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978-1-107-06051-7 - A Transatlantic Community of Law: Legal Perspectives on the Relationship between the EU and US Legal Orders

Edited by Elaine Fahey and Deirdre Curtin

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A TRANSATLANTIC COMMUNITY OF LAW

As a medium for communication between the EU and the USA, law has the ability to provide unique insights into the state of contemporary transatlantic relations. *A Transatlantic Community of Law* offers legal perspectives on the emerging institutional characteristics of transatlantic relations and contemporary rule-making in both trade and security. Making use of rule of law analysis, which has hitherto not been conducted in transatlantic relations scholarship, it draws together EU law, governance and rule-making scholarship and offers new ways of thinking about the use of law and contemporary transatlantic institutions.

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FOREWORD

Transatlantic cooperation and the European integration project share a common origin and, possibly, a common destiny. That is because European integration cannot be correctly understood without exploring its transatlantic dimension. Indeed, the United States has always been a supporter of a strong union among European states. In the aftermath of the Second World War, the US government was convinced that economic integration would prevent European states from entering into a war. A 'new Europe' composed of liberal democracies was thus seen as a remedy against Europe's fragmentation and the expansion of the soviet threat. At the same time, a strong Europe would facilitate cooperation on both sides of the Atlantic, by improving trade relations and by defending common interests in the wider world. As President Kennedy famously said, the USA does not regard 'a strong and united Europe as a rival but as a partner'. Thus, he encouraged further integration so that, in the near future, a transatlantic partnership of equals could be established.¹ At the end of the Cold War transatlantic relations also played a key role in erasing the East–West frontier that had divided the Continent into two camps for half a century. Both the USA and the EU firmly believed that supporting the accession of Eastern European states to the Union would bring stability to the region and prosperity to the peoples of Europe. Continuing the process of creating an ever-closer union was, once more, seen as the best way of pursuing those objectives.

Logically, transatlantic relations have evolved ever since EU–US diplomatic relations began in 1953, when the first US observers were sent to the European Coal and Steel Community. The reason is twofold. First, transatlantic relations have had to cope with the new challenges brought about by changing times. Currently, new emerging economies, international terrorism, failed states, and the proliferation of weapons of mass destruction may influence the agenda of transatlantic relations. In this regard,

¹ Speech by John F. Kennedy (Philadelphia, 4 July 1962).

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the 1995 New Transatlantic Agenda (the NTA), which is still today the most significant transatlantic policy document, sets out a comprehensive framework within which EU–US relations may develop. The rationale underpinning the NTA was to ensure continuity in transatlantic relations, while allowing room for change. In particular, that framework seeks to establish regular meetings at presidential, ministerial, and staff levels, to coordinate efforts when facing similar challenges, to establish parliamentary links, to foster economic relations on both sides of the Atlantic, and to build ties between EU and US representatives of civil society. Second, the evolution of transatlantic relations also mirrors the constitutional changes brought about by the reforming treaties. Notably, through the establishment of a common foreign and security policy, European states may, in principle, speak with one voice to their US counterparts. In the same way, as the EU is now empowered to adopt measures in the area of freedom, security, and justice, the USA may turn to the EU when joining efforts in the fight against international terrorism. It follows that transatlantic relations raise interesting and complex issues that this book, edited by Prof. Curtin and Dr Fahey, seeks to explore. It is divided into three parts. Part I focuses on the institutional aspects of transatlantic relations. It examines, for example, the role that the European Parliament has played in EU–US relations, as well as the contribution of sub-national entities to the development of those relations. This section also shows that the political branches of government do not enjoy a monopoly over EU–US relations, but that courts may also engage in a transatlantic dialogue. Thus, European courts have referred to the case law of the US Supreme Court when deciding similar cases. In the same way, the latter court has, albeit rather exceptionally, drawn inspiration from the case law of the former courts, notably the European Court of Human Rights, when deciding important constitutional questions such as the right to privacy.² Also, it is worth noting that the US Supreme Court and the European Court of Justice (the ECJ) hold meetings on a biannual basis where the exchange of ideas and experiences is common practice. This section also contains a very interesting comparative study on the way in which the US Supreme Court and the ECJ have interpreted the constitutional provision that respectively empowers Congress and the EU legislator to pass legislation regulating interstate trade. Part II looks at the substance of EU–US relations, that is, at the way in which transatlantic rule-making is carried out. ‘Law’, broadly understood, is explored not only as a means of building

² *Lawrence v. Texas*, 539 U.S. 558 (2003).

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bridges between the two sides of the Atlantic, but also as source of conflict between the EU and the USA. Of course, in a bilateral context, whether law is a friend or a foe of transatlantic integration would often depend on the degree of convergence (proximity) between those two legal orders. Regulatory convergence may not only result from an international agreement, but may also take place informally: legal solutions adopted on one side of the Atlantic may serve as a source of inspiration on the other side. Thus, the cross-fertilization of legal orders and the mutual borrowing of ideas are part and parcel of transatlantic rule-making. Conversely, where divergences arise, compromise and negotiations must take place. That is why, in my view, the conclusion of the Transatlantic Trade and Investment Partnership will open a new era of EU–US relations. In addition, transatlantic regulatory conflicts are an important element of EU–US relations, which this section examines. Notably, it looks at trade disputes that have arisen in a multilateral context such as the World Trade Organization. Finally, Part III focuses on transatlantic security. This aspect of EU–US relations has, needless to say, been of paramount importance in the aftermath of 9/11. Accordingly, this book looks at the way in which the EU has sought to strike the right balance between cooperating with the USA in the fight against international terrorism and complying with its own internal values, in particular with respect to fundamental rights. In this regard, bilateral agreements, such as the EU–US Agreements on the Transfer of Passenger Name Records and the EU–US Agreements on the Terrorist Finance Tracking Programme, are thus examined in light of that balance. At the same time, this section also explores whether transatlantic security may be difficult to reconcile with transparency and democratic accountability. In a clear and entertaining style, this book contains a thorough and critical overview of the legal aspects of transatlantic relations. It thus provides the reader with all the necessary elements to fully understand the nature, objectives, and dynamics underpinning the interactions between those two legal orders. On all accounts, it is a great pleasure to welcome this book. Students, scholars, and practitioners on both sides of the Atlantic will all benefit greatly from it.

Prof Dr Koen Lenaerts

Vice-President of the Court of Justice of the European Union

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PROLOGUE

MARK POLLACK

Aaron Sorkin's television series *The West Wing* presents a fictionalized United States' White House, one in which political actors are driven by noble motives, and reasoned deliberation and persuasion at least occasionally prevail over bare-knuckled political bargaining. While reading this book on transatlantic relations, I was reminded of a particular episode in which the president's Democratic speechwriter Sam Seaborn, memorably and handsomely played by Rob Lowe, engages in a long and vigorous debate with a Republican colleague over a memo about an arcane piece of legislation. After hours of back-and-forth argument and mutual exasperation, Seaborn finally hands his policy memo to the president's chief of staff. The chief of staff looks it over, and notes that Seaborn has abandoned his original argument in favor of the one advocated by the Republican. "You got turned around?" he asks. "Yeah," Seaborn replies, simply.¹

In teaching international relations theory, I screen that scene to students as an example of Habermas' ideal of deliberative democracy and the power of the better argument, while at the same time suggesting that genuine deliberation is a hothouse flower, which thrives only under specific, and rare, conditions. Even in academia, where in principle minds are most open and the search for truth is most imperative, it is rare for scholars to be truly "turned around" on any important issue, particularly one about which they have opined in print.

Yet this book has largely "turned me around" about the legal quality of the contemporary relationship between the United States and the European Union. In the introduction to this book, Elaine Fahey and Deirdre Curtin note that the received wisdom about the transatlantic relationship is that it is "institutionally light." In 2005, in my Annual Lecture in the *Journal of Common Market Studies*, I contributed to this received wisdom, suggesting that the 1995 New Transatlantic Agenda (NTA) represented an experiment in "deep integration in the absence of deep institutionalization." The

¹ A. Sorkin, *The West Wing*, Season 2, Episode 6, "The Lame Duck Congress".

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transatlantic economic relationship of the 1990s and 2000s, I argued, had abandoned the earlier, “shallow integration” focusing on tariffs and quotas, in favor of a deeper effort to remove, or at least manage, the growing raft of “behind-the-border,” non-tariff barriers to trade and investment. However, unlike in Europe, the USA and the EU “would attempt such deep integration in the absence of binding institutions, regulatory harmonization, or across-the-board mutual recognition, relying primarily on formal or informal co-operation between regulators.”² The NTA’s periodic Washington–Brussels summits, the informal dialogues among regulators, and the well-intentioned encouragement of transatlantic civil-society dialogue were all promising, but they constituted at best informal, soft-law efforts to address issues that, within each polity, had required hard-law commitments to achieve. The significance of the NTA, and its at-best-partial record of success, I concluded, lay in its “combination of substantive ambition and legal-institutional modesty.”³

At a superficial level, this statement about formal transatlantic institutions remains as accurate today as it was a decade ago. To be sure, the EU and the USA have now committed to negotiating a formal Transatlantic Trade and Investment Partnership (TTIP), which if successful will lay down a raft of hard-law commitments across a wide range of issue areas from tariffs to investment to sanitary and phytosanitary issues such as the regulation of genetically modified foods, and potentially a legal forum for the settlement of future disputes.⁴ Such an agreement would indeed represent “deep institutionalization,” and a major step forward in transatlantic relations; yet at the time of writing this prologue it remains an aspiration, with many difficult and politicized differences to be bridged before a legalized, hard-law partnership can be achieved. In the meantime, the transatlantic partnership lacks all or most of the overt legal trappings of the EU, including a constitutional architecture allowing for the making of legally binding rules and for the interpretation and enforcement of those rules by an independent Court of Justice.

What has “turned me around” on the role of law in the transatlantic partnership, therefore, is not the as-yet-unrealized promise of a future TTIP, but rather the demonstration, by the editors and the other contributors to this book, that, beneath the surface of its “institutionally light”

² M. Pollack, “The New Transatlantic Agenda at Ten: Reflections in an Experiment in International Governance” (2005) 43 *Journal of Common Market Studies* 899, 902.

³ *Ibid.*, 916.

⁴ Bartl and Fahey, this volume.

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formal architecture, the transatlantic partnership is becoming increasingly “legalized,” which is to say that US–EU relations are increasingly channeled into legal processes, and that these legal processes have arguably “hardened,” at least selectively, over time.

In a landmark study published over a decade ago, a group of legal and political science scholars defined “legalization” as a process that occurs along three dimensions: obligation, or the legal bindingness of international agreements; precision, or the clarity and detail of legal rules; and delegation to third parties of the authority to interpret and apply those rules.⁵ Along these three dimensions, they argued, legalization could vary from “soft” to “hard,” and each of these presented advantages and disadvantages to their members. Soft law, characterized by low levels of legal commitment, precision, and delegation, has the advantages of being relatively easy to negotiate and flexible in the face of uncertain and changing circumstances, yet it may fail to generate clear rules and credible commitments necessary to sustain cooperation among states. Hard law, by contrast, has multiple advantages, including the establishment of clear rules, monitoring, dispute settlement, and credible commitments, but at the potential cost of high *ex ante* negotiation costs and greater *ex post* rigidity.⁶ The point of this analysis is not to suggest that either soft or hard law is always preferable, but that states might rationally choose hard or soft law as a function of their cooperation challenges.

In the years immediately following the end of the Cold War, the USA and the EU generally opted for a soft-law approach to their bilateral relations, preferring low-cost negotiations *ex ante* and flexibility *ex post* to the more rigid and legally binding commitments of hard law. Over time, as the authors in this volume demonstrate, the two sides have demonstrated a greater willingness to move towards hard-law agreements and processes, although not uniformly or across-the-board. The founders of the legalization approach, writing about international relations more broadly, made the argument that international politics was becoming increasingly “legalized,” but they also argued that the “move to law is hardly uniform,” varying across issue-areas, forums, and over time.⁷ The chapters in the volume trace a similar theme-and-variation in the transatlantic

⁵ J. Goldstein, M. Kahler, R. O. Keohane, and A.-M. Slaughter, “Introduction: Legalization and World Politics” (2000) 54 *International Organization* 385.

⁶ K. W. Abbott and D. Snidal, “Hard and Soft Law in International Governance” (2000) 53 *International Organization* 421.

⁷ *Ibid.*, 386.

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relationship, which is shown to be moving towards greater legalization over time, but in complex and different ways across different issue-areas.

Fahey and Curtin organize their exploration of transatlantic legalization in terms of a tripartite distinction among (1) the institutional features of the relationship, (2) trade and economic rule-making, and (3) security issues. Taken together, these chapters provide a panoramic view of transatlantic cooperation across the full array of issue-areas, including both the traditional “bread-and-butter” issues of trade, competition policy, and regulatory cooperation, as well as the internal and external security issues that have come to occupy an equally important place in the relationship since the attacks of September 11, 2001.

Looking across all of these issue-areas, we can see a common set of developments at three distinct levels of analysis: (1) the bilateral, Washington–Brussels level, where security agreements have become increasingly hardened, with economics promising to follow; (2) the multi-lateral level in which the USA and EU channel at least some of their disputes and their cooperative efforts through broader legal venues; and (3) the transnational, transgovernmental, or “interstitial” level, at which US and EU actors have increasingly begun to participate in the processes of making, interpreting, and enforcing each other’s *domestic* laws.

The bilateral US–EU relationship was institutionalized primarily during the early post-Cold War years of the 1990s, focusing on substantive, mostly economic cooperation between Washington and Brussels, channeled primarily through mostly voluntaristic soft-law processes of dialogue and regulatory cooperation, which scored low across all three criteria of obligation, precision, and delegation, and later by soft-law non-binding agreements and memoranda of understanding. As predicted by the legalization framework, the advantages of these soft-law agreements included their relative ease of negotiation and their flexibility, while their disadvantages included the lack of credible commitments or effective implementation.⁸

In the months and years immediately following September 11, US and EU officials pursued a similar approach to internal security and antiterrorism initiatives, pursued through close regulatory cooperation rather than through legally binding, hard-law treaties. With the passage of time, however, the nature of these agreements became a concern particularly to EU officials, who worried about the protection of the rights of European

⁸ M. A. Pollack and G. Shaffer (eds.), *Transatlantic Governance in the Global Economy* (Lanham, MD: Rowman & Littlefield Press, 2001).

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citizens in the absence of clear, legally binding, and enforceable standards. The result was the conclusion of legally binding agreements regarding the sharing of airline passenger information (the so-called Passenger Name Record, or PNR agreements) as well as banking information (the SWIFT agreements), through which European authorities (represented in this volume by Sophie in't Veld) insisted upon the protection of the data privacy rights of European citizens. However, these moves also illustrated the *costs* of legalization, which have increased the difficulty and complexity of intergovernmental cooperation, as witnessed by the European Court of Justice's decision to annul an initial PNR agreement, and the subsequent vote by the European Parliament to reject the US–EU SWIFT agreement, later renegotiated by the two sides.⁹ While the security realm has arguably led the process of bilateral legalization, the proposed TTIP raises similar issues, and the initial difficulties that have cropped up in the early stages of negotiations already hint at the costs and challenges of a move to hard law in the economic sector.¹⁰

In short, the bilateral Washington–Brussels relationship is changing, and hardening, across various issue-areas, in ways that promise to yield both greater legal certainty and enforceability, but also higher *ex ante* negotiation costs and *ex post* litigation. As the authors in this book demonstrate, however, the legal quality of the relationship does not reside solely in the nature of Washington–Brussels agreements. To some extent, US and EU cooperation and conflict are nested in a wider set of multilateral legal agreements and forums. This is most obvious in the trade realm, where transatlantic disputes have often been channeled through the World Trade Organization dispute settlement process.¹¹ More recently, in the environmental realm, the bitter dispute over the extension of the EU's emissions trading scheme to US and other airlines has been referred to the International Civil Aviation Organization, which has been tasked with negotiating multilateral rules on such issues.¹²

⁹ See the chapters by in't Veld and Rees in this volume.

¹⁰ Bartl and Fahey, this volume.

¹¹ E. U. Petersmann and M. A. Pollack (eds.), *Transatlantic Economic Disputes: The EU, the US, and the WTO* (New York: Oxford University Press, November 2003). It is striking, however, that in recent years the USA and the EU have entered a more “pacific” period of transatlantic trade relations, with a dramatic decrease in US–EU disputes before the WTO; see A. Young, “Pacific Transatlantic Trade Relations,” paper presented at the Temple University workshop on “Transatlantic Relations under Obama,” May 18 2012.

¹² See e.g. Reuters, “U.N. Aviation Body Agrees on Emissions Deal,” October 4 2013, www.reuters.com/article/2013/10/04/us-aviation-climate-idUSBRE99302A20131004, accessed on October 27 2013.

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Perhaps the most striking, yet least noticed, aspect of the legalization of transatlantic relations, however, is the increasing interpenetration of the US and EU legal systems, such that European authorities and citizens become active players in the making, interpretation, and implementation of US law, and vice versa. This transnational or transgovernmental interpenetration of the US and EU legal orders arguably represents a quiet revolution in the relations between them, and nowhere has it been captured more vividly and more thoroughly than by the contributors in this volume. The USA and the EU are not, of course, merging into a single legal space, nor do the authors claim that they are doing so, but the two legal orders are increasingly proximate and porous, and they show us vivid images of US officials and citizens weighing in as participants before EU lawmakers and courts, and vice versa.¹³ This is arguably a new type of legalization, and the systematic exploration of it constitutes the greatest contribution of this volume, and one that is likely to turn around many readers regarding the legal nature of transatlantic relations in the twenty-first century.

¹³ See e.g. Fahey, this volume, and Mak, this volume.

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