Chapter V
European and National Law in History and Future: Some German Perspectives

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After listening to the amazing and very exciting papers presented in this conference, I decided to change the theme of my presentation into the following: European and National Law in History and Future. In order to explain this, some preliminary remarks must be made: I’d like to talk about the relationship between European law and national law and their respective development in the future. If, and to what extent national law could move at all, depends on the scope which is allowed to the national parliaments by the Union’s legislation. Of course, this starting point could be discussed heavily.

The European legal history and traditions are rich of treasures and prerequisites to build up something reasonable. Without repeating all that Ola Zetterquist has said, I would like to refer to the possibilities involved in the construction of a new Europe. As pillars of the full-grown European law I’ll mention the following. The European law sources consist of prescriptive law, “droit coutumier” and qualified law, this is a “droit écrit”. Then we find the British or

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Joakim Nergelius (Ed.), Nordic and Other European Constitutional Traditions, 55–60.
the English case law tradition. Further on, don’t let us forget the received or admitted Roman law which has created diverse national legal systems. We have state or public law, which is normally stated or written law, as obligatory “jus cogens” which is now decreasing compared to the “arbitrary” law, set by the participants, which is “ius dispositivum”. For our continental countries this evolution is of great importance. The citizens’ obedience towards the law, which has been painfully generated through the centuries, presumes the following main functions of law. That is to say, production and securing of protection and freedom, of justice and more recently social compensation. Neither law nor state are unchangeable certitudes by tradition, but should be regarded as developing systems. So, which goal am I then heading for?

Legal history is comparative law in the journey of time, which just means that today we have to look at our own legal history in the last centuries, where we will find many different tools. Let us take a step forward on the road to a more Europeanised legal history, which has to be created by ourselves. One of the reasons to do this is to enhance international co-operation. This is interesting, I think, not least with the new EU Member States in Middle and East Europe.

Now I would like to summarise some statements. The scientific analysis must thoroughly work out the genesis and function of the older legal institutes, so that the European jurisprudence will contribute to the growth of genuine European law. The supranational law is a new category of law above the national level, which will increase quicker than the national law. If it’s good or not we shall see and discuss continuously.

The classical international public law will diminish as the supranational law is growing. EU enters the scene of international law as a subject of its own. The political unification in the EU, taking place together with the technical (r)evolutions, mainly the IT development, increases the need of ongoing legal harmonisation in the EU and the world. In the medium-term perspective, this will also comprehend civil and penal law. Between the continental codified law and the Anglo-American case law, the European law will produce more and more convergencies. Right now the continental legal thinking succeeds better, from my point of view, which I think that the ECJ jurisdiction is proving.

Let me now show you a few fields of legal harmonisation, seen from a German perspective. EU law is and will remain a mixtum compositum. We can imagine a continued legal harmonisation of the following fields, which could be declared as forerunners of unified legal issues.

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