EUROPEAN UNIVERSITY INSTITUTE
INSTITUT UNIVERSITAIRE EUROPÉEN

# NEW PERSPECTIVES FOR A COMMON LAW OF EUROPE

# NOUVELLES PERSPECTIVES D'UN DROIT COMMUN DE L'EUROPE

Edited by / Sous la direction de
MAURO CAPPELLETTI

SUTHOFF
KLETT-COTTA

BRUYLANT
LE MONNIER

# NEW PERSPECTIVES FOR A COMMON LAW OF EUROPE

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# FOREWORD

by

MAX KOHNSTAMM

*President of the European University Institute*

*The idea of creating the European University Institute goes back to the early days of the European Community. It took a long time for the idea to be realised, but in the autumn of 1976 the first faculty and the first researchers started work at the home of our Institute, the Badia Fiesolana.*

*The Institute's mission, according to the Convention setting it up, is a twofold one: firstly, to contribute, by its activities in the fields of higher education and research, to the development of the cultural and scientific heritage of Europe; secondly, to be a forum for the exchange and discussion of ideas and experience in subjects falling within the areas of study and research with which it is concerned.*

*When it met to prepare our first academic year, the Academic Council of the European University Institue decided to organize regular colloquia, as a means to realise the second part of its mission. A study of the diversity and the common features of Europe's systems of law, a search for the common basis on which to found legal provisions applicable to those nations of Europe who would freely subscribe to them, was clearly part of the task entrusted to the Institute. The Academic Council therefore gratefully accepted Professor Mauro Cappelletti's proposal for a colloquium on « New Perspectives for a Common Law of Europe ».*

*It is the Institute's good fortune that the important contributions made to this colloquium, held at the Badia in May 1977, constitute the opening volume of its Publications Series. In this series, the Institute intends to publish the research*

*findings of its scholars and the proceedings of conferences and colloquia organized at the Badia. The present publication, like its successors, obviously does not represent opinions or positions of the Institute as such, but those of its various authors.*

*It is, however, our fervent hope that by the choice of subjects studied and discussed at the Badia, as well as by the way these subjects are treated, our publications will constitute an important means for the execution of the Institute's task, namely, through widening and deepening the understanding of our diverse histories and cultural traditions as well as of the common problems now facing us, to contribute to the unity of our nations, a conditio sine qua non both for the maintenance of their diversity and for constructive participation in finding solutions to the problems of our world in turmoil.*

*It is with this hope that we submit this first volume of our publications series to its readers.*

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# INTRODUCTION

by

MAURO CAPPELLETTI

*Chairman of the Law Department, European University Institute*

## I. The Purpose of the Colloquium.

Will the newly established European University Institute be able to become, albeit on a much smaller scale, the « Bologna University » of the 20th Century? Will it be able to develop into a transnational center of movements and ideas cutting across existing national frontiers and capable of actively participating in the re-born trend toward a *jus commune* – more generally, toward a new, powerful encounter of cultures and economics, politics and ideologies – of the peoples of Europe?

Such a task may sound overambitious; yet I firmly believe that the success or failure of the EUI will depend on whether or not, in the not too distant future, the answer to the above questions will be affirmative.

It was with this prospect in mind that, at the threshold of its very first academic year, the Academic Council of the EUI decided to choose « New Perspectives for a Common Law of Europe » as the subject for one of its first international Colloquia, entrusting me with the responsibility for its organization. Indeed, it seemed to all of us in the Academic Council that no other area better than the law could epitomize the past and present history, the glories and the decays, the hopes and the fears, and, above all, the present titanic challenge of Europe. Twenty-one countries – to count, quite artificially, only those in the « West, » from Iceland to Cyprus – each with a distinct legal system, represent an irrational, suicidal division

within a modern world which demands larger and larger open areas of personal, cultural, commercial, labor and other exchanges. Harmonization, coordination, interdependence are absolute needs of our time; and history is there to provide clear evidence that division is not an ineluctable fate, that indeed division is a relatively recent phenomenon in a Continent which, for centuries in past epochs, was characterized by a law common to most of its peoples.

The papers in this volume are the fruit of the EUI's Colloquium. The first versions of the papers were submitted for discussion to the fifty or so participants in the conference held on May 16-20, 1977, in the Badia Fiesolana, the historic, splendid seat of the EUI. In addition to the fifteen distinguished reporters – mostly comparativists, but also historians as well as experts in the sociological, political and economic aspects of the law – teachers and research students from the Institute's four Departments participated in a lively and enriching discussion. The present version is the result of the authors' revisions of their papers, based on that discussion. I am sure the authors would agree that, in many ways, their papers, as they now stand, are the result of a collective effort and reflect the stimulating atmosphere of several productive days of community life – the moral and intellectual atmosphere which should typically characterize the EUI.

Significantly, not all of the reporters are European. Two of them are American, to emphasize the profound permanent connections between European and extra-European legal cultures and to provide a wider perspective for the analysis undertaken at the European Institute. Also, even though the founding states of the EUI are the nine EEC countries, one of the authors belongs to a country, Greece, not yet a member of the European Communities. His presence points out the Institute's openness to Europe as a whole. The fact that the Greek participant, Professor Evrigenis, is also a judge at the Council of Europe's Court of Human Rights adds further significance. His choice should make clear that the Colloquium's topic was never meant to be limited to that particular expression of the « new law of Europe, » which is « Community law. » As important as Community law – the European

Communities' institutions, processes, and rules – certainly is, it still represents but the tip of the iceberg of that newly emerging « common law of Europe » which the reporters were required to analyze. The European Court of Human Rights symbolizes both the need to organize Europe beyond « the Little Europe of the Nine » – the Council of Europe unites today all but one of the twenty-one Western European nations, the only exception being Finland – and the philosophy of human rights which is the most valuable heritage of Europe's political thought.

## II. The Development of the Colloquium.

The reporters have tried to come to grips with the many facets of the topic chosen for the Institute's analysis. Nothing, at this point, would be more inappropriate than a summary of the reports: the wealth of the innumerable problems, ideas, and suggestions raised by them, can only be appreciated by a careful reading of the reports. It seems to me appropriate, however, to give here some account of the development of the Colloquium, calling attention to some highlights of the oral presentations and the discussion.

1. The first session, on the common « historical foundations » of the European legal systems, was dedicated to the analysis of the past, to gain a better vision of present needs and trends and of their historical roots and justifications. Professor Coing, the first reporter, analyzed three « great movements of ideas and great practical challenges, especially economic, » which were shared in common by all or most of Europe: the reception of Romano-Canonical law, the influence of Natural Law as developed during the Age of Enlightenment, and the process of industrialization. Among the reporter's conclusions, one in particular prompted much interest and basic approval at the EUI, perhaps because it reflects some of the very aims of the Institute itself. Professor Coing drew attention « to the immense role academic learning has had in the formation of our common legal heritage, in the Middle Ages

as well as in the Age of Enlightenment. It was academic training based on European ideas that created a class of lawyers animated by the same ideas, and it was the European lawyer who preceded European law. This is the point... at which our academic responsibility begins. We should fight for an organization of academic training in the field of law at our law schools in Europe, which instead of dividing the lawyers in Europe, tries to further mutual understanding. We must revise the idea which dominated legal education in the 19th century, that national legislation must be the basis of legal training.... What is necessary... is a curriculum where the basic courses present the national law... against the background of the principles and institutions which the European nations have in common ».

Next came Professor Gorla's presentation. The thrust of this contribution, and of the Colloquium discussion upon it, concerned the role of the courts in further developing the *jus commune* of Europe, especially during the 17th and 18th centuries. The great movement of the affirmation and « reception » of a *jus commune*, analyzed by Coing, did not in fact stop with the decline of Bologna, Padua, and the other great and essentially transnational universities. It was pursued by the courts and by their tradition of searching for, and feeling bound by, the *communis* or *uniformis opinio* of other courts, often unlimited by state borders. And, most importantly, the manner in which such precedents were sought by the courts of Continental Europe reminds us of English (Common Law) methods. Thus, the « cleavage » of methods, traditions, and institutions between the larger « Civil Law » area of Europe, on the one hand, and the « Common Law » area, on the other, appears in Gorla's analysis to be much less pronounced than many would believe.

2. The second session was meant to discuss « present components, factors, and previsions of future developments » of the emerging new common law of Europe. Of course, as rightly emphasized by Professor Limpens, to speak of a European *jus commune* today does not mean to envisage a utopian return to past experiences. History provides the roots for new developments; but history never repeats itself. The

new European common or uniform law will neither be a « second re-birth » of the Romano-Canonical law, nor a tardy reception of Civil Law by the British Common Law (or vice versa). Rather, it means completely new efforts toward reciprocal rapprochement, coordination and harmonization. Influences can only be reciprocal, not one-sided. Furthermore, any realistic vision of European legal harmonization must proceed today from the assumption that Europe is, and must remain, strictly connected with the rest of the world. Although we are speaking of a law *of Europe*, an inevitable factor, or component, of such a new law will certainly be the influence, at least indirect, of the law and legal developments of other parts of the world, especially of the two economic and political « superpowers » of our epoch. If it is true that co-existence of the major world powers has become a political and military *must*, then this also necessarily means world-wide relationships, exchanges and cooperation. The wall of Berlin is today as absurd and obsolete, both culturally and politically, as was the Fascist conquest of a colonial empire at the very eve of the death of colonialism. The implication here is the necessity of some coordination of the legal systems – the necessary condition of personal, economic, political and cultural relationships, exchanges, and cooperation.

Indeed, behind and beyond profound, even radical differences, one fact emerges very clearly in the contemporary world: that many basic problems, especially, but not only, economic ones, are the same, or very similar, in all the countries which have achieved a substantially similar stage of development. Think of the rise and growth of multi-national corporations, of massive international exchanges and tourism, of industrial pollution, of the chaos of sudden urban expansion, of the rise of new forms of criminality, of the danger of drugs. It is only too natural that legal solutions to these essentially similar problems are destined themselves to be similar; that successful solutions will spread from one country to another; and that experiences will be shared beyond the borders not only of nations, but also of continents. To speak, as the great British historian Arnold Toynbee used to do, of a « world government » as the only rational, indeed necessary, answer to the

mighty problems of our time, may still appear too futuristic to many; yet, the vision of a new unity, or coordination, of the peoples of Europe would not be a sound one if it simply implied the transplantation of the ideals of the nation-state from fragmented nations into a federation of a number of them. If Europe is to make a new, vital, lasting contribution to human civilization, this shall never be accomplished by molding itself into a third world-power, a mere addition of one unit to the existing two, but by fully overcoming the very ideals of the nation-state – no matter that those ideals were themselves a creation of Europe in another phase of its process of civilization.

Professor Limpens brought to the attention of the Colloquium participants three basic types of factors – ideological, economic, and political – which are favoring the emergence of a new common law of Europe. The discussion, however, focused *inter alia* on a fourth type: the « socio-cultural » factors. This point deserves some elaboration.

By socio-cultural factors the participants did not want to refer only, or even principally, to the unifying influence of an élitist, higher culture of Europe. Such cultural influence undoubtedly exists; suffice it to remember the widespread influence exercised in Europe during the 19th and 20th centuries first by the French *science juridique* and later by the German *Rechtsdogmatik*. Consider the point made by the next reporter, Professor Sacco: that the most important unifying factors are the *doctrine* and legal education; and remember also Professor Coing's conclusion, mentioned above, that a common law begins with a common training of lawyers, that, indeed, « European law » must be preceded by a « European legal education. »

But the discussion brought to the forefront another and, I dare think, even more telling meaning of « cultural » factors. What was meant was *popular culture* – the culture of larger and larger masses of men and women. Mention was made, in particular, of the millions of Southern Italian, Spanish, Portuguese, Greek, Yugoslav and Cypriot workers in Germany, Switzerland, France, Belgium, Sweden or England, who come into contact with different peoples, different customs, different

attitudes, thus mixing their own conceptions and behavior – their « culture » – with those of other populations of Europe. This is, in sum, the gigantic phenomenon, typical of contemporary Europe, of the mobility of masses – their transplantation from the countryside to the town, from agriculture to industry, from the sunny but poor and overcrowded South, to the colder, cloudier, but richer North. These socio-cultural factors are of extreme importance, not only insofar as the economic and political integration of Europe is concerned, but also vis-à-vis the development of a more uniform law. Movement of peoples creates convergence. To give an example, I would not hesitate to affirm that the Italian referendum of 1974 would never have given the result of about 60% of the population of « Catholic » Italy being in favor of divorce, if it were not for the kind of mass cultural influence which is mentioned above.

I wanted to emphasize this point because it reflects a concern expressed again and again in the Colloquium discussions, especially by the younger participants – the EUI research students. It was the concern that the development of a new law of Europe should not become the monopoly of an élitist group – represented, perhaps, by a mixture of bureaucrats in Brussels, of politicians in Brussels and Strasbourg, of judges in Luxembourg, and of professors in Florence – a group which, because of its own idiosyncrasies and culture, would tend to neglect the larger popular needs and aspirations. Several students in particular emphasized – quite rightly, I believe – that there is no future for Europe and for a new common law of Europe unless basic inspiration is drawn from the philosophy of both individual and social rights, in an attempt to combine the liberal ideal of political freedom with the social ideal of justice for all, i.e., of equality of opportunities. It is not without significance, someone pointed out, that the two main research projects of the Law Department in the EUI's first academic year had as their object both the protection of human rights and effective access to law and justice.

The session was concluded by the presentation and discussion of Professor Sacco's report. The new role of legal

scholarship, and especially of comparative law scholarship, in a Europe which strives toward unification was emphasized. Sacco, like Coing, broke a lance against the merely « positivistic, » national teaching of law which still prevails in the national universities. The comparative search for « common cores » – a search pioneered by the well-known Cornell University project led by Rudolf B. Schlesinger – shall be the primary goal of a renewed legal scholarship. Comparative law, someone also said, is the law of the future: only concrete, precise, thoughtful comparative analysis can delineate the main trends of the law of today, and thus, can reasonably predict the law of tomorrow.

3. The third session was dedicated to the « gulf » between Common Law and Civil Law. Is this gulf an insuperable obstacle to the harmonization of European legal systems? Two celebrated masters of comparative law were called upon to come to grips with this fundamental problem: Professor René David and Professor Sir Otto Kahn-Freund.

The first reporter seemed more optimistic: the real differences between the two major legal systems, he said, do not represent serious obstacles to rapprochement; they are not so much differences in fundamental principles and results as in methods and processes. The second reporter agreed with this point, but saw in these methodological and procedural differences more fundamental obstacles to unification than did Professor David. For Professor Kahn-Freund, the basic question is whether or not there exist today social, political and economic exigencies that are powerful enough to help overcome those very real and very serious obstacles; no legal unification would ever occur unless there are such powerfully pressing needs. Also, since such needs are stronger in certain fields than in others, unification shall start with those specific fields, rather than with broad topics and general principles. Moreover, « it is not only useless, but dangerous to extend attempts at harmonization into fields in which legal differences reflect differences in political or social organizations or in cultural or social mores. » « *Festina lente* » was, then, Kahn-Freund's conclusive warning.

Not unreasonably, however, some participants questioned the wisdom of this warning. Has Europe time enough to « go slowly »? Is Kahn-Freund's warning inspired by an excess of prudence? Also, even though it is certainly true that no real change in the law ever occurs without economic, social and other exigencies demanding such change, it is also true that law can itself act as an *instrument* for social change: a change in the law, while caused by societal needs, can in its turn cause transformations in the structures, approaches, and aspirations of society. Even « national characters, » said Professor Coing during the session's discussion, can and do change; and the law can assume an active role in such change. If this is true, then the need for a dynamically unifying law, rather than a law which, by passively accepting differences, petrifies them, emerges in bold relief. This is especially important when the differences in the law do not reflect valuable local, regional, or national characteristics, but rather the delay of certain parts of Europe in modernizing, i.e., in adapting their law to the needs of our time – a problem which is particularly acute not so much vis-à-vis the « gulf » between Common Law and Civil Law, but rather with respect to the more dangerous gulf between developed and less developed areas of Europe. Maintaining such differences, even when they reflect divergences « in political or social organizations or in cultural or social mores, » would have more to do with invidious conservation of discrimination than with a sound respect for pluralism.

On the other hand, the discussion also challenged, in part, the permanence of some of the basic methodological and procedural differences between Civil Law and Common Law. It is a matter of fact, for instance, that the law-making role of the judiciary is more prominent in most Common Law countries, where a higher image of the judge prevails; but it is also true that, especially with the 20th century creation of constitutional courts in a growing number of European Civil Law countries, which include Germany, Italy, Austria and, in part, France, that role has been forcefully growing in these countries as well. Interestingly, the structure and role of the European Communities' Court of Justice, whose decisions, like constitutional court decisions, frequently have *erga omnes* effect, are more like