# Law, History, and European Integration

**Pia Letto-Vanamo**
University of Helsinki

**1.** Introduction: The title of my paper is "Law, History, and European Integration". The subtitle, however, could be "Some Ideas for Rethinking European Law". Actually, it is quite popular to "rethink" – at least among my colleagues in the Nordic Countries. Indeed, some weeks ago I gave a speech at the University of Copenhagen at a conference arranged by my Danish colleagues in legal history, legal theory, and legal sociology. The topic of the conference was "Rethinking European Legal Culture". Then, too, my faculty at Helsinki has a Centre of Excellence for Foundations of European Law and Policy Research (see: http://www.helsinki.fi/katti/foundations/), where the main goal is to rethink European law, especially as far as concerns the current doctrine of legal sources and legal reasoning.

Evidently, my Nordic colleagues are right in their rethinking approach. Generally speaking, we – working and studying at universities – should always be capable of and ready for rethinking, for seeking new perspectives, for questioning old truths. More specifically, European integration is challenging us to new narratives of the history of European Law, and to new ideas about its future, particularly with the enlarged European Union.

I have three main points in my paper: First, I will deal with European legal history, about a definition of a *Europe of Law* that can be found in the writing and teaching of legal historians in most European countries. After that I will discuss the *law of Europe* by presenting some trends in current development of European Law, and claiming that:

a) many European laws exist – or at least many different approaches to legal harmonization, which is true even within the European Union, and

b) a trend is under way from substantive law to procedural law that can be seen in European regulation, both within the European Union and at national level, too.

Finally, I will comment on European justice (*Gerechtigeit*), which is – or should be – something more than purely and simply European legislation.

**2.** What is Europe?: When we try to define Europe by reading books and articles written by historians, philosophers, or even political scientists we easily recognize how they all agree that Europe is not only a geographic unity, but it is also something ideal, something cultural.

At least three key elements defining European identity are mentioned. These are Christianity, Greek philosophy, and Roman law. And while studying texts written by legal historians, the most important foundation of Europe seems to be Roman law.

Thus, we are telling our students the story (hi-story) of European legal thinking by claiming that European legal systems have similarities – even a common core – based on the influence of Ancient Roman Law.

This story has been, and could be criticized; not only because of its eurocentrism, but also because it is told mainly by German legal historians, neglecting legal historical developments in the European "peripheries" such as those in the Nordic countries. However, it is quite a good story, a great narrative of the importance of law in Europe. The most crucial point in the heritage of Ancient Roman Law is the idea of an autonomous normative (consequently legal) order regulating relations between human beings.

That is something European, which becomes clear when comparing European legal tradition(s) with other legal traditions of the world. Of course, even in Europe legal norms do not emerge or function in a vacuum; and it would be impossible to think that a national or supranational legal order (especially with criminal law norms) could be efficient without reflecting the basic ethical and moral values of the society concerned.

It is not only the idea of law we have acquired from Ancient Rome. The most important institutions and concepts of modern European (private) law can be found in ancient literature: in the Institutions of Gaius and in the Digest, the second part of the Justinian *Corpus iuris civilis* from the 530s AD.

It also appears that European integration – the founding of the European Community in the 1950s – would not have been possible without countries with similar legal orders: sharing the same basic ideas concerning, for example, contract law and issues of liability.

Today, we see that the European Union is not only furthering economic integration. It is furthering legal integration, as well – by using legal instruments for the purposes of economic integration. And the law is also present as a criterion for membership of the Union. According to the so-called Copenhagen criteria, only states respecting the principle of the rule of law (*Rechtsstaat)* can become members of the EU. Thus, the law is also important for economic relations, for a well-functioning market economy, and for co-operation between state authorities.

You may remember how Max Weber, one of the big names in European legal and political thinking, wrote about "the European way" by maintaining that the big cities with their economically active bourgeoisie were crucial for the modernization of law in Europe. Predictability was and is of importance in economic relations; and this can be guaranteed through legal norms and their application by independent courts.

But where European integration is concerned, it is not the idea of law – or law as an instrument – that is important. Additionally, the so-called second life of Roman law used to be mentioned, at least for educational reasons. Then the focus was on the history of European universities and the reception of Roman law. We learned that many still-functioning European universities, such as the Universities of Bologna, Paris, Montpellier, Cologne, and Prague, were founded in the Middle Ages. We also know that in all of them it was usual to study law – both Roman law and Canon law.

Researchers of university history have told us that the medieval universities, their teachers and students, formed an early European network of law – that of trained lawyers. They read the same books, compiling and commenting on Ancient Roman law texts. The same teaching method, the scholastic method, was used, the Latin language was the *lingua franca* of university education, and very often students and professors were travelling around Europe, moving from one university to another. Researchers interested in the history of the legal profession have found that those universities trained young men as judges, secretaries (often with the title of *syndicus*) or advocates mentioned in the court records of the big cities or in

the early high courts. They were representatives of the European *ius commune*, the Roman-Canon common law.

However, this narrative can also be criticized. At least, it should be mentioned that many variations existed of the European Roman-Canon *ius commune*, like today with European Community/Union Law. Additionally, it can be claimed that legal scholars always have double citizenship. We learn – and are inspired by – foreign theories and ideas, but we are also practitioners: Legal ideas will be tested through legal practice, and international ideas such as new European legal principles or concepts have to be transposed into national environments in light of relevant societal and economic conditions.

**3. (a)** Nevertheless, that (hi)story contains something very interesting. In the Middle Ages, Ancient Roman law was not only taught and learned – it was also reformed and systematized. Canon law became systematized, as well. Since then, we have had many common classifications, categories, and concepts in European legal science(s). Roman law has been important for development of private law doctrine. Ideas and concepts from Canon law cannot be denied where the history of public or criminal law is concerned. For instance, the principle of subsidiarity – crucial for today's EU Law – was developed by canonists.

And it is this period of European legal history that has mostly inspired scholars of today – at least those interested in harmonization of current European law on the basis of common European principles, common concepts, and of common European legal education. This can be called a model of bottom-up-harmonization. This model has inspired most academic working groups for European legal harmonization, such as the Lando Commission drafting Principles of European Contract Law (PECL), or the Acquis Group (European Research Group on Existing EC Private Law), or the group of professors that recently drafted and published (in cooperation with the European Commission) a Draft Common Frame of Reference (DCFR; Principles, Definitions and Model Rules of European Private Law).

These academic groups have so to say an opposite agenda to that of the EU legislator with "sending" often quite fragmented competition, consumer, and other norms (regulations and directives) to Member States, where

national state authors with the help of legal professionals try to place them into the national legal order and implant them into the national legal doctrinal system. This can be called a top-down-approach to European harmonization.

But still other approaches exist to European legal co-operation, even within the European Union. We all know something about international private law, about its system based on complicated choice of law rules and the principle of *ordre public* protecting basic values of the national legal order/ society concerned.

You might also know of quite a new EU Regulation called the Rome I Regulation (EC 593/2008) on the law applicable to contractual obligations (based on the Rome Convention, 1980). The regulation includes, for example, rules on freedom of choice and on the applicable law in the absence of choice. Astonishingly, this contains no references to the Principles of European Contact Law (PECL) or to the UNIDROIT Principles of International Commercial Contracts (2004). However, in a workshop in Helsinki two weeks ago (December 2008) one of the drafters of the Regulation stated that it was the will of the EU Member States not to open up the use of bottom-up-drafted principles. These are made by law professors – not through the democratic legislative procedure of the European Union.

Thus, competing approaches exist to harmonization of European law. Apart from law professors, national states, the European Parliament, and the European Commission, at least one other actor interested in development of European (Union) law has to be mentioned. This is the EU judiciary. Today, the European Court of Justice is – perhaps not "running wild", but playing a crucial role by widening the scope of European Union Law. This can especially be seen when human rights and other basic rights are concerned.

At least one ECJ case ought to be mentioned. This is the so called *Kadi* case (*Yassin Abdulla Kadi and Al Barakaat International Foundation against the Council and Commission; Joined Cases C-402/05 P and C-415/05 P*). Through this case, the European Court of Justice is re-defining the relationship between international law and EU law – by annulling a Council Regulation based on a Resolution of the Security Council of the United Nations, because it infringes Kadi´s and Al Barakaat´s fundamental rights under European Community Law.

**3. (b)** It is not substantive law that seems to be important for the Europeanization of law. And it is not the European Union that has been the agent of legal harmonization in Europe. The Council of Europe, the European Convention on Human Rights (1950) and the European Court of Human Rights ought to be mentioned here, as well.

In my country, entry to the European Union (in 1995) was no legal revolution, but ratification of the European Convention on Human Rights (1990) was – at least a small one. Article 6 of the Convention on the right to a fair trial was the main reason for a deep-going reform of the Finnish court system and legal procedure in the 1990s. Indeed, several cases against Finland in the Strasbourg Court have dealt with the requirement of Article 6 §1 that a decision must be made within a reasonable time.

Further, many other EU countries – not only new Member States – have been on the receiving end of judgments from the Court of Human Rights based on Article 6 concerning, for example, access to justice, independence of the judiciary, and parties' right to be heard.

At the same time, it is interesting to look at current documents of European Union institutions. There, terms such as good governance, better regulation, co-regulation, or alternative dispute resolution, European ombudsman, and so on, are commonplace. Often, they refer to the fact that decision-making procedures are also important, or at least that a need exists for new models of regulation or decision-making.

In my understanding, this can be seen as a sign that justice is also emerging through certain procedures, by applying certain formalities. In every case, an interesting idea lies behind the trend: the experience or the hope that citizens (parties to a case) may accept negative decisions if they have had a real opportunity to participate in the decision-making (or court) procedure, i.e. they have been properly heard, and fairly treated.

From the perspective of legal history, however, this is nothing new. It is well known that during pre-modern times people gathered together in early court sessions, at the so-called *thing*, to talk of common matters and to resolve conflicts. And although no adjudicating third party, no authoritative sovereign, stood above the parties, nevertheless decisions made by the *thing* assembly acquired acceptance or legitimacy. This happened through participation – and through use of certain formalities (rituals), as well.

**4.** However, justice has never been, and cannot be only something procedural. This is true especially when justice in the meaning of *gerechtigheid* is concerned. Then, one can ask whether a place exists for justice in European Union Law – or even more widely, in current European legal thinking.

To answer this question I would like to refer to an interesting debate, to that between *Paolo Prodi* and *Jan Schröder* on the relationship between law and justice. In his great book "Una Storia della Giustizia" (2000, translated into German 2003) Italian historian Paulo Prodi claims that until early modern times several fora, and a pluralism of legal orders, existed, where (divine-) natural, secular, and ecclesiastical norms lived side by side. After the Reformation and the fall of Natural Law, pluralism changed to a monism of positive norms. Today, we stand solely in one forum, that of positive written norms.

At the same time, justice (*giustizia*) has retired into the individual conscience. Instead of a pluralism of legal orders, we are facing the dualism of positive law and conscience. According to Prodi, we are facing development towards a one-dimensional legal norm(ativity) without any meeting with justice. Today, no binding legal ethics exist that could help us to deal with the problems of our time. Thus, one can recognize the incompetence of the one-dimensional norm in handling justice, especially when questions about abortion, euthanasia, or protection of the environment are concerned.

In the article "Verzichtet unserer Rechtssystem auf Gerechtigkeit" (Akademie der Wissenschaften und der Literatur 2/2005) German legal historian Jan Schröder criticizes Prodi's pessimism with examples taken mostly from German legal history but also from current European debates, those on so-called general legal principles and fundamental rights.

It is true that, during the era of the (pluralistic or) dualistic legal system, injustice in positive law could be redressed by norms of Natural Law, or by *equitas* as one form of justice. In our time this is not possible, but correcting means are still available for a judge who regards positive law as unjust. Since the 18th century a model of unwritten legal principles has existed, the idea that positive law as such includes unwritten basics, so-called legal principles. According to modern theory (since the 20$^{th}$ century) legal principles surround positive law but with less binding force than that of ordinary legal norms. Today, we also know the model of legalistic justice, which covers modern fundamental rights and so-called general clauses of

individual laws. Moreover, judicial technique has changed over time. No longer are references made to justice as such, no use is made of "scientific legal sentences" as in the 19th century, but application of legal principles occurs – as "guidelines" from individual legal culture curing unjust positive law.

Thus, our time has not forgotten justice, but different techniques have been developed for bringing it within the modern legal system. These techniques are historically determined, and local variations in their use exist.

And still today, also according to Schröder, common or shared ideas of justice exist for measuring positive law. For instance, no concept of customary law could exist without collective ideas of justice. A custom can become legal only if it is derived from a certain understanding of law. Otherwise criminal customs could also become part of law. But often, in current complex European societies dominated by the law, only members of the legal profession have that understanding. Or at least they seem to have it: otherwise such institutions would not exist beside or against traditional ones such as national and international soft law – with e.g. the new *lex mercatoria* – based merely on ideas and acts of their own agents.

On the basis of historical analysis we can, like Paolo Prodi, point to the dominance of pure law and individualization of the idea of justice, but we can claim, like Jan Schröder, that the modern legal order also includes ideas of (objective) justice. In my understanding, it is possible to assert that collective ideas of justice are transported into European and national legal reasoning and decision-making through fundamental rights. Individualization is characteristic of modern ethics, but more consensus exists than before on fundamental moral norms, at least within European institutions. This can been seen in human and fundamental rights, where moral norms have been translated into legal language.

Thus, the law is needed if different values cause conflicts between individuals and groups. Then, legal principles, linked with fundamental and human rights, do not define values of individuals and groups but guide resolution of conflict between them. This can be seen, for instance, concerning freedom of speech or freedom of religion. Thus, human rights are guarantees for individual choices. And freedom of choice is one of the foundations of modern law.