Europe and the Standardization of the Law: Past and Present

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I. The quest for standardization: between expansion and harmonization

European contributions, in the past, to standardize law in a variety of ways can be considered to be substantial. It may be said that all previous waves of globalization of law have had a distinct European flavour. Currently, the domestic law of countries from all continents either belong to, or are greatly influenced
by the two major legal systems: continental law and common law. It should be pointed out that the notion of sovereignty, the organization of power through the state in its modern form, the law that regulates the relations amongst states, are all, originally, European constructions.

While the fall of the Berlin Wall in 1989 can be symbolically said to have started the present era of globalization, Europe no longer finds itself in the centre of this phenomenon. The current trend to standardize the law comes, for the first time, not from Europe, but from the United States, along with some specialized international institutions, such as the World Bank, the IMF or the WTO. Furthermore, this process of legal regulation or convergence is made, in some cases, by non-state actors as well, such as the case for the ‘lex electronica’, telecommunications and other fields. The overwhelming supremacy of the single superpower displays its effects on the realm of law, to the point that, for some, the time has come to speak out against the ‘Americanization of the law’.

Law, and legislation in particular, has always been regarded as one of the striking manifestations of sovereignty. In the era of globalization of trade, financial markets, communication and many other sectors of human activity, it is natural to enquire about the changes that have taken place in the sphere of law. Should the idea that the concepts of sovereignty and state are in crisis be true, then the different legal systems cannot escape scrutiny as to their reactions thereto.

The study of the way Europe determined the major legal orientations for the rest of the world in the past, has a twofold relevance. First, it points out that this European prevalence is far from being of purely historic interest: its consequences remain and still influence the evolution of new legal phenomena. Second, as the present legal developments or trends in the distribution of power are perceived as being mere replications of previous forms of European legal organization and expansion, while still others are considered, in some circles, as the models to be followed. An example of the former is the comparison of the European Union with the Holy Roman Empire. Examples of the latter are the ius commune, existing throughout most of the European continent until the end of the eighteenth century, and the lex mercatoria, constructed by the merchants themselves to regulate their relations.

At first sight, globalization naturally calls for standardization of the law. The convergence of rules, even though still formally belonging to different legal systems, is imposed by the reality of the activities carried out on a transnational level. Admittedly, the ideas of unification, harmonization and standardization of the law are probably as old as the science of law itself. By defining natural law, Cicero stated that ‘there is a law which is the same in Rome and in Athens, it will be the same today and tomorrow, eternal and immutable, a unique law, for all nations and all times’. For millennia, the idea of a law superior to that created for the legislator and applicable to all human beings, irrespective of the will of
the legislator, was dominant, regardless of whether this natural law emanated from divine will or reason. This prevailing vision of the law was superseded by the positivistic approaches only during the last century. The fact that today many rules have the same content in New York and Paris, in Buenos Aires and Tokyo, has nothing to do with the common nature of human beings or their common submission to the Almighty. It has its roots in the ever-increasing movement of interdependence, exacerbated by the globalization. But standardization of the law and likewise interdependence, were not born with the present era of globalization. What it is new is their scope and dimension, as well as some particular forms of achieving it.

At this stage, a clarification with regard to the terminology employed here seems necessary. ‘Standardization’ is used in a rather broad sense. It refers to the different ways of rendering uniform the legal responses to the same facts or situations, irrespective of the place they occur or of the national elements involved. The result of this can be called the legal convergence. The technique of ‘standards’ is just one amongst others leading to standardization. It consists of the adoption, at an international level, of patterns of normative conduct, with the aim of being generally adopted or followed by the international actors, either public or private, or both.¹ Other techniques include, putting them in the following ascending order of integration: harmonization, reception or imposition of foreign law, and finally unification.

Harmonization implies the maintenance of different national legislations, but obliges them not to be contradictory with regard to a certain, common aim. Comparativists (that is, jurists specialised in comparative law) refer to ‘reception’ when dealing with the adoption by a country of foreign legislation or techniques, or even legal thinking or concepts. They do not distinguish, however, between the reception and the imposition of foreign law. The former is, in general, the result of an act of imitation of what is considered to be the best already available legislation. It corresponds to a free choice of the legislator, who decides to borrow rules from existing law abroad instead of creating new rules by their content. The latter is when a foreign legal system was imposed through colonization and conquest, and kept once the foreign domination ended.² Unification of law at the national level was mainly accomplished in the nineteenth century. It occurs at an international or supranational level today. It means the substitution of multiple rules by a unique legislation.

International cooperation presupposes, as bare minimum, harmonization, both in fact and in law. The higher the level of cooperation, the more developed the degree of standardization of the law will be. Therefore, the world that emerged after the end of the Cold War calls for more standardization. The democratization process in Central and Eastern Europe, the solution of certain internal conflicts, the emergence of new states, the constitution of the WTO, the deepening of the European integration, the creation of regional economic
integration institutions everywhere, the development of new technologies, the increasing awareness of the need to pursue common goals in the fields of the protection of human rights and international humanitarian law, environment or other common goods, lead to legal harmonization or even unification, as well as reception. In some cases, there exists a danger of unilateral imposition of foreign law. In still other cases, there is a struggle between different legal systems for the conquest of what could be called the new ‘legal markets’, that is, the new fields of activity and the new democratic societies.

We will try to illustrate in this chapter that Europe continues to be one of the main ‘exporters’ of legal constructions of major importance, that the undeniable legal standardization coming from the US, international organizations or even private actors is still partial in its subject matter and, finally, that European states, in spite of the fact that they have faced loss of powers in different fields by their transfer to the top or to the bottom, still remain sovereign and play a significant position in the process of legal convergence.

II. The Europeanization of the law throughout the world

Before dealing with the way Europe exports its law to the rest of the world, it is suitable to briefly refer to two models of standardization, which precisely emerged by standardizing the law in the European continent: those of the Roman world of Antiquity and the Holy Roman Empire of the Middle Ages.³

II.1 Roman law

Roman law had an impact which was threefold. First, the emergence, which started with the appointment of a second praetor (the praetor peregrinus) in 242 BC, of the ius gentium, separated from the ius civile, the latter being applicable to Roman citizens only. Although the idea already existed in Athens, what is remarkable is the very existence of a set of rules intending for application to private relations of Roman citizens with foreigners or between foreigners. Another element with potential impact was that its ground was founded on the fact that all peoples live partly according to their own laws, partly according to the universal principles.⁴ It is not by chance, that later the law regulating the relations between states was called the ‘Law of Nations’ (droit des gens, Völkerrecht). Second, the expansion of Roman domination brought about the spread of Roman law. Third, the codification and the study of Roman law afforded the appearance of what was called, at a later stage in history, the ius commune, as we will see below.

Roman law then not only supplied the structure of the legal systems for continental Europe, but influenced other systems and provided the basis of legal reasoning in general as well.
II.2 The Holy Roman Empire

The Holy Roman Empire, characterized by the existence of a multitude of principalities and other local powers, with their double allegiance to the Pope and to the Emperor, was the typical example of legal split, by the existence of a plurality of legal regimes. Each city and principality was governed by its own local custom and legislation.

However, due to the work of scholars who ‘re-discovered’ Justinian’s Digest in the twelfth century, the *ius commune*, a set of rules based on Roman law, applicable from Poland to Portugal and from Scotland and Sweden to Sicily, came into being. It did not replace local customs and legislation. It was subsidiary to them, as it filled the gaps, helped in interpretation and provided legal techniques. In this sense, the *ius commune* in the continent was exactly the opposite of what the common law of England was meant to achieve, which indeed, unified the law of the kingdom by the substitution of local customs by the rules set up by the judges.

The process of unification of national law, mainly through codification, sounded the death knell for the *ius commune*, and to a large extent, for the *lex mercatoria* as well. National law is generally perceived as the reason for the disappearance of the first examples of ‘supranational’ law. It is no surprise then, that jurists who are analysing the legal convergence provoked by globalization are irresistibly drawn toward the concept of *ius commune*. The temptation to search for analogies is, indeed, large. As for some of them, globalization amounts today to a sort of ‘de-codification’, in the sense of the increasing loss of importance of national codes. Yet, for some other authors it is the process of standardization of the law carried out by the EC/EU that allows the mention of the birth of a new *ius commune*. For still others, the experience of the *ius commune* is renewed in Europe, but with the reception of American law.

Nevertheless, the idea of a rebirth of the *ius commune* is nothing new. Already three decades ago, René David proposed, as a way to achieve the unification of private law,

> to revive and develop the old idea of *ius commune*, adapted to the modern world. It is essential, leaving aside any question of forming super-states or attacking state sovereignty, to reconstitute a body of law whose persuasive value, if not its statutory authority, will be recognized in the various states.

II.3 The notion of sovereignty and the conception of the state

The Peace of Westphalia in 1648 is symbolically mentioned as the cornerstone for the foundation of the modern state, characterized by being a *sovereign* state, that is, not subject to any superior power.
European expansion (not only through colonialism) heralded the use of this model of the state everywhere. The phenomena of decolonisation, supposed to be a reaction against European rule, brought about the emergence of new ‘European-style’ states in all continents. It is not exaggerating to say that all states of the world are shaped according to the European model of nation-state, including the most reluctant ones vis-à-vis Western traditions. Thus, the People’s Republic of China, the Islamic Republic of Iran, the Great Socialist Arab Libyan Yamahiriya, to mention a few examples, are all based on the traditional distribution of executive, legislative and judiciary organs. Ironically, the states that received the model of sovereign states from Europe are the first to defend the notion of sovereignty today.

From a legal perspective, this phenomenon of exportation of the European state has been the most important one, since states are the envelope and the structure of the legal domestic systems. However, it is not the only fact worth pointing out. Constitutionalism, codification, standardization of the rules solving the conflict of norms pertaining to different states, are but only a few other examples of the way Europe influenced the legal developments of the rest of the world.

II.4 The development of international law

International law, as we know it today, is largely the product of European theory and practice. Needless to say, this does not mean that other regions of the world did not have their own system regulating their international relations, or that they did not contribute to the development of general international law. It is nevertheless a fact that the structure and the main content of international law are from European origin. In his classical study of the history of international law through epochs, Wilhelm Grewe distinguished the main periods that fashioned international law until the First World War as being the Spanish (1494–1648), the French (1648–1815) and the British (1815–1919) epochs. After the end of the First World War, European countries lost their hegemony in the making of international law. The inter-war period is characterized as a transition one of Anglo-American predominance, the epoch of the United Nations (1945–89) as the one of the American–Soviet rivalry and the emergence of the Third World, and the present epoch as the one of an international community with a single superpower.

The epochs of more quantitative development of international law, the French and British ones, coincide with the designation of this discipline as the ‘Public Law of Europe’. International law as a system was indeed considered as only applicable amongst the European powers, including later the new states having a European stock, such as the United States and the Latin American countries.

This decisive European influence in the formation of international law also had its impact in domestic laws of other states, especially the ‘new comers’,
admitted to enjoy ‘the benefits of European Public Law’, as the Treaty of Paris of 1856 stated referring to the admission granted to the Sublime Porte. For example, the legal regulation of the treatment to be accorded to foreigners needed adaptation in order to satisfy the ‘international minimum standard of treatment’. A similar phenomenon of harmonization of national laws through the influence of international law can be found in the second half of the twentieth century with regard to human rights, in which the European influence was preponderant.

II.5 The expansion of the European legal systems

The European legal systems expanded throughout the world through different means. Colonialism was the main way through which other societies were filled with Spanish, French, English and other European legal orders. The movement for codification in continental Europe, which began with the Prussian Allgemeines Landrecht in 1794 but took off with the Code Napoléon of 1803, was largely followed in the rest of the world. Even a typically isolationist country like Japan could not resist the reception of German and French law at the end of the nineteenth century, when the country opened itself to the rest of the world. In general, European codification inspired the codification movement everywhere. Hence, the codes adopted in Latin America and other countries were a mix of articles generally borrowed from different pre-existing European codes. In extreme cases, a foreign Code was accepted in its entirety, being applicable to the country, without any ‘nationalization’ at all. The most celebrated case was the adoption of the Swiss Civil Code by Turkey’s Kemal Attaturk in 1926.

III. The standardization of the law in Europe

Compared with other continents or regions of the world, Europe shows the highest degree of regional standardization of the law. Within Europe, the highest degree corresponds in turn to the EC/EU, although the harmonization process carried out in the ‘bigger’ Europe is not negligible either.

III.1 Within the EC/EU

The idea of standardization of the members’ national law was already present at the foundation of the EEC. Although the Treaty of Rome refers in one case to ‘approximation [rapprochement, in French] of national legislations’ (art. 3 h), and to ‘harmonization of legislation’ (art. 99) in another, the distinction is one of degree rather than substance, for approximation is just a first level of harmonization.

Indeed, the EC/EU is a striking example in which different forms of standardization take place. Regulations and decisions are means of unification, whereas directives amount to harmonization. Although directives leave the
choice of form and methods of implementation to the national authorities in order to achieve the results established by them, their effects go further than a simple technique of harmonization. The margin of manoeuvre of national legislation is very limited, thanks to the mechanisms developed by the Court of Justice of Luxembourg to cope with the situation in which a member state did not rightly implement (or did not implement at all) a directive: the indirect effect (that is, the obligation to interpret national legislation in conformity with the directive), the direct effect (the binding effect as to the result to be achieved and the possibility of invoking the directive before national courts) and the responsibility of member states for non-implementation.\textsuperscript{17} This is just one example of the powerful standardization effect that the case law of the European Court of Justice possesses, which since the \textit{Costa v. ENEL} case has consistently affirmed the supremacy of Community law.\textsuperscript{18} Moreover, its judgments with regard to conformity or not of certain legislation or measure of one state ineluctably influences the attitude of the others.

Of the three pillars of the European Union, the first one, the Community Pillar, is the most developed in terms of standardization. In matters of Community exclusive competence, the result is unification through Community law, since member states are excluded from legislating in those matters. The two other pillars (common foreign and security policy, and justice and home affairs), due to being politically more sensitive, still closely rely upon the direct will of the member states’ governments. Consequently, the degree of standardization is lower. One way of developing it is by ‘transferring’ some matters from these pillars to the first one, as has been the case since 1 May 1999 with the judicial cooperation in civil matters having cross-borders implications.\textsuperscript{19}

\section*{III.2 Pan-European standardization}

The process of legal convergence in the ‘bigger’ Europe is being carried out through different means, of course, far more limited than those existing in the (currently) ‘little’ Europe. The tools are, in some cases, the traditional system of the adoption of treaties, in other cases, the unilateral reception of Community standards by way of national legislation of non-member states.

The Council of Europe, through the adoption of international conventions in half a century, made a silent but considerable effort toward standardization of law. The subject matter covered by this effort has a wide range, as highlighted by two extreme examples such as the calculation of time-limits and the immunity of states. No doubt, the most sparkling achievement has been the regime of protection of human rights set up by the Treaty of Rome of 1950 and its successive protocols. Other conventions obtained only a limited number of ratifications or accessions, although this does not necessarily mean that their solutions were not followed at the national level.\textsuperscript{20}
The standardization of the law is also achieved by the requirement of harmonization of the domestic law with the Community law of the actual or potential candidates for membership within the EU as one of the conditions for eligibility. The ‘acquis communautaire’ becomes then a material source of standardization outside the EC/EU. In other cases, the standardization occurs through the creation by treaty of the European Economic Area, or by bilateral agreements between the EU and countries such as Switzerland. Although not being a candidate for membership to the EU, Switzerland has, to a large extent, synchronized its relevant legislation to the same wavelength as that of the EC, through ‘der autonome Nachfolgzug’, a euphemism used in Bern to explain that Switzerland follows European standards, even though it is not obliged to do so. The same terminology is employed to explain that the Swiss government applies all the Security Council sanctions, without being a member of the United Nations.

III.3 The construction of the European Union and its perspectives

The present wave of globalization has found Europe in a complex process of integration. Nation-states are losing their powers by delegating them both to the top (the Community/the Union) and to the bottom (the regions). We have referred to the former phenomenon above. The latter is mainly the result of constitutional or administrative changes within the states concerned, as was recently the case in the United Kingdom. With different degrees and mechanisms, many European states conducted political or administrative decentralization in the last decades, the extreme case of distribution of power between the central government and the constituent parts of the state being that of Belgium in 1993. The European Union is not completely alien to the present regionalist wave. Some of the regionalist movements – whether secessionist or not – see the EU as the way to escape from their state ‘rule’. The Committee of the Regions was established by the Treaty of Maastricht. Some regions have their own offices in Brussels. To some extent, one cannot avoid thinking about some kind of renewal of the Holy Roman Empire, with the fragmentation of political entities in a multitude of regions on the one hand, and the unification of the law applicable to all of them, on the other hand. For the time being, this is a vague perspective, rather than a future reality.

The transfer of sovereign powers and their relinquishment must be distinguished. The key to that distinction lies in the state’s capacity to regain them, or put another way, whether the transfer is permanent or not. An independent state which decides to become a member of a federal state consents to the permanent loss of part of its powers (that is, defence, foreign affairs) in favour of the central government. It cannot recover them, unless it successfully secedes. On the contrary, an independent state, member of an integration institution, such as the European Union, or more generally of any international
organization, always retains the possibility to withdraw, recovering, at the same
time, the powers it had previously delegated.

Europe knows where it comes from, but it does not know where it is going,
from the point of view of political organization. Supranationalism, federalism
with different perspectives, confederation in the framework of the existing
nation-state scheme, the splitting of nation-states and the creation of mini-
states within a confederation, are some of the options at stake. Today, Europe
constitutes the laboratory in which a new distribution of power at the regional
level is taking shape.

IV. Legal globalization phenomena and their implications for
Europe

Globalization of markets and telecommunications, deregulation and privatiza-
tion characterized the last decade from the economic point of view. The process
of democratization in different regions of the world, the adoption of collective
sanctions and the use of force with or without UN Security Council authoriza-
tion, the implementation of an international criminal jurisdiction and some
notable cases involving the exercise of universal jurisdiction by national courts
with regard to major crimes committed abroad, were outstanding events from
the political point of view during the same period. Law followed these
developments in different ways. The debate turned, in some cases, around the
choice of the necessary new legal regulations, and in other cases around the
interpretation of existing rules or the legality of some conducts followed in order
to face the new challenges of the post-Cold War era. Undoubtedly, the US
decided or at least greatly influenced most of these choices, through unilateral
action or through international institutions. Furthermore, American private
actors are also playing a major role in the legal configuration of the new
economic and communications domains.

IV.1 Americanization of the law

As we have seen above, for some authors, the present period is characterized by
the reception of American law in Europe. Like a new ius commune, this reception
does not consist only in the adoption of American legal rules, techniques or
institutions. It also consists of the widespread use of English, in the same vein
as Latin was long before, and of the formation of legal professionals in American
universities, instead of the old European universities. These last features are
largely overestimated as to their impact in the ‘Americanization’ of the law. For
using English as lingua franca and studying across the Atlantic does not
necessarily imply the adoption of an American way of thinking.

Europe, and with her the rest of the world, has nevertheless received an
impressive number of legal concepts and techniques in business, trade, banking,
stock market, finance, telecommunications, insurance and corporate law in the
second half of the last century from the US. Even the terminology borrowed
from America is largely kept in its original language. Making a list of the English
technical terms now of general use in different languages would be too long.
This tendency of reception of American law increased extraordinarily in the last
decade. The new trend is to enlarge this phenomenon to other areas of law,
such as criminal law or procedure. The ‘accusatorial’ procedure of common law
has begun to be partially or even entirely imposed in continental Europe, which
traditionally practised the ‘inquisitorial’ procedure, in which the judge plays an
eminent role.\textsuperscript{24} Arbitration, already largely imposed in commercial transactions,
is also expanding in civil matters. Mediation through private or semi-public
agents is also gaining pace in national legislations. These cases of ‘privatisation’
of justice trace their origin to the US.\textsuperscript{25}

One reason for this Americanization is the actual or potential pressure of
American economic actors. States are not willing to lose American investments
or clients, thus feeling obliged to adapt their legislation to the practice of these
American actors. However, this process of Americanization of the law should
not be over-evaluated. For a large part, European systems of law remain faithful
to their traditions.\textsuperscript{26} The same can be said about an eventual American consti-
tutional influence in the drawing of the Europe of tomorrow. The idea of the
United States of Europe is not new, and it was advanced from extreme opposite
sides. American federalism is nevertheless difficult to perceive as a model for
European integration. Transplanting the model from the other side of the
Atlantic faces a number of considerable obstacles ranging from the linguistic
barrier to cultural and historical differences and, further, the difference in their
origins and the distribution of power.

Law, and international law in particular, is the field in which the American
supremacy has more difficulties in imposing it. Law is probably one of the last
pockets of resistance against American hegemony. Outstanding examples are
the American impossibility to impose its view in international conferences
having adopted multilateral conventions, such as those of Ottawa on Anti-
Personnel Mines of 1997, of Kyoto aiming at the adoption of a Protocol to the
United Nations Framework Convention on Climate Change of the same year,
or of Rome on the Statute of the International Criminal Court of 1998. It is not
just by chance, that in all these cases the European positions were different from
those adopted by Washington.

\textbf{IV.2 Standardization by International Organizations}

The specialized international (that is, inter-state) organizations, both from the
UN family or not, substantially contribute to the harmonization or even
unification of the law in their related fields through their action. It is especially
the case of highly technical institutions using the contracting-out system, such
as ICAO, WHO, WMO and others, whose resolutions are directly applicable in the national systems of their members, provided that these states do not notify their decision of not being bound by them. Most importantly, from the point of view of the substance, it is the standardization achieved in the field of international trade with the adoption of the Marrakech Agreements and the resulting activity of WTO.

As such, the process of legal convergence is not new. There are even older institutions aiming at the unification of law, such as the Hague Conference of Private International Law, created by an initiative of the Dutch government in 1893, or the International Institute for the Unification of Private Law (Unidroit), created in Rome in 1926. What is particularly novel is the enlargement of the fields covered by the standardization, the level attained by it and the speed of the process.

American influence is tangible in the activity of international institutions in the area of trade and finance. In some cases, the American government plays an eminent role by fixing the agenda, in others, by furnishing the content of major parts of the legal instruments adopted. Thus, the Vienna Convention on Contracts for the International Sale of Goods of 1980, the Unidroit Principles of International Commercial Contracts adopted in 1994 and the Principles of European Contract Law of 1995 are largely modelled after the American Uniform Commercial Code. Another example worthy of mention, is that of 'corporate governance', that is, the establishment of basic shareholders rights and the protection of the equity investors. The debate began in the US in the 1970s. The American Law Institute adopted the Principles on Corporate Governance in 1993. The OECD adopted five principles in 1999. These principles were integrated in the European legal systems taking one step at a time. Corporate governance is part of the IMF and World Bank policies of standardization of the law today.

Indeed, one of the contemporary important tools of standardization of the law is the emphasis put by the Bretton Woods institutions to improve, according to them, the legal framework for global markets and finance through the development of legal standards. The fields of primary importance are banking, accounting, bankruptcy, corporate governance, insurance and securities market regulation. These standards may be used as conditionalities in loan agreements.

A new trend looming large in the era of globalization is the standardization of sensitive legal areas through the actions of a political body such as the Security Council. The most recent and spectacular example is illustrated by resolution 1373 (2001) with regard to the measures that UN state members have to adopt against terrorism, including improving their legislation to struggle better against this scourge. This new kind of activity is pursued not only with the active participation of the European members of the Council, but in some cases thanks to their own initiative as well.
IV.3 Standardization by private actors

Another trend of globalization is the increasing role played by private actors in the legal regulation of particular fields, a role traditionally reserved for the states and international (inter-governmental) organizations. Globalization would reveal the ultimate consecration of the *lex mercatoria*. The International Chamber of Commerce and its branch organizations are followed by other non-governmental institutions in other fields, such as the International Maritime Committee, the International Olympic Committee, and so on. The most remarkable contemporary example of the role of private actors in the legal regulation and management of a particular activity rests in the case of the Internet, the symbol par excellence of globalization. The European Union did not insist upon its original idea of entrusting the administration of the Internet to an international organization and accepted the position of the American government heading the creation of ICANN (Internet Corporation for Assigned Names and Numbers), a private institution created under Californian law. In exchange, the EU obtained the creation of the Governmental Advisory Committee, open to all governments and international organizations, albeit, having only an advisory competence.29

IV.4 Have the European states lost their control upon some new transnational activities? A paradigmatic case: the decision of the Tribunal de Grande Instance of Paris in re *Yahoo!*

It is a common belief that ‘cyberspace’ is a world without borders. In order to show that this picture is exaggerated, attention will be drawn to the decisions of the Tribunal de grande instance of Paris in the case *UEJF (Union of Jewish Students of France) and LICRA (League Against Racism and Anti-Semitism) v. Yahoo! Inc and Yahoo France*, of 22 May 2000 and 20 November 2000. The plaintiffs accused Yahoo! of violating article R.645–1 of the French Penal Code for the display of Nazi objects for sale on its auction site located in the US. The respondent invoked that the French tribunal lacked jurisdiction, primarily because its server was located in the US and its services were essentially addressed to surfers located in the territory of the US. Moreover, according to Yahoo!, any measure decided against it could in any case not be executed in the US, since that measure would be in contradiction with the First Amendment of the Constitution, which guarantees the freedom of opinion and expression.

The Tribunal rejected Yahoo!’s defences. It considered that, even if the site ‘Yahoo auctions’ is mainly intended for surfers located in the US, the auction of Nazi objects in that site is accessible to all persons willing to follow it, including French people. By permitting the visualization in France of these objects and the eventual participation of French surfers to such auction, Yahoo! Inc. committed a fault on French territory. The Tribunal also stressed the fact
that Yahoo! knew that its auction site is also addressed to French people, since each connection from France to it is responded to with advertising in French.

The decision of the French tribunal in the Yahoo! case imparts three important lessons. The first one being that web sites cannot consider themselves to be safe from prosecution for violation of laws of countries other than they are located. Consequently, states have the means of pursuing the application of their laws with regard to web sites located outside their territories, provided that a jurisdictional link exists, as was in the case depicted above. Finally, this case clearly shows the potential divergent interpretation of basic human rights, such as freedom of expression, on both sides of the Atlantic. For the time being, the question remains open, since Yahoo! has brought a case in an American court seeking to preclude any possible enforcement of the French decision in the US and the decision is pending.

V. Conclusions

At the end of the day, a balance of what Europe has done for, and has received from, the standardization of the law, still appears to be in favour of the European input, rather than to reception from abroad.

No doubt, Europe, both at the Community and the national level, is experiencing the influence of law coming from ‘abroad’. Nevertheless, it is not a novelty. There is no ‘pure’ system of law, without any external influence. In spite of the fact that there is undeniable influence of American law in some particular fields, the European legal systems keep their main characteristics, techniques and traditions.

There is both an American and a European influence in the standardization of the law.

The experience of integration in Europe is used as a model all over the world: Europe continues to be the main ‘exporter’ of legal-political constructions related to the organization and distribution of power. In the past, it was the nation-state. At present, it is its model of integration that it is followed at different levels in many regions of the world.

The European regime of protection of human rights has been not only a model for the rest of the regions of the world, but also the standard to measure both the scope of the rights protected and the effectiveness of the system established in those regions.

The influence of Europe in the delineation of the new legal regimes of the twenty-first century will depend on the last resort of the European attitude itself. Independence and active defence of its legal perceptions, interests and values as was notably the case with regard to the Helms–Burton and D’Amato–Kennedy Laws, and within the WTO in other different cases, or submission, as is the case in the field of the interpretation of the rules governing the use of force and the
system of collective security. On the one hand, Europe is better placed than any other region or country to face American pretensions to unilaterally impose new rules or peculiar interpretations of existing ones. On the other hand, Europe is well equipped to play a significant role in the collective process of standardization of the law at the global level.

Notes
1. ISO (International Organization for Standardization) defines ‘standard’ as a ‘document, established by consensus and approved by a recognised body, that provides, for common and repeated use, rules, guidelines or characteristics for activities or their results, aimed at the achievement of the optimum degree of order in a given context’. Other definitions, such as the one of the WTO Agreement on Technical Barriers to Trade, lay stress on the non-mandatory character of compliance with standards. For an analysis of different definitions of standards in a technical sense, see Schepel and Falke (2000:91–5).
2. For an interesting analysis of cases of ‘reception’ in different regions of the world, see Doucet and Vanderlinden (1994).
4. Gaius, lib. 1 Institutionum.
10. R. David (1971:4–5). As representative of France at UNCITRAL, Professor David had proposed the creation of an international organization called ‘Union pour le jus gentium’, aiming at the unification of the law governing the private international legal relations. The uniform laws adopted by the organization would automatically enter into force within the member States, unless they announced their contracting out. See David (1977:7).
11. Liebich (Chapter 5 in this volume).
15. For a discussion of this topic, see Pajor (1992) and the authors he quoted.
16. See art. 249 EC Treaty, as it stands after 1 May 1999, date of the entry into force of the Treaty of Amsterdam.
20. See Monaco (1984). For an updated list of the conventions adopted in the framework of the Council of Europe and the status of signatures, ratifications, accessions and successions, see: http://conventions.coe.int/treaty/EN/cadreprincipal.htm
21. See some proposals in Breton and Ursprung (Chapter 13 in this book).
22. The Declaration of Laeken of the European Council of 15 December 2001, setting up a ‘Convention’ in order to make proposals upon the future institutional developments,
raises a number of very important questions with regard to the distribution of power within the European Union itself and between the EU and the member states.

24. This is true not only in Central and Eastern European countries after the end of communist rule, but also for Western countries such as Italy. See Cedras (2001:153).
27. See Jacquet (2000), who also shows other influences, such as those coming from German law.
28. See the in-depth research paper of Pistor (2000).
30. For a general consideration of this clash of interpretation of the freedom of expression and its impact in Europe, see Weiler (1999:105–7).
31. Notably, the US, not having ratified the Inter-American Convention of Human Rights, is not part to any regional system of protection of human rights, although the Inter-American Court of Human Rights has always counted an American judge.
32. For example, *European Communities: Measures concerning meat and meat products (hormones)* WT/DS26/AB/R. Available at: http://www.wto.org
33. See notably the conclusions and plan of action of the Extraordinary European Council Meeting on 21 September 2001, SN 140/01. Available at: http://www.europa.eu.int

References


