concept of the community:

1. *Direct effect,* as defined in the *van Gend en Loos* judgment.
2. *Supremacy,* as defined in the *Costa/Enel*[5] judgment of 1964.

3. *State liability* for damage caused to individuals as a consequence of a breach of community law, recognized in the court's judgment in 1993 in the *Francovich*[6] case.

The addition of this third fundamental principle completed the scheme of effective protection of individuals' rights under the community legal system.

The European Community is conceived of as not only a community of states but also a community of peoples and of citizens.

In sum, the rights of individuals protected under the community legal system derive directly from community law without the need for any additional national legislative intervention (direct effect); prevail over any national law found to be contrary to community law (supremacy); and, where these rights have been harmed by acts or omissions of the state, give the holders of these rights a right to reparation (principle of state liability).

Sources of Community Law

On this basis, we next describe in the following order the constitutional principles, legislative instruments, and general principles that form the foundation for European law.

Constitutional Principles. The national constitutions and the constitutional values common to the member states together constitute a source of law for the identification and shaping of the general legal principles of community law—of particular importance in the field of fundamental rights.

As one might expect, the treaties establishing the European Communities laid down the rights and obligations governing the member states and the peoples of the European Communities. They also constitute the fundamental basis for what is called the *constitution* of the European Community. This notion is not a merely rhetorical idea. On the contrary, it is a statement that the court has used to define the community as a community of law, a community in which the principles proper to a state of law are fully applicable. It was with the constitutional nature of the treaties in mind that the court was able to determine the scope of judicial review and review the constitutionality of legislation and other acts of the community institutions. One of the most notable judgments in this regard was in the *Les Verts* case in 1986,[7] in which the court held that all acts adopted by the community institutions were subject to judicial review even where the treaty itself did not expressly provide for the review of acts of one of those community institutions. The court reasoned that

> the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of

> the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty. . . . The Treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions.

Again, in its *Opinion 1/91* on the draft agreement on a European Economic Area , the court reaffirmed the idea that "the EEC treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a community based on the rule of law."[8]

The constitutional dimension of community law, however, has a wider scope than the treaties establishing the European Communities. In an indirect way, the community legal order also has its constitutional basis in the constitutions of the member states. It suffices to recall in this respect that in order for each state to join the European Community, it must have the national constitutional basis to allow it to do so.

On the other hand, given that the member states retain a constituent power in the community, any substantive modification that is made to the treaties in the process of European integration—in other words, any "constitutional amendment" of the community—first needs the necessary constitutional basis in each member state. For example, in order to be able to ratify the Treaty on European Union of 1992, a number of member states had to make amendments to their national constitutions, which in some cases required national referendums on the proposed amendments. It is worth bearing in mind that while this might seem like a procedural hurdle, in fact these national constitutional amendments have played a substantial part in reinforcing the democratic legitimacy of the community legal order and of the integration process.

Legislative Instruments. The community institutions adopt the basic legislative instruments used to unify the law within the community: regulations, directives, decisions, and so on. These measures are particularly significant since they are in large part immediately applicable in each of the member states by virtue of the principles of community law.

The most common legislative instrument is the *directive,* a framework law that requires the member states to adopt and implement domestic legislation within a specified time. It is designed as a means of achieving a common law in Europe through domestic legislation. Thus, the directive does not have direct effect unless a member state fails to adopt and implement executing legislation or incorrectly implements the directive.

Domestic legislation adopted on the basis of a directive has to be interpreted in conformity with specific principles aimed at achieving the result envisaged by that community measure of legislative harmonization. Since 1984, the relationship between directives and domestic law has been the subject of a number of important judgments from the Court of Justice. Some of the most significant were in connection with the European Council directive on the principle of equal treatment of men and women in the workplace.

The first judgment in this line of case law was in *von Colson*.[9] In this case, a German court questioned the compatibility of a provision of the German civil code with the directive, and for this reason referred the matter as a preliminary question to the Court of Justice. In its view, the German provision could only be interpreted as providing for a very limited right to damages in a situation where a job applicant had been discriminated against on grounds of sex.

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The Court of Justice confirmed that, in applying national law and in particular national legislation specifically adopted to implement the directive, the national court had to interpret its national law in the light of the wording and the purpose of the directive in order to achieve the result referred to in the treaty, whereby a "directive shall be binding as to the result to be achieved."[10] Since the *von Colson* judgment, this dictum has been reiterated many times as constituting the basis for interpreting national law in conformity with community law. The court went on to say that

> it is for the national court to interpret and apply the legislation adopted for the implementation of the directive in conformity with the requirements of Community law in so far as it is given discretion to do so under national law.[11]

This obligation was strengthened in the *Marleasing*[12] judgment, in which the court held that the national court is required to interpret national legislation *insofar as it is possible* in the light of the wording and purpose of the directive. This obligation also holds in situations such as in the *Wagner Miret* [13] case, where the state considered that it was not necessary to modify domestic law because it already had fulfilled the requirements of the directive.

Although these cases concerned directives, the obligation of "sympathetic interpretation" applies to any provision of community legislation, including, most importantly, the treaties. Thus the principle of free movement of goods, which is provided for in the treaty, has had quite an impact on the interpretation of domestic provisions on unfair competition. The principle of freedom of establishment, also provided for in the treaty, has had an impact on those aspects of company law and fiscal law that have not been harmonized.

The uniform effect of directives is not confined to the European Community. From a legal point of view, the unification process extends in large measure to the European Economic Area—the area comprising non–European Union (EU) member states Norway, Iceland, and Liechtenstein. Moreover, EU directives also influence the laws of countries belonging to neither the European Economic Area nor the European Community. The obvious examples are those countries in Central and Eastern Europe that are applicants to join the community and that are now in the process of adapting their legislation to meet the requirements of community law (although not

legally bound to the community) and Switzerland, whose legislation has been considerably influenced by the legal models adopted in the community.[14]

General Principles. General principles of law represent important basic values such as the respect of fundamental rights and the principle of democracy. Some are found in the treaty itself, such as prohibitions on discrimination on grounds of nationality and gender, as well as the principle of sincere cooperation on the part of the member states. Others are found in the provisions of secondary law.

Nevertheless, the general principles mainly originate in the national legal orders, and the court's case law has played an important role in their integration into the community legal order. Many of these principles have been recognized by the court as having constitutional status and have consequently constituted a parameter of legal control (which is in fact constitutional control).

The protection of fundamental rights has been shaped by the court's case law, which in turn has been formed on the basis of the general principles of the laws common to the legal systems of the member states. In the field of human rights, these general principles usually stem from two sources:

1. the constitutional values provided for in the national constitutions and guaranteed by the respective constitutional courts in the member states; and
2. the European Convention on Human Rights as interpreted by the European Court of Human Rights.

By referring to the European Convention on Human Rights, the Court of Justice bases itself upon an already existing standard of protection of international relevance. This means that the convention will remain a yardstick for the development of fundamental rights within the European Union because those rights are, as the Court of Justice has emphasized, the expression of legal traditions common to all member states

The Role of Comparative Law

The European Community Treaty entrusts the Court of Justice with the task of defining the rules governing the noncontractual liability of the community on the basis of an analysis of comparative law.[15] It goes without saying that this necessarily implies a certain creative law-making role. The court has also used comparative law techniques in other areas of community law. In the field of fundamental rights, for example, the court takes the constitutional traditions of the member states and the international treaties to which the member states are signatories as a first point of departure.

A particularly interesting example of the use of the comparative law method was in the *AM & S*[16] judgment, in which the court conducted considerable research in order to define the scope of the term "legal privilege," whereby correspondence between lawyers and their clients benefits from special protection in antitrust proceedings. There were provisions in neither primary nor secondary law in respect of this

principle, and the court therefore asked the parties to take a position on the law of the different member states on the question. It is interesting to note that the court considered the question of such importance that it reopened the oral proceedings in order to allow the parties to make their arguments on the point. In the hearing, given the importance of the principle for the legal profession, the Consultative Committee of the Bars and Law Societies of the European Communities was granted leave to intervene and made a particularly pertinent contribution. Advocate General Sir Gordon Slynn also made a thorough study of the comparative law considerations in his opinion to the court.[17]

In its judgment, the court confirmed that

> Community law, which derives from not only the economic but also the legal interpenetration of the Member States, must take into account the principles and concepts common to the laws of those States concerning the observance of confidentiality, in particular, as regards certain communications between lawyer and client. That confidentiality serves the requirements, the importance of which is recognized in all of the Member States, that any person must be able, without constraint, to consult a lawyer whose profession entails the giving of independent legal advice to all those in need of it.[18]

The court found that it was apparent from the legal systems of the member states that, although the principle of such protection was generally recognized, its scope and the criteria for applying it varied. The court concluded that

> Apart from these differences, however, there are to be found in the national laws of the Member States common criteria inasmuch as those laws protect, in similar circumstances, the confidentiality of written communications between lawyer and client provided that, on the one hand, such communications are made for the purposes and in the interests of the client's rights of defence and, on the other hand, they emanate from independent lawyers, that is to say, lawyers who are not bound to the client by a relationship of employment.[19]

Thus the court concluded that given those conditions, the confidentiality of correspondence between lawyer and client is protected by community law.

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As eminent legal writers and former judges of the court have pointed out,[20] the use of the comparative law method is especially common when the court is in the process of deliberating the drafting of its judgments, although this is only rarely mentioned in the judgments themselves.

For the judge, a full consideration of the contrast of the different laws of the member states is of extraordinary importance. Interestingly, the differences often are not so great as one might expect. Indeed, it is generally the case that the different legal

orders provide similar solutions to legal problems, despite the technical and dogmatic variations in the route taken. Even within the Court of Justice, the differences in approach of the judges as regards questions of substantive law are rarely attributable to their respective legal traditions. On the contrary, the judges are more conditioned by their national legal background when it comes to questions of procedure.

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Of course, comparative law research sometimes finds that there is no uniform solution to be found in the law of the member states. In those cases where there is a wide divergence among the solutions provided by the national laws, the court inevitably has to make a decision itself on the scope of the concept in community law. The judgment in the *Puma* case[21] on trademarks is a good example. This case provided the first opportunity for the court to interpret the concept "risk of confusion" as provided for in the first directive on the harmonization of trademark law. There were two incompatible approaches to this concept. The court, charged with providing a single interpretation applicable throughout the community, had to decide between the German and the Benelux approaches, in the end opting for the German model.

Final Considerations

When dealing with a question of European Community law, the most important thing to bear in mind is that in contrast with the national legal orders, the European Community legal order is neither an isolated nor an insulated legal phenomenon. One of its essential features is its integration with the national legal orders. The principles of direct effect, supremacy, and liability precisely refer to the relationship between the community's legal order and those of its member states.

The creation of a European law does not entail the suppression or substitution of national legal orders but rather the coexistence and joint operation of a plurality of legal orders. The upshot of the development of community law has been intense legal harmonization, brought about in two ways:

1. common community legislation, which prevails over national legislation; and
2. legislation adopted on a national level that in substance constitutes a common law across the different national legal orders.

One can also see an increasing process of europeanization in legal thinking and a greater convergence among the national legal orders. This convergence, which has resulted in a proliferation of common legislative provisions, has been the subject of a number of studies made in the fields of constitutional law as well as in administrative and private law.[22]

Insofar as this process of europeanization extends beyond the boundaries of European Community or European Economic Area law, it constitutes more of a phenomenon of culture than of positive law. A two-way process is at work: European Community law has been a determining factor in the europeanization process, which in turn has had an impact on the development of community law itself.

The process of unifying law is not without limits, however. The legal order of the European Communities is based on principles of both conferred powers and subsidiarity, both of which constitute limits on the scope of community laws. Thus, important areas of the law, such as criminal or family law and the law on property and succession, continue to be governed wholly if not exclusively by the domestic law of the member states.

Lastly, it is important to stress that European law does not question in any way national or regional identity or its specific legal features. On the contrary, such specific roots are an essential element to the European legal culture. The European Community and its law derive strength not in spite of the diversity of its members, but because of it.

Notes

[1] The basic elements of the process of integration are the three European Communities, i.e., the European Coal and Steel community (Treaty of Paris, 1951), the European Economic Community, and the European Community for Atomic Energy (Treaties of Rome, 1957). Because of its general character, the European Economic Community is the most important one. From the entrance into force of the Treaty of Maastricht in 1993, it is simply called the European Community. The same Treaty of Maastricht brings both the above-mentioned communities and the areas of intergovernmental cooperation under the umbrella of the Treaty on European Union. This union has a single institutional framework. The latest amendments to the Treaty on European Union entered into force on May 1, 1999 (Treaty of Amsterdam).

[2] Case 26/62 [1963], ECR, p. 3.

[3] Ibid.

[4] EC Treaty, Art. 17.

[5] Case 6/64 [1964], ECR, p. 1253.

[6] Joined cases 6/90 and 7/90 [1991], ECR, p. I-5357.

[7] Case 294/83 [1986], ECR, p. 1339.

[8] Opinion 1/941 [1991], ECR, p. I-6079.

[9] Case 14/83, [1984] ECR, p. 1891.

[10] EC Treaty, Art. 249.

[11] Case 14/83 [1984], ECR 1891, point 28.

[12] Case C-106/89 [1990], ECR p. I-4135.

[13] Case C-334/92 [1993], p. I-6911.

[14] In a recent case before the U.S. Supreme Court, a reference to European Community law can be found. In *Printz v. United States,* 117 S.Ct. 2365 (1997), Justice Breyer, dissenting, argued that the "federal systems of Switzerland, Germany, and the European Union" provide that "constituent states, not federal bureaucracies, will themselves implement many of the laws, rules, regulations, or decrees enacted by the central 'federal' body." The dissent argued further that constituent states implement many such laws "because they believe that such a system interferes less, not more, with the independent authority of the 'state,' member nation, or other subsidiary government, and helps to safeguard individual liberty as well (Id. at 2404).

[15] Art. 288, para. 2.

[16] Case 155/79 [1982], ECR, p. 1575.

[17] [1982], ECR 1642.

[18] [1982], ECR 1610, point 18.

[19] [1982], ECR 1611, point 21.

[20] Pierre Pescatore, "Le recours, dans la jurisprudence de la Cour de justice des Communautés européennes, à des normes déduites de la comparaison des droits des États membres" (*Revue internationale de droit comparé,* 1980, p. 337); and Ulrich Everling, "Rechtsvergleichung durch Richterrecht in der Europäischen Gemeinschaft" (Vorträge aus dem Europa-Institut, Nr 151, Saarbrücken 1988; "Zur Begründung der Urteile des Gerichtshofs der Europäischen Gemeinschaften," EuR 1994, p. 127).

[21] Case C-251/95 [1997], ECR, p. I-6191.

[22] For example, see Ulmer, "Vom deutschen zum europäischen Privatrect," *Juristenzeitung* 1992, p. 1; Müller-Graff, *Privatrecht und Europäisches Gemeinschaftsrecht*, 1991; idem, "Europäisches Gemeinschaftsrecht und Privatrecht" *NJW,* 1993, p. 13; Lutter, "Die Einbindung der nationalen Gesellschaftsrechte in das europäische Recht," Reformbedarf im Aktienrecht, *Zeitschrift fur Unternehmens- und Gesellschaftsrecht,* 1994, p. 121; and Van Gerven, *Torts: Common Law of Europe Casebooks* (Oxford: Hart Publishing, 1998).