Transnational law practice is coming to the European Community. Can Americans have the best of both old and new worlds?

By David A.O. Edward

Speaking of the Constitution, Justice Holmes once wrote:

"When we are dealing with words that are also a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begenders. It was enough for them to realize or to hope that they had created an organism; it has taken a century, and has cost their successors much sweat and blood, to prove that they created a nation."

Citizens of the European Community often forget how uncertain the future of
the American nation once was. Americans, when they read of the Community's political difficulties, should remember that these are much the same disputes and arguments that once threatened to prevent the emergence of an American nation at all.

The parallels between Europe and America are not exact and are often carried too far. It is misleading to talk about the "United States of Europe" because the European Community is neither a federation nor a nation in any traditional sense. On the other hand, the Treaty of Rome is more than an international treaty. It is a constituent act, and a lawyer cannot ignore two features of the American system that have proved to be of vital importance: the Supreme Court and the development of the commerce clause as "the mechanism by which the Court strives to maintain a working federalism."

Britain's best export to America, Alastair Cooke, identified the Supreme Court as "the one absolutely new thing in government invented by the Founding Fathers, to be accurate, the 'absolutely new thing' was a function this body claimed sixteen years after its invention—the function of judicial review." Some would go further and say that the federation did not really become effective until 1824, the year of Gibbons v. Ogden.

It is easy to write a constitution or treaty, but it is difficult to give those words a shape that has meaning for ordinary people. The free movement of commerce across old frontiers has been as important to the vitality of the American nation as the structure and working of its institutions. So, if the European Community's activities have been limited so far to matters as unspectacular as the price of butter and the standardization of automobile headlamps, this may only prove that the lesson of history has been learned—that it is better to start by developing the commerce clause.

The European Court of Justice at Luxembourg, by giving life to the commerce clauses of the Treaty of Rome, has done as much as any other institution to cement the foundations of the European Community.

This can be seen in a field where unity of purpose and community of outlook might least have been expected—the legal profession. The Treaty of Rome provided for the free movement of goods, persons, services, and capital, but it was by no means obvious that these provisions applied to the free movement of lawyers or of lawyers' services. One appendix is very much like another, so there was not much difficulty in saying that doctors and surgeons must be free to practice in other countries. But law and legal procedure are essentially "national." Surely, it was argued, the treaty did not and could not apply to lawyers.

This problem was debated at and fro with much learning and not a little hot air, until a Dutchman called Reyners insisted in his claim to be admitted to the Belgian bar. His application had been rejected on the ground that, under Belgian law, members of the bar must be Belgian nationals. Reyners took his case to the court at Luxembourg and won.

The court laid it down that the provisions of the treaty apply as much to the activities of lawyers as to those of other professions. Very soon afterward, they went further and said that freedom to provide legal services must not be obstructed by rules of procedure not "objectively justified." By these and later decisions the court has forced lawyers in Europe to modify long-held and cherished beliefs about the "national" character of their profession and its activities.

Transnational practice can't be delayed, court holds

These decisions were not inevitable. The court could have found good reasons for reaching a different result. The treaty required the Council of Ministers in the first years of the Community to prepare the way for freedom of movement by harmonizing the national laws and regulations that govern admission to and the practice of the professions. The council failed to do this within the time specified, but on one view action by the council was still an essential feature of the scheme laid down by the treaty. So the task of achieving freedom of movements could have been left to politicians and administrators.

Instead, the court asserted that the rights given by the treaty to individuals could not be delayed by political inaction and that, since the time limit had expired, the only remaining purpose of action by the council was to make it easier to exercise rights that already had come into existence. In short, the intention of the treaty was more important than its machinery.

These sweeping decisions have not disposed of all the difficulties. The court has only provided the solution and left others—including the legal profession itself—with the problems. It remains a fact that French court procedure is fundamentally different from English court procedure; that under one system it is professional misconduct if a lawyer interviews an independent witness before a trial, while under the other it is professional incompetence or worse to fail to do so; and, that 99 per cent of French and English lawyers know as much about the law of Denmark as the man on the moon. On the other hand, it is also true that the services of lawyers are exportable because in fact they are exported and are being exported to an increasing extent, not least by the large American law firms.

What are the consequences of the European Court of Justice's decisions both for Europe and for America? One has to ask how the lawyers in the Community have been forced to treat the practical problems as real and immediate. If a lawyer has the right to provide legal services in another member state—a right that state cannot now take away—how does one ensure that his activities are subject to professional rules and discipline in the same way as they are in his own country? Which rules must he obey: the one that he must not interview witnesses or the one that he may? If he wishes to settle permanently in another member state, must he become a member of the local bar? If not, how can he be said to be practicing on the same terms as nationals of the host state, since equality of treatment is another principle of the treaty? On the other hand, if he is required to join the local bar, how does one apply the principle of equality to the fact that he is already qualified as a lawyer in his own country? Must the rules be uniform, or can one take account of existing similarities between, for example, Irish and English law on the one hand, and French and Belgian law on the other?

These problems are not new. America has been faced with them for years and has still not given a clear answer. In Europe a partial answer was given by a Community directive of March, 1977, which has just been implemented by national legislation in the member states.

Starting from the proposition that a lawyer is free to provide legal services in another member state, it provides the
framework within which he may do so. He must state what his national qualifications are and provide proof of them, if necessary. If he undertakes work in court, he must obey all the rules of the host state and must, if required, work in conjunction with a lawyer entitled to practice before that court. Otherwise, he must obey the rules of the state from which he comes, but he must also respect the basic rules of the host state. All this is to be subject to a system of professional discipline in which the authorities of both states have a part to play.

Unfortunately, the directive is long on generalities but short on specifics. It remains for the legal profession itself to fill the gaps and this, in turn, has led to action at another level.

**C.C.B.E. is acquiring institutional character of its own**

The Consultative Committee of the Bars of the European Community, which began as a forum for discussion, has started to acquire an institutional character of its own. Its nine national delegations now represent the governing bodies of the profession in all the member states, and the C.C.B.E. has issued a "professional identity card" in six languages to enable a lawyer to establish credentials without difficulty or administrative obstruction.

In spite of the many differences in national rules, it was possible for the C.C.B.E. to establish fairly quickly that they derive from the application of a few common principles. A rule and its formulation may be different; the reason for the rule is the same. For example, the rules that protect information given in confidence by a client are different, since they reflect the history and legal systems of the differing member states. But the reason for the rule in every country is that, in a free society, the citizen must feel free to tell his lawyer everything on a basis of mutual trust.

Having established the principles, it should now be easier to apply the rules to lawyers of different countries, but the C.C.B.E. has established an arbitration tribunal to settle disputes when the national bars cannot agree. The search for common principles has shed new light on old rules. Attention has been focused on their substance rather than their form. The day when there is a single legal profession in the European Community, with one set of rules and one governing body, may be far off and may never arrive. The day when there is some unity of purpose and community of outlook between the bars of the Community has arrived.

The consequences for future relations between Europe and America may be good or bad, depending on how the cards are played. In many respects the problems are the same on both sides of the Atlantic. As Jean Monnet (father of the European Community) said: "When the problem becomes the same for everyone, and they all have the same concern to solve it, then differences and suspicions disappear, and friendship very often takes their place." If the warmth and generosity of my welcome in America last year is any guide, the friendship already exists. There is enormous scope for co-operation between the bars of Europe and America, and comparative study could help both to shed new light on old problems.

But it would be dishonest to suggest that differences and suspicions do not exist. The expansion of American law firms is watched with as much concern in Europe as it is in America. This reaction may be written off as owing to the small man's fear of competition, but the problem goes deeper than that. Justice Powell, a former president of the American Bar Association, said in Bates v. State Bar of Arizona: "In view of the sheer size of the profession, the existence of a multiplicity of jurisdictions, and the problems inherent in the maintenance of ethical standards even of a profession with established traditions, the problem of disciplinary enforcement in this country has proven to be extremely difficult." If the problem is difficult within the United States, it cannot be easier elsewhere, and it is ironic that a European lawyer would not be allowed to do in most states of America what an American lawyer is free at the moment to do in most states of the European Community.

The problem of bringing clients and lawyers together on a mutually fair basis consistent with the public interest is, as Justice Powell said in the same case, as old as the profession itself. If lawyers in Europe are to be subject to an effective system of discipline across frontiers, it is inevitable and necessary that American lawyers, together with lawyers from other third countries, should be subject at least to the same degree of regulation and discipline. This is not a reflection on their personal ethics, which in most cases are extremely high. It is simply that regulation and discipline are essential to the offer of competence and integrity made by the organized professions to the public. This at least is a point of view strongly held in Europe if not (apparently) by the Department of Justice, whose recent activities do not seem to a European lawyer at least, to have had much regard to their implications for the American lawyer practicing abroad.

The legal profession is only one of many whose activities are developing on an international scale, and the activities of the professions are only one facet of human activity. The international enforcement of antitrust law is another example of the problems that existing structures based on the autonomy of the nation state are inadequate to solve. The parallels and the differences between the European Community and America are therefore worth studying, not for academic interest but because they may suggest new solutions to problems that refuse to recognize old frontiers.

I am conscious that I have written "Europe" when I mean only a part of Western Europe and "America" when I mean the United States. Brevity is not always the friend of accuracy, but it need not be misleading. If and when the European Community expands to include Spain and Portugal, Latin America will have the strongest ties both with the Community and the United States. Canada has them already, and it is only necessary to read the names of 50 American citizens chosen at random to see that the roots of the American nation stretch further into Europe than the present frontiers of the Community.

If the European Community continues to be one in which the rule of law is strong in defending and promoting the free movement of people and ideas, then it may yet fulfill the hopes of the most gifted of its begetters. ▲

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