Epistemology and Methodology of Comparative Law

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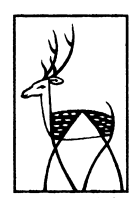
Epistemology and Methodology of Comparative Law

Edited by

Mark Van Hoecke

Katholieke Universiteit Brussel



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Foreword

This volume contains mainly the plenary papers of the Conference on Epistemology and Methodology of Comparative Law, organised in Brussels on 24 till 26 October 2002.

This Conference has been organised by the *Katholieke Universiteit Brussel*, in collaboration with the *Vrije Universiteit Brussel* and the European Academy of Legal Theory. We are grateful to both universities and to the Fund for Scientific Research, Flanders, for their generous financial support.

Whereas comparative law conferences generally focus on some fields or topics of positive law, the aim of the Brussels conference, of which the plenary papers are published in this volume, was of a more theoretical kind: reflecting on comparative law as a scholarly discipline, on its epistemology and its methodology.

Some of the topics on which the papers and the discussion were focussing are:

— which kind of 'knowledge' is, or could be, aimed at by comparative law?
— the classification of legal systems into 'legal families' (is there an emerging 'European legal family', which is transcending, or at least overlapping, the traditional classification *Common Law—Civil Law*? Do we have to distinguish different classifications into 'legal families' according to the area of law?);
— the relevant context for determining (the content of) the law, or the distinction of different levels on which comparative research may be carried out (e.g., a more technical 'surface level', a 'deep level' of the ideological background of law and legal practice, and an 'intermediate level' of other elements of legal culture, such as the socio-economic and historical background of law);
— the identification and demarcation of a 'legal system', which is to be compared with another 'legal system' (this brings us to the opposition between 'legal monism' and 'legal pluralism', and the definition of the European legal orders, sub-State legal orders, along with what is left of traditional sovereign State legal systems);
— the relationship between domestic law, international private law and international public law;

— the desirability and possibility of developing a basic common legal language, with common legal principles and legal concepts (a common *technical* legal language, as it is currently developing within the European jurisdictions and other norm creating institutions, and/or a legal *meta-language*, which would be developed and used within an emerging *European legal doctrine*).

The scope of the approaches in this volume is rather wide. Some papers are methodological reflections of experienced comparatists, starting from their broad practice in comparative research. Other papers are of a more theoretical nature and reflect mainly on the epistemologic question of (the accessibility of) knowledge of foreign legal systems and of law in general. They all have in common that they address more fundamental, scientific problems of comparative research that are too often neglected in comparative scholarship.

Mark Van Hoecke
Brussels,
February 2003

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1

Legal Culture v Legal Tradition[*]

ALAN WATSON

LEGAL CULTURE VERSUS Legal Tradition? The dichotomy is unreal in most circumstances. But not in all.

Legal culture is legal tradition, and legal tradition is legal culture. But with an exception. Those living the culture, namely lawyers including judges and law professors, are usually unaware of the tradition. They are often unaware of, and indifferent to, history. (I would like readers to know that I am dealing only with private law. Constitutional law is beyond my expertise).

My fascination with legal culture and legal tradition results from my work as a comparative legal historian. Comparative legal history is largely an unexplored field. It confronts dramatically the basic issues of the relationship of law to society, and of the factors in legal change: why change occurs when it does, how it does, and the direction of change. It promotes answers that are radically different from those proposed by sociologists of law and historians of one legal system.[1] Yet the subject will continue to be under-exploited. Nonetheless, in my view, an understanding of it is vital for the development of a common law for the European Union.

Much law is dysfunctional and is obviously so. Law in a society can only be explained by its history, often its ancient history and frequently its contacts with foreign legal history. I seek in this talk to discuss part of this phenomenon. Law operates, or should operate, on the basis of social reality, but it is the product of human imagination. Often reality and imagination do not mesh.[2] It should be borne in mind that most legal scholars, apart from

[*] For Miguel-Angel Rabanal.

[1] For my views on comparative legal history see, eg, Alan Watson, *Legal Transplants: an Approach to Comparative Law*, 2nd ed (Athens, GA, University of Georgia Press, 1993); *Society and Legal Change*, 2nd ed. (Philadelphia, Temple University Press, 2001); *Roman Law and Comparative Law* (Athens, Ga, University of Georgia Press, 1991); *The Making of the Civil Law* (Cambridge, Mass, Harvard UP, 1981); *Law out of Context* (Athens, GA, University of Georgia Press, 2000); *The Evolution of Western Private Law* (Baltimore, Johns Hopkins University Press, 2001); *Legal History and a Common Law for Europe* (Stockholm, Olin Foundation, 2001).

[2] See, eg Alan Watson, *Authority and Law (*Stockholm, 2003).

legal historians, are impatient with legal history and ignore it as irrelevant with a resulting misunderstanding of law.[3] In their turn, legal historians fail to explain the importance of their subject for today. Legal history, especially perhaps Roman law, is often taught in a vacuum without its relevance for modern law being spelled out. Sadly, comparative legal historians also must be pedants, not romantics. They must not belong to the tempting school of those who know 'What must have been.' Rather, they must restrict themselves to what the sources in their original context tell them.

I stress 'in their original context.' Context is of fundamental importance for an understanding of legal sources. Roman law in Justinian's *Digest* has a very different feel from law in the Icelandic sagas, notably *Brennu-Njáls Saga*. The Roman texts are bloodless: the facts as stated are assumed accurate, no attention is paid to procedural devices or the characters of those involved, or political pressures or bribery. The explanation is that jurists were 'armchair lawyers,' not interested in practice but only in interpretation which brought prestige among fellow jurists. The creators of the sagas were writing human drama. Procedure is central. The great lawyer is he who knows how to exploit procedural devices, and this is not necessarily the pleader. The players in the lawsuit are shown in detail: their willingness (or otherwise) to compromise, their fighting ability, the character of their wives. It is not enough to say in explanation that one work is about law for lawyers, the other is not. Again, one should wonder why law is so absent from Homer's *Odyssey*, a work so filled with potential legal situations. The *Digest* and *Brennu-Njál* give two extremes, but sensitivity to context is essential in understanding all legal sources.[4]

The core of law is authority. Law must be authoritative. If law is totally ignored in practice it scarcely deserves the name of law.[5] But what makes legal rules and institutions themselves authoritative? In different ways in different societies patterns for authority emerge. Most of the peculiarities of law—and they are legion—are to be explained by the search for and the reliance on authority. Authority—and it is needed—is often obscure, and frequently faked. The need for authority is at the heart of both the impact of past legal history—including the long survival of inappropriate law—and of borrowing law from elsewhere. Thus, the prevalence of legal transplants,

[3] This is one of the themes of William M Gordon's Stair Society lecture in 1999: 'The Civil Law in Scotland', *Edinburgh Law Review* (2001) 5, pp 130 ff. John Cairns and Olivia Robinson have observed: 'Watson has thereby laid down a major challenge for legal historians, comparative lawyers, and sociologists of law. It is a challenge that has rarely been taken up:' *Critical Studies in Ancient law, Comparative Law and Legal History* (Oxford, Hart 2001), p xvii. Alas that this is so. For a response to critics see Alan Watson, 'Legal Change: Sources of Law and Legal Culture,' *University of Pennsylvania Law Review* (1983), pp 1121 ff.

[4] Very instructive is Kees Bezemer, *What Jacques Saw* (Frankfurt am Main Klostermann 1997).

[5] See, eg Hans Kelsen, *The Pure Theory of Law* (Berkeley, University of California Press 1934) pp 10, 30 ff.

the main method of legal development, is in large part due to the need for authority.

Why borrow? One reason is, of course, that it is easier to borrow than to create rules and institutions from new. A more significant reason, I suggest, is this need for authority. In the absence of legislation, which typically has been scarce for private law, law making is left to subordinates—judges and jurists—who, however, are not given power to make law.[6] They must justify their opinion. It will not do to say 'This is my decision, because I like the result.' They must seek authority. When this is not available in their own system, they seek it elsewhere, and if it cannot be found they fake it or transform it.[7] There is more to the issue. One system comes to be regarded as the most suitable donor: Justinian's *Corpus Iuris Civilis* or the French *Code civil* or English law in the form of William Blackstone's *Commentaries on the Law of England* or the Chilean *Código civil* of Andrés Bello.[8] Reliance on this system provides the authority that is required. Somehow that system is more authoritative than others. Inevitably this search for authority removes the focus to some extent from the precise needs of the particular society. Often what is borrowed is inappropriate.

Borrowing is only part, though perhaps the most obvious, of the conjunction of legal culture and legal tradition. The other part is the search for justification within one's own legal system. The search, cultural as it is, is inevitably backward looking whether it is for judicial precedent or juristic doctrine. Authority, to repeat, is essential for law and functions to create the tradition. To return to legislation. The sole necessary talent of rulers is to remain in power. For this, legislation in most fields of private law at most times is irrelevant. Rulers usually have no need to seek the best law for their citizens. The job of law-making is often left to judges and jurists who, however, as I have said, are technically not given the power to make law.

This conjunction of legal borrowing and the need for authority in law results in legal tradition. The notion of a legal tradition means that, though there will be frequent anomalies, there will be an overall logical progression from point A through point B to point C. Thus, one can talk of a 'Western Legal Tradition' with its divisions into civil law systems and common law systems. The startling and upsetting conclusion is that a system of private law must be understood primarily in terms of its own legal history, not societal, political and economic history in general.[9]

[6] See, above n 2 eg, Watson, *Roman Law and Comparative Law*, pp 97 ff.
[7] For me the most interesting transformation is to be found in the French *Code civil* on torts, arts. 1382–86: cf Watson, *Evolution*, above n 2 pp 113 ff.
[8] For this last see MC Mirow, 'Borrowing Private Law in Latin America: Andrés Bello's Use of the *Code Napoléon* in Drafting the Chilean Civil Code' *Louisiana Law Review* (2001) 61, pp 295 ff.
[9] See, above n 2 eg Watson, *The Making of the Civil Law*, pp ixff.

This brings us inevitably to chaos by which I mean in this context, as a result of legal tradition, an absence of a necessary logical connection between legal rules, institutions and structures on the one hand, and the society in which they operate on the other. This absence of a logical connection entails that the great majority even of lawyers cannot explain the reason for the law. Why was the subordination of married women's property rights in the early nineteenth century so much greater in the eastern US than in Mexico? Were the Mexicans less sexist? Why is or was there a Rule against Perpetuities in England and the US when there was not and is not a similar rule in Scotland or continental Europe? And there is no sign of the problems of perpetuities in Roman law. Why is the heading of title four, chapter 2 of the French *code civil* 'of delicts and quasi-delicts' when the terms do not occur again, and when the distinction between them is never explained? Why in the same code are there only five articles on torts but 27 on the relatively unimportant contract of *mandat*, mandate?[10] Why is there such a vague provision in the *code* (article 371) as 'The child, of whatever age, owes honor and respect to his father and mother?' Why was the abolition of a similar provision in the old Dutch civil code so hotly opposed in the preparation of the recent new code when the article had never been applied? Why is there, especially in civil law countries, such a sharp division between public and private law? Why is religion, so fiercely partisan in early Christian Byzantium, so scarce in the Byzantine Justinian's *Digest* and *Institutes*? The answers, so important in my view for understanding the nature of law and its place in society, can only be found in the legal tradition and legal culture. Yet comparative legal history is largely unexplored. To return for a moment to delict in French law. The five provisions of the *code civil* have been little altered since 1804. But the substance of the law has been greatly changed in actuality. Yet French courts cannot refer to preceding cases in their judgments. What does this tell us about legal development?

At this point, law professors and reformers will protest. To understand Blackstone and the structure of his *Commentaries* and his impact on modern English law, one surely does not need to understand Latin? Sadly one does, and to read the sources he used.[11] To understand modern English conflict of laws, surely one does not need to know Latin and the source that Joseph Story in the USA so tragically misunderstood?[12] Sadly one does. To go beyond the frontiers of the EU, one may ask why matrimonial property systems in the USA are so different in the western states from those in the east. One surely does not need to know Visigothic law of the fifth century,

[10] An indication of the reasons for the complexities of *mandat* deriving from *mandatum* may be found for the 13th century in Bezemer, *Jacques*, p 79.
[11] See, above n 2 Watson, *Roman Law and Comparative Law*, pp 166ff, 275 ff.
[12] See Alan Watson, *Joseph Story and the Comity of Errors* (Athens, GA, University of Georgia Press 1992).

and medieval doctrines of accession of property?[13] But one does. The relationship between law and the society in which it operates is enormously complicated, and can only be understood through comparative legal history. The New York Chancellor James Kent is famous for the use he made of French law. How different would have been the development of US law if Kent had been able to read German?

It might be objected that with the existence of a plethora of translators of EU drafts and documents, lack of skill in other languages is no barrier to sensible law reform. The objection, sensible as it appears, would make sense only if there was no such thing as legal culture and legal tradition. Law, as it exists now, will be the starting point for suggestions of reform, and today's law has ancient roots that need to be understood and which will not be translated for EU use.

Naturally, for private law the stress within the EU for a common law must be on the future. But that is what makes comparative legal history so vital. Only an understanding of legal culture and legal tradition can illuminate and explain the interrelations between one system and another, and the fundamental values. Why was the substance of Justinian's *Corpus Iuris Civilis* so out of contact with the social and religious realities of early Byzantium? Why did it then become so relevant for subsequent legal history? What are the lessons? Why is the structure of the *Bürgerliches Gesetzbuch* and the *code civil* so different? Does one provide a better model than the other for the future? Does it make sense to keep separate codes for private law and commercial law? For what reasons and in which circumstances did such a distinction arise and survive? What are the roots of modern codification? Do codes show the way ahead? What is the relationship between the English law and the law of continental Europe? Is there a bar to future harmonisation other than that of the tradition and culture *of lawyers*?

Should the way ahead for the integration of law in Europe lie in a new system of legal education?[14] My personal experience has been that professorial colleagues do not want to know about legal culture and legal tradition, about comparative legal history. They positively *want* to believe that law reflects (in whatever sense) the needs of society. Change in law results for them from change in society. To believe otherwise is uncomfortable for them. They would have to rethink the rationale of their discipline, and question their basic assumptions. Students, again in my experience, are more open-minded. French citizens show enthusiasm for the *code civil*, Germans for the *Bürgerliches Gesetzbuch*. But neither code is written in stone. What difference would it make, or should it make, if future lawyers

[13] See Watson, *Society and Legal Change*, pp 107ff.

[14] I am at the moment at work on a book on the poor quality of legal education at many times in many places in the western world.

realise that both codifications were framed greatly under the influence of legal education in their time? The French codification owes much to the basic textbook of Gabriel Argou, *Institution du droit François* (11th edition, 1787);[15] the German to the university teaching of '*Pandektenrecht*' and the works that it spawned. The development of a common law for the EU should occur in awareness of legal tradition and legal culture.

[15] See, eg Watson *Making of the Civil Law*, pp 111f.

2

Legal Cultures and Legal Traditions

H PATRICK GLENN

IN THINKING ABOUT the laws of the world, in their diversity, we appear driven by an epistemological urge to think of different laws as representative of larger, explanatory categories of being. It is not clear why this is so but it is a widespread phenomenon. The laws of the world are thus seen or grouped (the list is probably not exhaustive) as systems, cultures, traditions, styles, mentalities, families, circles or spheres (*Rechtskreise*) or civilizations. The effort has been in large measure taxonomic, a means of satisfying the 'rage for order' yet there have been varying emphases on the importance of taxonomy. The efforts have been efforts of construction and not deconstruction. Law is presumed and sought to be explained or justified in terms of the larger ontological notions. If we think of law as a social good, there is nothing here which is alarming. The laws of the world should emerge strengthened from this demonstration of interrelationships and larger forms of intellectual justification. It appears in any event inescapable.

Does it matter then which of these epistemological tools we deploy? Does it matter, for example, whether we think of laws, which clearly exist, as representing culture or tradition or system? It might not, if each was supportive and relatively innocuous. Yet there has been very little second-order enquiry into the relative merits or demerits of these ways of conceptualising multiple laws. This is partly the result of the historical novelty of such enquiry, since it has been only (relatively) recently that there has been widespread awareness of the diversity and proximity of the laws of the world. It has also been partly the result of bias, as local models of law were transposed into universal ones, as with Hart's elevation of the notion of a legal system to the level of 'general jurisprudence'.[1]

So it appears to be a useful enquiry as to whether some of these epistemological tools are more justifiable than others. The most widespread of these tools, in the western world, is the notion of legal culture. This reflects the

[1] HLA Hart, *The Concept of Law*, 2nd ed (Oxford, Clarendon Press, 1994).

growth and importance of social science thinking, notably in anthropology, where the notion of culture has been used as an important instrument of analysis. It reflects also the widespread incorporation of the notion of culture into popular use and understanding. Yet where did the notion of culture come from and what use is really made of it? Does it really assist in understanding multiple laws? Does it come accompanied by undesirable side effects or consequences, even unintended ones? This paper attempts to deal with these questions and uses the notion of legal tradition as a contrasting epistemological concept.

1. A HISTORY OF 'CULTURE'?

The word culture comes to us from the Latin '*cultus*' for worship or reverential homage. We retain today the notion of a cult. Yet our present concept of culture is more expansive and apparently later in origin. 'Agriculture' may be the transitional word, as worship or reverence for the earth and its soil came to include its cultivation. It was then a relatively simple linguistic step from cultivation of the soil to cultivation of the spirit or mind. The development of this idea is relatively recent, however, and appears closely tied to what is known as the enlightenment. 'Culture' then became an expression of ultimate values, an 'alternative, secular source' of them which could compensate for the decline of religion.[2] The word came into frequent use as a means of German resistance, in the name of German *Kultur*, against French universalist theories. The debate was vigorous and often vindictive. In the early twentieth century the French Dictionary Quillet was still noting that 'culture' could be used ironically, as in '*la culture allemande*'.[3] The idea then began to be developed as a 'scientific concept'[4] and modern anthropology could speak of its 'development' of the concept of culture.[5]

There would therefore be a history of the concept of culture, one which is relatively easy to describe and which appears to generate a large consensus. What is the epistemological significance of this, particularly in relation to the contrasting concept of tradition? The notion of culture is rooted in a larger, though specific, European context. There was no thought of European 'culture' prior to its development as a concept, though there was clearly European life, European history, and European values. We know

[2] A Kuper, *Culture. The Anthropologists' Account* (Cambridge, MA/London, Harvard University Press, 1999) at 8.
[3] Kuper, above, note 2, at 7; and see further M Sahlins, *How Natives Think: About Captain Cook, for example* (Chicago/London, University of Chicago Press, 1995) at 10–14, with references.
[4] C Geertz, *The Interpretation of Cultures* (New York, Basic Books, 1973) at 34.
[5] EA Hoebel, *Anthropology: The Study of Man*, 3rd ed (New York, McGraw-Hill, 1966) at 5.

this because we have a record, of captured information, which gives content and specificity to the genealogy of European accomplishments. This captured information is tradition, that 'which comes down to us from the past',[6] and it appears appropriate to situate the concept of culture not in opposition to that of tradition but as a manifestation of it. There is thus a tradition in Europe (and original to Europe in its development) of speaking in terms of culture. This is explicitly recognised in much anthropological and other literature. In this volume, Professor Samuel speaks of a 'tradition of law as culture';[7] Gibson and Caldeira speak of 'anthropological traditions' of speaking of culture as a holistic concept;[8] Kuper recognises that there are distinct national traditions of speaking of culture (French, German, English).[9] This is not in itself an indication of epistemological superiority or dominance, only an indication of generality or breadth.[10]

Recognising the traditional nature of the concept of culture does not, however, fully explain the relations between the concepts of culture and tradition. This is because it is often said that culture *includes* tradition, as well as much else, or is essentially the same as tradition. The western concept of culture would itself be capable of generalisation, and contemporary western practice indicates that this is the case. Professor Watson in this volume typifies a widespread western view that tradition is culture and culture is tradition.[11] Professor Bell in his treatment of French legal cultures concludes that culture includes both contemporary practices and 'a set of ideas and values' such that 'tradition is an important part of culture and especially within the law.'[12] Yet this broad or expansive concept of culture is part of the history of the concept, and its scientific development. It is part of the tradition of culture that it seeks to be all-inclusive, extending even to tradition. We will later see the reasons for and development of this idea. It may thus be a part of a tradition that it seeks to modify, encompass, or deny its own past or traditional character, as where notions of modernity or postmodernity may deny their own historical roots.

In contrast to the concept of culture, that of tradition has no particularly western, or particularly recent, history. It has been both known and practised as the respect which communities give to their own past, as essential to their own identity. Kronman has described it as the essential, distinguishing feature of humanity, distinguishing human beings from both gods

[6] AWB Simpson, *Invitation to Law* (Oxford, Blackwell, 1988) at 23.
[7] G Samuel, below at chapter 4, in this volume.
[8] J Gibson & G Caldeira, 'The Legal Cultures of Europe' (1996) 30 *Law & Society Review* 55 at 57.
[9] Kuper, above, note 2 at 5–8.
[10] It is, however, an indication of the limits of the notion of culture outside the European context.
[11] Watson, above chapter 1 in this volume.
[12] J Bell, *French Legal Cultures* (London/Edinburgh/Dublin, Butterworths, 2001) at 6.

and animals.[13] It has functioned with written, historical means of capture of information, but is properly seen as proto-historical, both known and practised by those who lived according to a *lex non scripta*.

These distinctions are important, in spite of their sometimes convoluted character, since it will eventually become clearer, in this paper, that there are important epistemological differences between tradition and culture, differences to which it is now appropriate to turn.

2. CULTURE AS A MEANS OF UNDERSTANDING

It is now a commonplace in the anthropological and sociological literature that the concept of culture is highly variable and extremely inclusive. It would have a 'certain aura of ill-repute … because of the multiplicity of its referents and the studied vagueness with which it has all too often been invoked.'[14] There have been tabulations of definitions of culture, 157 having been offered in the years 1920–1950.[15] No one appears today to be counting. Some are openly dismissive. Thus culture would include 'everything and the kitchen sink';[16] it would exhibit 'the flabbiness of a term which leaves out too little,'[17] 'failing to identify any particular factors that can be seen to be making a difference';[18] it would be constituted by '*n'importe laquelle manière d'agir*'.[19] We have already seen that it would reach back into its own past and include tradition.

Why has such a criticised concept become so important in western discourse? The explanation lies in its history, in its tradition. It came forcefully into western consciousness as a means of differentiating human groups (at least French and German ones), in the face of claims to convergence or universalism judged excessive. It thus continues today this primary function and is pressed into service wherever resistance to uniformity or dominance or hegemony occurs. This can be a very valuable function, particularly in law, as offsetting radical forms of positivism[20] or illustrating complexity and diversity within national legal systems too often perceived as monolithic.[21] Yet there are different means of differentiation in the world and,

[13] A Kronman, 'Precedent and Tradition' *Yale Law Journal* (1990) 99, 1029 at 1065.
[14] Geertz, above, note 4, at 89.
[15] Kuper, above, note 2, at 56, 57.
[16] G M Luhrmann, 'The Touch of the Real', *Times Literary Supplement* January 12, 2001 at 3.
[17] T Eagleton, 'The Torn Halves' *Times Literary Supplement* July 10, 1998 at 6 ('the word has begun to run riot; we now have police culture, beach culture, gun culture, deaf culture … ').
[18] R Cotterrell, 'The Concept of Legal Culture' in D Nelken (ed.), *Comparing Legal Cultures* (Aldershot/Brookfield, VT/Singapore/Sydney, Dartmouth, 1997) 13 at 20.
[19] R Brague, *Europe: La voie romaine*, 2nd ed. (Paris, Criterion, 1993) at 133.
[20] See, for the breadth of analysis of legal cultures, C Varga (ed.), *Comparing Legal Cultures* (Aldershot, Dartmouth, 1992).
[21] See, for example, Bell, above, note 12.

if the criticisms are correct, culture would provide a means of differentiation only at the expense of other, and important, elements of understanding of human relations. Culture is too crude as an epistemological instrument. How does this manifest itself, more particularly?

The concept of culture exists as a means of differentiation, providing a description of difference. It is thus a descriptive concept. Yet its shortcomings come into evidence when it 'shifts from something to be described, interpreted, even perhaps explained, and is treated instead as a source of explanation in itself.'[22] Thus Bernard Williams finds that explaining changes in 'cultural practice' in terms simply of the existence of 'other values or beliefs possessed by the people who live in the culture … does not offer much of an explanation … we need an explanation of why that itself should have happened.'[23] Using culture as an explanation means explaining something in terms of everything. We are thus condemned to work with 'a logic and a language in which concept, cause, form and outcome [have] the same name.'[24]

What in particular does the concept of culture disguise or conflate in the functioning of human and legal societies? In explaining societies in terms of their cultures, it refuses to distinguish between fundamental elements of human activity. One of these elements is genetic information, the inner programming or hardware which makes us act as we do, as human beings. It is true that there have been many statements by anthropologists to the effect that their domain of culture is 'not the result of biological inheritance,'[25] such that some recognition of human biology is possible. Yet the breadth and importance of the notion of culture reduced the human being, in the perspective of many, to the status of a 'blank slate' in which social or behaviourist pressures, alone, contributed to human conduct.[26] Wherever the limits of biological control may lie, and we clearly do not know the answer to this, there are at least some distinguishing biological features of human beings, and it does not appear epistemologically appropriate to eliminate this possibility altogether.

While the existence of genetic information is challenged by an over-inclusive concept of culture, it is the case that all other types of non-genetic information are similarly challenged, notably the information constituted by tradition. The existence and identity of this information, in the form of tradition, is challenged because the concept of culture would conflate tradition with the uses made of it, in the form of present manifestations of culture. Since both actions and the informational reasons for action are

[22] Kuper, above, note 2, at xi.
[23] B Williams, *Truth and Truthfulness* (Princeton, Princeton University Press, 2002) at 29.
[24] C Geertz, cited in Luhrmann, above, note 16.
[25] Hoebel, above, note 5, at 5.
[26] S Pinker, *The Blank Slate. The Modern Denial of Human Nature* (London, Allen Lane, 2002).

culture, there is not much point in distinguishing between them, as the many over-inclusive definitions of culture indicate. The past, with its information, simply becomes a largely undistinguishable feature of present manifestations of differences between groups. Thus Hoebel defined culture in part as 'the integrated system of learned behaviour patterns which are characteristic of the members of a society' and we see here the notions of present systems and patterns, to which is added the necessity of their having to be 'learned' (from somewhere).[27] The same blurring is evident in what is said to be the first definition of culture, that of Tylor in 1871, who stated that culture, with which he equated the idea of civilisation, is 'that complex whole which includes knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by man as a member of society.'[28]

In contrast with this blurring or conflating tendency of the concept of culture, which sacrifices all refined distinctions in favour of global, present, differentiation, the concept of tradition requires that epistemological distinctions be drawn. As that which comes down to us from the past, tradition represents the 'massive development of non-genetic information' which exists in the world.[29] It exists today largely on physical means of support, demonstrably non-genetic in character. Even where the information of tradition is stored in memory, it would have an existence distinct from the hardware of the mind—memetic as opposed to genetic information—beliefs and memories which exist as 'collections of information' and which would simply reside in the patterns of activity and structure of the brain.[30] We may not be able to trace with precision the line between genetic and non-genetic information, but we are at least constantly reminded of the existence of them both in determining human action.

In the same way, insistence on the importance of tradition requires us to distinguish between its existence and the current activity carried out, or not, in its name. Tradition may influence what we do, but it is that which precedes our action, as a means of normative influence. One can of course over-emphasise the importance of tradition as a determinant of conduct (the 'grip of tradition') but in the western world today there is little danger of this. So in preserving the epistemological concept of tradition, distinct from action, we open the possibility of gauging the novelty or originality or

[27] Hoebel, above, note 5, at 5. See also, for culture defined as 'the collective programming of the mind that distinguishes the members of one group or category of people from another' yet going on to include in culture 'symbols' such as words, gestures, pictures, and objects … dress, hairstyle, Coca-Cola, flags and status symbols, G Hofstede, *Culture's Consequences* (Thousand Oaks/London/New Delhi, Sage Publications, 2001) at 10.
[28] Cited in Kuper, above, note 2, at 57.
[29] Williams, above, 23, at 28.
[30] Pinker, above, note 26, at 32; and on the notion of memetic information, see R Dawkins, *The Selfish Gene* (Oxford, Oxford University Press, 1976) at 206–09; D C Dennet, *Darwin's Dangerous Idea: Evolution and the Meanings of Life* (New York, Simon & Schuster, 1995), ch 12.

discordant nature of human activity. Action is not simply '*n'importe laquelle manière d'agir*'; it may be qualified as in conformity with, or in violation of, established traditional criteria. This is a useful epistemological result; it allows us to appreciate diachronic movement in the life of a community. It also allows us to identify a dimension of human life which would be constituted by 'action' or 'practice' or 'social practice' or 'praxis', all of which occur in what we know as the present. This practice, to the extent that it is judged worthy of recording, becomes part of the mass of non-genetic information of the world and eventually may become part of the information of the traditions of the world. The operation of tradition is thus effected in a looping manner, as tradition affects conduct or practice, which in turn is recorded and becomes part of ongoing tradition, again influencing subsequent conduct or practice. The distinction thus drawn between genetic information, tradition, and practice, allows us to understand more completely what goes on in the life of a community. It is obviously a more refined instrument than that of culture in its application to law, since the mass of the law, as traditional information, stands apart from both genetic information and the use to which it is put in the decisional process (legal 'practice'). Actual practice, of the courts for example, then is captured and adds to the store of the information of the legal tradition. We may thus distinguish between what we must do, what we are told to do, and what we actually do, and these distinctions appear to be useful in understanding human life.

There is a final dimension to the vague or over-inclusive nature of the concept of culture. It directs our attention to all of the characteristics of a society, largely for purposes of differentiation of the particular society from other societies. Hoebel thus stated that '[e]very separate society has its distinctive culture.'[31] Yet in this 'automatic or organic coherence of culture,'[32] in an expanded present, we are given no indication as to how particular societies may have been constituted or distinguished themselves initially from other societies. They simply, and separately, *are*. The inclusive concept of culture, relegating tradition to a cameo role, thus is unable to capture the dynamic, dialogical, and diachronic character of the emergence and constitution of societies.[33]

Is it the case, however, that the conceptual fog surrounding the notion of culture is of no real consequence, and that it may be justified exclusively in terms of the differentiation function which it does fulfil? This appears to be

[31] Hoebel, above, note 5, at 6.
[32] E R Wolf, *Pathways of Power. Building an Anthropology of the Modern World* (Berkeley, CA: University of California Press, 2001) at 313.
[33] See, for group identity as negotiated and dialogical, a social construct rather than a given, T Makkonen, *Identity, Difference and Otherness. The Concepts of 'People', 'Indigenous People' and 'Minority' in International Law* (Helsinki, Forum Iuris, Faculty of Law, University of Helsinki, 2000) at 15, 19.

a widespread conclusion underlying western use of the term. Culture is seen as so adaptable and flexible a concept that it is innocuous, and so we can use it everywhere and anywhere. Is there, however, a darker side to 'culture', in the form of consequences which are noxious, though unintended.

3. THE CONSEQUENCES OF A CONCEPT OF CULTURE

The way in which we think affects generally how we act. It is therefore at least possible that thinking in terms of culture has consequences in terms of human activity and human relations. This will depend, however, on the manner in which the concept of culture is thought, given its character as an over-inclusive and ambiguous concept, used as a means of differentiating human groups. After a century or two of use, some conclusions are now being drawn by those who have paid most attention to the concept, but before turning to those conclusions it is necessary to amplify further how the concept of culture has been developed, largely in the social sciences.

There has been great diversity in the articulation of what culture is, but some general tendencies are evident. Given its all-inclusive and differentiating character, it has been widely described as an encompassing whole, naturally specific to each group. Thus Tyler as early as 1871 referred to it as a 'complex whole,'[34] and there have been countless variations on this theme. Culture would thus be an 'integrating and integrated whole,'[35] an 'integrated system,'[36] a 'total system,'[37] a 'total way of life,'[38] a 'holistic concept,'[39] a 'totality,'[40] and a 'full cultural system' or 'integrated complex' (these latter two being applied to religions).[41] Its many elements would contribute to a 'total life-way.'[42] Scholars would attribute to each culture a 'soul' or 'type.'[43] Given the ambiguous nature of the concept of culture, this view is not universally held, and there have been those who have insisted on its open and dynamic character, and notably lawyers who have so insisted.[44] Yet the holistic concept has generally prevailed and this is

[34] J Monaghan & P Just, *Social and Cultural Anthropology. A Very Short Introduction* (Oxford, Oxford University Press, 2000) at 35.
[35] *Ibid*, at 44.
[36] Hoebel, above, note 5, at 5.
[37] Above note 5, at 25.
[38] S Grana & J Ollenburger, *The Social Context of Law* (Upper Saddle River, NJ, Prentice Hall, 1999) at 2, citing Brinkerhoff, Whie and Ortega.
[39] Gibson & Caldeira, above, note 8, at 57.
[40] Pinker, above, note 26, at 22.
[41] See D R Kinsley, *Hinduism. A Cultural Perspective*, 2nd ed. (Upper Saddle River, NJ, Prentice Hall, 1993) at xi.
[42] Hoebel, above, note 5, at 25.
[43] I Magli, *Cultural Anthropology. An Introduction* , transl. J. Sethre (Jefferson, NC, London, McFarland & Co., 2001) at 140.
[44] See, for example, M Van Hoecke, 'The Harmonisation of Private Law in Europe: Some Misunderstandings' in M Van Hoecke & F Ost, *The Harmonisation of Private Law*

now accepted by those who are increasingly critical of the entire idea of culture. Thus 'the majority' or even 'all' contributors to or participants in the debate have assumed (erroneously) that cultures are 'substantive, *bounded,* entities.'[45] There is therefore 'concern that the concept of culture has become a liability, over-homogenising, too static—an effect of description rather than its precondition.'[46] It is said that there has been an 'objectification' of culture[47] and there are critiques of a 'traditional, unified, reified, civilizing idea of culture' as well as writing 'against culture.'[48] Clifford Geertz acknowledges that one way of obscuring the meaning of culture is to imagine it as a 'self-contained' 'super-organic' reality and that coherence cannot be the major test of validity for a cultural description, yet still affirms that '[c]ultural systems must have a minimal degree of coherence, else we would not call them systems.'[49]

So, in spite of what any one author has said or may still say, there has been a massive acceptance of culture as a kind of society-specific entity. There is a 'prevailing public ideology' which sees cultures as 'separate spheres.'[50] The public, moreover, cannot be faulted for this since it has been an essential, even inherent, element of the scientific development of the concept. It is the allegedly overarching coherence of culture which has defined it, and if it does not have this character, it dissolves into more specific concepts or activities. It is an 'abstraction', developed as such and recognised as such. This has had, and may well continue to have, important consequences for the way people think of themselves and of others.

A first consequence relates to what may be referred to as local culture, one's own. This is often today thought of as the culture of one's country or nation. Hoebel stated that '[t]he basic assumptions of a culture are necessarily consistent among themselves,'[51] so we have here the same, underlying notion of a non-contradictory field of meaning which is often used in

(Oxford/Portland, Hart Publishing, 2000) 1 at 5; and see Monaghan & Just, above, note 34, at 46, with references to those seeing culture as a product of random history, a 'thing of shreds and patches'; and 'more recently' as bricolage, a constant re-working, casting-off and reviving. Others see the concept of culture as recently being affected by a process of globalisation, such that it is 'no longer possible to talk about the virtues of national legal cultures as stable and viable entities ... .' See W Heydebrand, 'From Globalisation of Law to Law under Globalisation' in D Nelken & J Feest, *Adapting Legal Cultures* (Oxford/Portland, Hart Publishing, 2001) 117 at 131.

[45] R Ulin, *Understanding Cultures. Perspectives in Anthropology and Social Theory*, 2nd ed (Oxford, Blackwell, 2001) at 204, 205 (emphasis in original)..
[46] P Harvey, 'Culture and Context. The Effects of Visibility' in R Dilley (ed), *The Problem of Context* (New York/Oxford, Berghahn, 1999) 213 at 213.
[47] M Herzfeld, *Anthropology. Theoretical Practice in Culture and Society* (Oxford, Blackwell, 2001) at 32.
[48] A Sarat & T Kearns, 'The Cultural Lives of Law' in A Sarat & T Kearns, *Law in the Domains of Culture* (Ann Arbor, MI, University of Michigan Press, 1998) 1 at 3.
[49] Geertz, above, note 4, at 11, 17.
[50] Makkonen, above, note 33, at 25
[51] Hoebel, above, note 5, at 23.

explaining positivist constructions of legal systems.[52] The result of this denial of contradiction or inconsistency is the widespread assumption that states should be culturally homogeneous, even though this is the case for almost no states in the world. 'All of the cultural differences *within* a society are rendered invisible and irrelevant,' given such 'mono-cultural understanding.'[53] There are therefore few states which view themselves as 'multi-cultural' since this is seen in large measure as a contradiction in terms. There are immeasurable consequences of this underlying idea in the treatment of minorities within states. The most widespread attitude towards minorities is of course their non-recognition. This may be seen as a direct consequence of the notion of necessary cultural homogeneity.

A second, related consequence relates to cultures other than one's own. If one's own culture is necessarily coherent and (at least relatively) homogeneous, other cultures must exhibit the same characteristic. This is what it is to be a culture, and other cultures become necessarily 'univocal, non-differentiated, and likewise bounded.'[54] Here one's neighbour, culturally speaking, becomes the Other. The notion of incommensurability inevitably is used in describing the relations between cultures, since they are necessarily internally coherent but relationally distinct and inconsistent with one another.[55] Moreover, given a largely presentist notion of culture, in which the past is largely marginalised, other cultures appear simply as observable patterns of conduct, divorced from their underlying reasons or justifications. This has happened with the western definition of 'custom,' which tells us that it is essentially repeated conduct, such that we would understand the law of customary peoples by simply observing their conduct and not engaging with the substantive reasons for such conduct.[56] In short, the foreign culture is, in the language of Edward Said, 'essentialised' and we now see that his criticism of scholars of the orient is now rooted in a much larger process of essentialisation endemic to western social science in its conceptualisation of culture.[57]

[52] Lord Lloyd of Hampstead & MDA Freeman, *Lloyd's Introduction to Jurisprudence*, 5th ed. (London/Toronto, Stevens/Carswell, 1985) at 332, in discussing Kelsen, though noting that in later writings Kelsen abandoned the idea of non-contradiction.

[53] J Carens, *Culture, Citizenship, and Community. A Contextual Exploration of Justice as Evenhandedness* (Oxford, Oxford University Press, 2000) at 70, 56 (emphasis in original).

[54] Ulin, above, note 45, at 205.

[55] See, however, for the difficulty in determining what incommensurability could mean, as opposed to more comprehensible notions of incompatibility, rough equality, etc., HP Glenn, 'Are Legal Traditions Incommensurable?' *American Journal of Comparative Law* (2001) 49 133.

[56] See HP Glenn, 'The Capture, Reconstruction and Marginalization of "Custom"' *American Journal of Comparative Law* (1997) 45 613.

[57] E Said, *Orientalism* (London/New York, Penguin, 1991). Said did not situate his criticism of 'Orientalism' in the context of culture, though stating at 5 that ideas, cultures and histories cannot be understood without their force, or more precisely their configurations of power, also being studied.

Once the world is conceptualised as consisting of separate and complete human entities, inconsistent or incompatible with one another, we appear to reach another level of consequences. What are the relations between these separate and complete entities or cultures? All conclusions may be theoretically possible, but our initial formulation of the problem is strongly suggestive of the conclusions which have been reached. The cultures are autonomous, inconsistent entities and there is no suggestion in their formulation of any notion of mutual accommodation or interdependence. They are conceptualised as being simply separate, and internally consistent. Where two might overlap, there is necessarily conflict between them, since they lose their character as separate cultures if elements of inconsistency are introduced into them. Definitions of culture or cultural difference thus tend to slide into descriptions of underlying conflict, as where differences are described as 'inherent, imperative and unbridgeable' and groups as 'mutually exclusive' and 'categorically opposed.'[58] The language of culture has thus become a language of conflict. There is discussion of 'culture wars';[59] the notion of culture 'tends to be used as a weapon in strategic debate';[60] culture would have become 'the very language in which political demands take shape [having] … shifted over from being part of the answer … to being part of the problem.'[61]

There is now a clear escalation in language. The International Bar Association has sponsored a conference on 'The Clash of Legal Cultures in Central and Eastern Europe.'[62] It has been said that '[i]n Belfast and Bosnia, culture is not just what you put on the cassette player, it is what you kill for.'[63] Samuel Huntington, in his *Clash of Civilizations*, made extensive use of the concept of culture and took as his central theme that 'culture and cultural identities, which at the broadest levels are civilization identities, are shaping the patterns of cohesion, disintegration and conflict in the post-Cold War world.'[64]

Culture, as an epistemological instrument, thus contributes to or is constitutive of, an epistemology of conflict, as opposed to an epistemology of conciliation. Our understanding of the world is inherently conflictual, by virtue of the instrument of understanding which we have in large measure adopted.

[58] Makkonen, above, note 33, at 19.
[59] Kuper, above, note 2, at 1 (Introduction: Culture Wars'); D Nelken, 'Towards a Sociology of Legal Adaptation' in Nelken & Feest, above, note 44, 7 at 26.
[60] Y Dezalay & B Garth, 'The Import and Export of Law and Legal Institutions: International Strategies Publishing in National Palace Wars', in D Nelken & J Feest, above n 44, 241 at 242.
[61] Eagleton, above, note 17.
[62] International Bar Association brochure, 7th Eastern European Regional Conference, 7–10 Septembre 1997, Bratislava, Slovak Republic.
[63] Eagleton, above, note 17.
[64] S Huntington, *The Clash of Civilizations and the Remaking of World Order* (New York, Simon & Schuster, 1996) at 20.

It is difficult to see how this could have been otherwise, given the underlying, abstract concept of culture. As a descriptive concept, and as an element of social science methodology, the concept of culture is not meant to provide substantive argument on the questions which inevitably arise within cultures or between them. It rather describes, in a sense, the end results or products of those internal arguments or debates, at least as seen by an external observer or social scientist. If society A has reached result a, and society B has reached result b, or so it appears from empirical research which has been undertaken, this understanding is what the concept of culture can tell us. What it does not purport to tell us, and which by its nature it cannot tell us, is whether a or b should be adopted in the event of some form of overlap between societies A and B, or what combination of a or b might be possible. As a descriptive concept, culture cannot tell us whether a particular culture should give way to another or whether there is some form of via media between the two. It has no data dealing with such questions. As it has been constructed, culture sees only inconsistency, incompatibility and conflict, in the same way that differences between so-called legal systems are conceptualised as conflicts of laws. It is no accident that the notion of culture has become prevalent at a time of Darwinian biological understanding, when Darwinian ideas have in some measure been taken over into social thought. As a matter of survival, a culture must prevail over other cultures, since the concept of culture provides no internal, normative information which could tell it how to adjust in its relations with other cultures. Dominance is the only game in town.[65] This occurs even at a second-order or epistemological level, as the notion of culture is itself imposed on non-western forms of life.[66]

There is a further dimension of the concept of culture which is of relatively recent origin and which must be considered in order to appreciate all of its consequences. Nineteenth century anthropology worked with a concept of race, as an element in evolutionary or Darwinian theories of social development.[67] Culture was then advanced as a preferable conceptual marker in differentiating human societies, notably by the anthropologist Boas. Yet we appear to have substituted one essentialising classification for

[65] N Foster, 'Company Law Theory in Comparative Perspective: England and France' 48 *American Journal of Comparative Law* (2000) 572 at 594, 595 (the present culture being diffused is, *naturally*, mainly that of the dominant power …)(emphasis added).

[66] See, for example, W Capeller, *Une introduction aux cultures juridiques non-occidentales* (Brussels, Bruyant, 1998), notably at 15 on domination of 'l'herméneutique occidentale'; M Strathern, 'The nice thing about culture is that everyone has it,' in M Strathern (ed), *Shifting Contexts. Transformations in Anthropological Knowledge*. (London/New York, Routledge, 1995) 153, notably at 156 ('And one effect of this ubiquitous descriptive is to think that it in turn comprises a world historical phenomenon. It is as though those who talk about "cultures" were witnessing cultures talking about themselves!'); Huntington, above, note 64, at 91 ('Non-Western cultures').

[67] See HP Glenn, *Legal Traditions of the World* (Oxford, Oxford University Press, 2000) at 30, 243, with references.

another and it is said that culture is now 'proving ill-adapted to protect against the tenacity of racism's old enticements and its resurgence in new forms.'[68] Culture thus would often come to serve as 'a politically correct euphemism for race,' or even as a 'form of' or 'the dominant form of racism.'[69] This can come about since both racism and culture would be based on 'the proto-racist belief in the existence of insurmountable and natural cultural or biological differences.'[70] The concepts of race and culture would be related to extreme forms of nationalism, and the expression 'cultural fundamentalism' has been used in describing anti-immigration sentiment in Europe.[71]

We are certainly working here in the domain of unintended consequences, and no-one is able to foresee the future of a concept or idea when it is initially advanced. Our growing awareness of all of the epistemological consequences of the concept of culture are now however provoking reaction, and there are serious reasons for the reaction. Moreover, many of the same criticisms which are made of the concept of culture may be made of similar constructions such as style, mentality and civilisation, to the extent that all lend themselves to the reification and categorisation of human groups, in an essentialising manner.[72]

To what extent is the concept of tradition vulnerable to the same treatment which the concept of culture has received? Perhaps it is equally vulnerable. Yet it is a much older concept, used and practised everywhere in the world, and it has yet to undergo the same kind of reification and conflictualisation as has occurred with the concept of culture. This may be because tradition is best conceived as simple information, lasting over time, which lacks the material dimension of social life present in the concept of culture. Tradition, moreover, comes with no clear markers, and it is difficult to identify traditions as autonomous or separate or pure. Traditions have fuzzy edges; they can only be identified in relation to other traditions; they contain within themselves elements of opposition; they are linked to

[68] AJ Hall, 'Racial Discrimination in Legislation, Litigation, Legend and Lore' 32 *Canadian Ethnic Studies* (2000) 119.
[69] Kuper, above, note 2, at 240, 241, citing Michaels.
[70] Makkonen, above, note 33, at 43.
[71] Strathern, above, note 66, at 156.
[72] On style see Magli, above, note 43, at 140 (citing Benedict to the effect that style a 'consistent pattern of thought and action' though not ontological reality); A Crombie, *Styles of Scientific Thinking in the European Tradition* (London, Duckworth, 1994), notably at ix ('the general style of any culture') and xi ('a taxonomy of styles'); I Hacking, *Historical Ontology* (Cambridge, MA/London, Harvard University Press, 2002) , notably at 182 on the presentism of style ('The history that I want is the history of the present'). On civilisation, see Kuper, above, note 2, at 25, 26 (civilisation as 18th century marker of 'triumphalist' history of 'advanced peoples'); Huntington, above, note 64 ('clash' of civilisations). On mentalities, see Bell, above, note 12, at 14–16 (mentality variously defined as set of beliefs or collective mental programme, noting objections that concept too general and failing to allow for complexity and variety of different approaches).

one another by lateral or cross traditions which are defined otherwise than by the criteria of definition of a main or principal tradition.[73] To speak of a tradition of '*le droit civil*' or a tradition of the common law, or a tradition of islamic law is not to construct a precise, autonomous and internally consistent object. The concept of tradition would therefore be an epistemological concept which is rooted in what can be called an epistemology of conciliation, as opposed to an epistemology of conflict.

4. CONCLUSION

The suggestion has been made recently that we should abandon the notion of culture.[74] This may appear to be an impossibly radical proposal, since it has become so widespread a means of differentiation amongst the people of the world. Yet this paper has indicated many reasons for abandoning it, and it is not the case that it is irreplaceable. We simply need to be more specific in naming that which we are discussing. We need to abandon an overly complex and overly inclusive abstraction, which becomes a blunt instrument of conflict, in favour of more precise instruments of analysis. These more precise instruments of analysis could include 'knowledge, or belief, or art, or technology, or tradition, or even … ideology.'[75]

In law the place of tradition is well-established, as non-genetic information which influences but does not control legal practice. It is tolerant of argument, and argument has always been a useful antidote to reification and homogenisation, while allowing peaceful resolution of disputes.

[73] See generally on these themes, Glenn, above, note 67, ch 10.
[74] Kuper, above, note 2, at x.
[75] Above note 2 and see at p 245 on the need to unpack the concept of culture.

3

Legal Epistemology and Transformation of Legal Cultures

MAREK ZIRK-SADOWSKI

1. LEGAL POSITIVISM IN POLISH LEGAL CULTURE

LEGAL POSITIVISM FORMULATED as a legal doctrine is almost inherently anti-metaphysical.[1] Positivistic objection to the conceptions of the natural law is their being based on the philosophical assumptions which threaten the legalism of positive law and equality before the law. Introducing clear metaphysical assumptions to the legal discourse, speaking in favour of some standpoint in philosophical disputes would be a threat to equality before the law. Directly imposing a certain philosophical standpoint by the authority of the law or the authority of a court would result in those who do not share it being treated differently by the law or court than those who do share it. Therefore, positivists avoid assuming clear and explicit philosophical standpoints in legal discourse.

In Polish legal culture, the law is prevalently perceived in the way characteristic of original legal positivism, in which a judge is, first of all, a representative of a ruler (a sovereign). If a judge's authority is legitimised, his every action has to be treated as the action of a sovereign. Generally, this concept is supplemented with such prerequisites of law as the protection of human rights or the incorporation into the law of a minimum of natural law.

Following this line of thinking, we can say that authority is vested in a judge almost automatically simply through being given a relevant part of the ruler's power. I would like, only in outline of course, to put forward the thesis that in order to exercise legal authority judges have to achieve certain ethical standards. The aim of this article, however, is not to give moral directions, but to show that detailed study of the way judges examine the law is sufficient to sustain this thesis.

[1] The doctrine of legal positivism ought to be distinguished from the positivistic method constituting a lawyer's technique of work.

2. CARTESIAN EPISTEMOLOGICAL MODEL AND THE LEGAL POSITIVISM

Such a simple perception of the role of judges originates, to a great extent, from the positivistic model of the theory of law—common to Polish legal and political cultures—which treats the law as a kind of an object totally external to and independent of judges, and studied, in fact, like other natural objects.

A verdict brought in by court is ultimately based on the authority of the institution. Introducing definite metaphysical presumptions to a legal discourse, declaring in favour of a particular opinion by way of philosophical arguments, would threaten the equality in law. If a particular philosophical opinion were directly imposed by the authority of the law, those who shared this position would be treated by the court or by the law in a different way than those who did not. Therefore, positivists avoid assuming definite and unambiguous philosophical attitudes in a legal discourse or in legal texts themselves. However, positivism itself introduces into jurisprudence an epistemological concept that obviously stems from the Cartesian epistemological model.

That model was based on the opposition between the subject and the external order of objects. The subject was in a cognitive relation to the object. Language as a medium of cognition was confined only to its denotative function, its role being reduced to the presentation of images embedded in the consciousness of a researcher.

Such a model of cognition, in which the subject-object opposition is essential and language plays the role of a medium, still prevails in the 'natural attitude' to the world,[2] so common in our culture. This attitude is based on presumptions which in all create the sense of cognitive objectivity. A few of these presumptions are particularly characteristic.[3] The basic one claims that existence is subjective, and that such subjectivity is independent of and primary to cognition. Cognition is, therefore, the result of the influence of the object on the subject. Another presumption is the belief that cognition is a result of cognitive activity of the subject in an objective order. Since this objective order was defined in a number of ways, the cognitive activity of the subject was also presented differently:

> When the objective order was perceived as a causative-consecutive one, observation and experiment were regarded as those forms of activity of a researcher that enabled him to examine the subjectivity; when the objective

[2] K Jaspers, 'The Criticism of the Positivism and the Idealism', in: (eds) L Kolakowski, K Pomian *Existential Philosophy*, (Warszawa PWN, 1965) p 146.

[3] They are pointed to by B Tuchanska in her paper 'Problem poznania jako pytanie ontologiczne' (The Problem of Cognition as an Ontological Question), in: (eds) *Racjonalność, nauka, społeczeństwo* (Rationality, Science, Society), H Kozakiewicz, E Mokrzycki, MJ Siemek (Warszawa, PWN, 1989) pp 242–43.

> order was understood as a rational orderliness, as *logos* of the world, intellectual, intuitive-discursive activity was considered the only way in which cognition participates in this order; and finally—when the objective order was treated as an irrational stream of life, empathy or non-intellectual intuition were pointed to as the media which make the cognitive contact with objectivity possible.[4]

Thus, objectivity leads to the third presumption of 'natural cognition', to the conviction as to the always non-comprehensive character of the object of study.[5] The object is examined in relation to what is 'different' from it, so one cannot fully or comprehensively understand it. Cognition and a researcher are always in relation to what is external to the object of study.

3. THE ORIGINAL POSITIVISM

The model of examining the law based on the opposition of a researcher and the object of his study was clearly noticeable in the first stage of the development of positivism which—for this reason—can be called original positivism; a good example of original positivism was the positivism of J Austin.[6] Owing to certain social events, the law becomes an external object in relation to a lawyer studying it. Speaking more precisely—it becomes an external object because of the emergence in a political society of authority called a sovereign, whose commands are obeyed by members of that society. The observation of social manifestations of this obedience allows for the separation of the law as an object of study external to a lawyer, and then for the reconstruction of its conceptual structure. This conceptual structure of the law is discovered through induction, in the same way as the structure of the natural world. In such a model of examining the law there is no situation in which a judge's decision is not determined by the law. This decision can be nothing other than a temporary symptom of an unfinished process of rational cognition of law.

Law as a Meaningful Object

This model of examining the law within the framework of legal positivism has never, in fact, been challenged, although it has been significantly modified by analytical philosophy. Specifically, there has been a change in the role of language in the model of the reception of law.

[4] *Ibid*, p 243.
[5] Above n 3, p 243.
[6] Cf M Zirk-Sadowski, *Prawo a uczestniczenie w kulturze* (Law and the Participation in Culture) (Łódź, University of Łódź Press, 1998) pp 17–20.

The refined version of legal positivism primarily represented by Hart renounced the naturalistic vision of the relation between the subject and the object of his study as a causative-consecutive influence of the object on the subject. As under the previous version of positivism, it maintained the thesis of separating the subject from the object of study. Refined positivism separates out the law as an object which is examined by the application of a communicative criterion. If the so-called external point of view is the factor that determines the distinguishing of a legal norm from rules of etiquette, then the theory of a society built by this version of positivism for epistemological purposes is largely a theory of a certain communication society. After all, a normative criterion exists in the acts of speech, and original rules do not have to be efficient, though citizens have to assume an external point of view to them. Therefore, the law is not a simple natural object as it was under original positivism. The apprehension of the law has to be mediated by speech.

Although law is not totally reducible to language, it is nonetheless for refined positivism by nature a linguistic phenomenon. It would be necessary to recreate and understand language in order to use the law.

Resigning from the naturalistic approach to the law, refined positivism distinguished between external and internal aspects of a binding rule. Since the law is some kind of binding rules, one can take an external or an internal position also in relation to the law. Externality does not here mean a position of an external observer for whom the law is like other natural object. Separation of the law as an object of study is possible only through language; only then is the law a meaningful object. Externality and internality of law are two aspects of the meaning of law, and not of some natural object.

This differentiation is essential for an understanding of law and society. We speak of the external point of view when dealing with rules only as an observer who himself does not accept those rules, whereas the internal point of view appears when we accept a rule and we regard it as binding. At the same time, Hart rejects emotional interpretation of the internal approach to a rule, admitting that emotions are neither necessary nor sufficient for the existence of binding norms. A question arises, however, as to whether we can distance ourselves from a norm and criticise it or refuse to observe it by experiencing that norm from the external position.[7]

According to MacCormick, in the internal point of view one should distinguish the cognitive and the volitionary aspects.[8] The cognitive internal point of view is characteristic of those who, being members of a group,

[7] Cf R Sarkowicz, *Poziomowa interpretacja tekstu prawnego* (Parallel Interpretation of a Legal Text) (Krakow, Wydawnictwo Uniwersytetu Jagielonskiego, 1995) p 99.
[8] N MacCormick, 'On the Internal Aspects of Norms', in: *Legal Reasoning and Legal Theory* (Oxford, Clarendon Press, 1978) p 289.

do not regard a rule as their own. This aspect is possible owing to its relation to a given norm of the volitionary point of view of other members of the group, who regard the rule as their own and support it emotionally. And therefore MacCormick points out that it is not the emotional attitude to the norm but the different ways it is understood by members of a group and by an outsider which determine the ability to the assume the internal point of view.[9] In fact, it is the social situation that determines the internal point of view. Introducing the categories of the external point of view as well as those of the cognitive and volitionary internal points of view, MacCormick continues Hart's considerations, preserving the role of simple social facts in examining the law.

Consequently, the law is also examined in the subject-object cognitive relation under refined positivism. Under original positivism the law was examined directly, due to the isolation of such acts of will called law. Under refined positivism it is impossible directly to gain knowledge of those acts of will which constitute the law. They are recreated from language, the full participation in which is possible owing to the affiliation with a certain group. An act of will is not, therefore, examined in the social context of direct subordination to a sovereign, but has a meaning created by a certain type of community. In reality, however, the cognitive subject-object relation remains immune to threat under refined positivism as well. The law is studied as an object separated from a lawyer, since it is sufficient that the lawyer meet certain social criteria for the apprehension of law through language.

Owing to the reduction of the internal point of view to the volitionary element, participation in legal culture allows the object of study to preserve its autonomy from the subject. The volitionary element allows the rejection of the thesis that the act of examining the law is at the same time the act of constituting it. Its introduction to the internal point of view means, in fact, a decision to accept a rule without influencing its contents. Owing to the volitionary element, the rule becomes a factor stimulating the behaviour of a lawyer, the moment of practical action. Both Hart and MacCormick avoid interference in the meaning of a rule, reducing legal problems to the social criteria of a rule's acceptance.

The introduction of a natural language as a medium through which the law appears and within which it must be examined brought out the problem of judicial discretion. Applying the analytical concept of law, Hart could not have failed to notice that a legal text formulated in a natural language is often characterised by potential obscurity, as its meaning depends on the context in which the text is analysed. Even the best lawmaker is not able to eliminate this danger since some unpredicted context may always appear, about which we will not know, whether or not it is included in the norm. Open texture is thus something different from obscurity since even

[9] *Ibid*, p 291.

for a well-defined term a new situation may potentially occur for which it will be necessary to decide if the term can be applied in this new situation.

With the open texture as an immanent feature of the natural language, a case is not clearly included under a legal rule. Until a judge eliminates the open texture by an interpretative decision, the case cannot be decided through the application of the law. According to Hart, when legal norms show 'open structure'—ie they use unclear, evaluative expressions or general clauses or when a given situation is not regulated by the law at all, a legal decision is based on non-legal evaluations. A judge is then in the situation of discretion, acts 'at his own discretion', which means reaching beyond the law in search for another kind of standard which would enable him to make a new rule or to supplement the old one.

4. LEGAL POSITIVISM IN THE PROCESS OF TRANSFORMATION

In the case of the open texture, a rule included in a legal text is not final for a judge's decision. In an entirely new situation in which the rule is applied, the judge himself has to 'close' the meaning of the term used in it, to decide whether the situation is comprised by this term.

Original positivism did not notice this problem. Since it did not see the role of natural language in the cognition of law, a doctrine of a judge as a representative of a sovereign was sufficient to legitimise all his decisions.

The statement that somebody has a legal obligation, in Hart's concept means that he is in a situation that falls within a category of a binding legal rule, requiring a particular action or omission. If there is no binding legal rule, we cannot speak about a legal obligation.

In consequence, a judge deciding a particular case at his own discretion does not execute the legal obligation contained in this case. It occurs when norms cannot be applied automatically and the situation has to be evaluated as the context of the application of a norm is not sufficiently clear. Judges cannot then apply legal norms 'automatically', but have to take independent decisions on the application of a legal norm, which is a consequence of the open texture as a feature inherent in legal language. Therefore, in such a situation positivism cannot give grounds for judicial decisions and, at the same time, reject a creative role in the law for the lawyer in view of the concept of a legal rule under positivism.

Under refined positivism the cost of basing the model of examining the law on the Cartesian subject-object opposition is clearly noticeable. This cost lies in the contradiction between the lack of clear determination of judicial decisions by the law and the simultaneous rejection of a creative role in the law for a lawyer.

This cost may not be so obvious in legal cultures characterised by a continuity of tradition, semantic stability in the law or by its very slow evolution.

This price, however, grows immediately in the cultures of countries in the process of transformation, and thus in the period of a non-revolutionary transformation of legal culture. Generally, transformation means the continuity of law achieved mainly through the application of the same legal texts in new systemic conditions, as well as the acceptance of subjective rights fairly acquired in the pre-transformation period.

For a lawyer, and especially for a judge, the rule of the continuity of law means the necessity of assuming an active, creative attitude to law, an attitude that collides with the positivistic philosophy of life prevailing in the legal culture. Legal practice in the conditions of transformation disproves the positivistic vision of a lawyer studying the law as an object external to him.

And thus a dissonance appears between the prevailing doctrine legitimising lawyers' actions and their actual role in the culture.

5. THE COGNITION OF THE LAW AND THE PRACTICE OF TRANSFORMATION

All these observations, as it seems, can be related to the upheavals caused by the emergence in Poland of the judiciary as the third power in the state of law mentioned in item 1 of this paper. A researcher considering the condition of Polish legal culture will readily note an opinion, held by politicians and lawyers, that law is cognisable—like other natural objects. Most frequently this opinion manifests itself in the thesis that one should strictly distinguish between the cognition of the law itself and attitudes towards it, particularly moral ones. It is believed that the cognition of law is a relation which stems from strict separation of a researcher and the object of study. It is assumed that in law, like in natural sciences, in which impartiality of reception is ensured by the separation of these two elements of the cognitive relation, it is possible to distinguish between the moment of apprehension of the law and the action of a lawyer studying it. Receptive impartiality of legal analysis should be ensured by the reduction of law to a legal text—a set of regulations existing independently of the lawyer reading the text.

Naturally, one can discern differences in the interpretation of a text by different readers, but it is commonly believed that those differences result from methodological mistakes or from deficiencies in education with regard to jurisprudence.

In this context, lawyers seem to be equipped with special knowledge, enabling them to uncover an 'objective' meaning of a legal text, which exists independently of them.

On the other hand, one can observe the practice of courts of law which markedly departs from this vision of law through a very active and creative derivation of new meanings from the old law by lawyers.

A popular concept of examining law as of an object independent of lawyers is more and more clearly colliding with the observed manifestations of judicial authority over the meanings attributed to law. Many a time, the same legal text appears to be the source of entirely new rights and duties that were not taken into account by the legal practice of the previous system. It therefore appears that even within the refined version of positivism, it is impossible to legitimise the power of lawyers over the meaning of the law that can be specifically observed during periods of transformation. As it seems, in order to eliminate the inconsistency found in the legal culture, it is necessary to reject the model of examining the law based on the subject-object opposition presented in chapter 2 of this paper.

6. THE DISCURSIVE VISION OF THE JURISDICTION

The most influential contemporary legal doctrine that renounces such epistemology can be found in the works of Ronald Dworkin. In order to overcome legal doctrine based on the opposition of an object of study and a researcher, he distinguished a category of norms in a legal system; these norms, so-called principles, have not been so far taken into account in the research on positivism. They form specific standards of procedure that should be observed because such are the requirements of justice, honesty or of other aspects of morality.

Principles differ from rules in that they are, among other things, more capacious or under-defined, which means that the multiplicity of various rules can be presented as exemplifications or substantiations of one principle. In view of their relation to a certain goal, intention, authorisation or value, principles are regarded as worthy of acceptance because they contribute to the justification of rules. Both principles and rules are norms of behaviour since they indicate who should act, how they should behave and under what circumstances.

Rules are norms of behaviour that are applied in an all-or-nothing fashion.[10] This means that in any given situation in which a hypothesis of a norm is formulated, legal consequences defined by a norm occur when the norm is binding and do not occur when the norm thus does not have to be observed. The rule is complete in that its completeness and accuracy depend on a full enumeration of exceptions to its application.

The nature of principles is a non-legal one, and therefore they do not specify which legal consequences should result from a situation envisaged by a principle. They do not normatively define the decision of the organ applying the law. They support the conclusion that a certain legal consequence

[10] R Dworkin, 'Is law a system of rules', in: R Dworkin (ed) *The Philosophy of Law*, (Oxford, Clarendon Press, 1977) p 45.

has occurred. The character of a legal principle is, according to Dworkin, formulated as follows: 'Nobody will acquire a more advantageous legal situation through acting against the law or morality.' This principle does not mean that the law never allows anybody to benefit from their illicit acts. Someone who breaks an agreement and prefers to pay compensation in order to sign a more beneficial contract is in such a situation. In this case, the principle is not considered to be incomplete on account of its not forming part of the legal system, and the above example does not refute this principle. The principle only points to arguments that should be taken into consideration by the organ applying the law, although it does not specify legal consequences that should be brought about by the organ.

Principles, therefore, bear the dimension of 'weight' or 'importance', while all the rules are equally binding in a particular normative order.[11] The way in which a juridical organ resolves the conflict of principles depends on the weight it attributes to them in a specific context. One rule may be then regarded as being more important than another. The weighing of principles does not mean that one principle is considered to be worse than the other. In spite of the conflict, a court of law can even try to take both the principles into consideration. Resolving the conflict of principles requires relating them to actual conditions. The definition of the relation of subordination is based on proper argumentation. A juridical organ evaluates the weight of all the principles that collide with each other and defines the conditional relation of priority.

According to Dworkin, the positivism mistakenly presumes that the law consists exclusively of rules. That is why it artificially isolates the law, separating it from normative social structures. It is the legal principles that link the law to normative social structures. A judge is bound to apply legal rules. In the so-called hard case, however, it appears that a rule may be insufficient for taking the right decision. If, for example, the application of a rule violates both the reliability of the law and the confidence of citizens in the state or in their fairly acquired subjective rights, then according to positivists, a judge has to take an arbitrary decision. Dworkin believes otherwise. A judge should then refer to legal principles that are not as binding as rules, and can only be respected to a certain degree and form a specific link between a judge applying the rules and those normative social structures. The law, therefore, consists of both rules and principles.

Hart's criterion for distinguishing a legal rule is not suitable for weighing principles. Positivistic concept of validity refers to the test of pedigree. Whether a specific legal norm is binding results from the way it was created and if it meets specific requirements of competence, ie if it can be derived from a decision of a competent legislative organ. According to Dworkin,

[11] *Ibid*, p 47.

a legal rule does not stem from a particular decisions of a legislative organ or a court, but is the result of the 'sense of appropriateness' that has developed among lawyers and in social circles over a long period of time.

They are binding as long as this sense is maintained. The evidence that a particular principle is a legal one should be sought in the 'institutional support' which means that a given principle is *de facto* brought into being by a court of law or that it gives reasons for legal regulations. Such a principle can be isolated from interacting norms of institutional responsibility, from current statutory interpretation, from the persuasive power of a set of precedents, and from the relation of all these elements to recent moral standards, etc. The elements of institutional support cannot be expressed through one simple rule of recognition allowing for the undisturbed and definite identification of a principle. The criterion for recognition would then mean that it would be too complex to express, in terms of a rule, the relation between a principle and official acts of legal institutions.

It appears, that in principles (unlike in rules) the difference between acceptance and 'validity' is not clear, and so the first positivistic thesis of the existence of a common touchstone of law should also be rejected. The rule of recognition does not apply to principles. Dworkin's concept of the binding nature of principles also leads to the rejection of the positivistic thesis which postulates the separation of law from morality (ie the independence of the criteria for law to be binding from moral standards), in view of the thesis of institutional support, of which moral values are also an element.

As we have already pointed out, one of the theses of positivism claims that when general, blurred terms appear in legal rules, there is no correct answer to a particular legal issue. This claim leads to a belief that it is solely the abstract meaning of the expressions used that determines the legal consequences of statutory law. When the expressions are blurred, their texture is open, which results in the lack of explicit criteria for defining the effects of the written law.

Dworkin believes that the problem has been incorrectly formulated.[12] He rejects the presumption that the source of inconsistencies in judicial verdicts is, in fact, the lack of one right decision in a hard case. Dworkin regards as equally correct the thesis that only the lack of a proper method to reach this decision, as well as the imperfection of the techniques of jurisdiction make judges' consensus impossible.

According to Dworkin, there are no definite arguments to prove that in hard cases, when principles are weighed, there is not just one right decision to be taken. In our legal culture, however, there is a strong belief that such a decision is always possible. In Dworkin's opinion, if a legal system

[12] R Dworkin, 'No Right Answer', in: P Hackes and J Raz (eds) *Law, Morality and Society—Essays in Honour of HLA Hart* (Oxford, Clarendon Press, 1977) p 68.

is sufficiently developed and consists of a great number of rules, principles and constitutional procedures as well as of numerous precedents and legal acts, we always have the right to assume that the right decision can be reached, although it may not be found due only to the imperfection of judges, which thus makes two contradictory decisions seem possible. When practical argumentation is open, the thesis on the existence of such a decision can always be put forward. That judges are unable to take such a decision means only that the communication between them is not perfect and that their argumentation skills are insufficient.

Therefore, the thesis of the existence of the only right decision has, for Dworkin, a clearly normative character and requires that evaluation criteria for various decisions should be built in order to form the basis for the best decision possible.

Within the positivistic concept which views the norm very narrowly, it is impossible to motivate the normative thesis on the existence of the one right answer. In the situation of discretion, positivism confined itself to the description of the various competing alternative decisions, as it could not find any legal criterion for choosing one of them. Only when the legal system is open and the factor of principles is introduced to its interpretation does such a possibility occur. At the same time, however, it appears the interpretation has to have a creative character. For principles are not simply applied: they are 'weighed'. It is the role of the practice and the science of law to integrate the whole normative social culture, of which legal rules are only an element.

Therefore, the law is not a complete object, given to lawyers by a lawmaker, as was claimed by Austin, or recognised by them through the test of pedigree called, in Hart's concept, the rule of recognition. The law is an interpretative fact, and so there is no point in searching for some defined semantics of law. Positivism introduces semantic sting to the science of law trying, through lexical manipulations, to formulate semantic criteria for using legal concepts.[13]

In the interpretative approach, the role of judges and the science of law is to search for the best possible understanding of law in the context of norms and cultural values.[14] Dworkin compares such constitution of law to the collective construction of a novel by generations of authors who add subsequent chapters to its text.

A judge interpreting the law becomes a central character of the legal culture. Dworkin contrasts the idea of a judge in the service of the integrative vision of the law with that of a positivistic judge.

A positivistic judge believes that political decisions should be taken by those elected democratically, and the courts should be subordinate

[13] Cf R Dorkin, *Law's Empire* (London, Fontana 1986) pp 33–5.
[14] *Ibid*, pp 410–11.

to legislature. In hard cases, when a legal text is unclear and insufficient for deciding the case, the judge has to replace a legislative organ, ie to make a judgement that would take into consideration the opinion or the belief of a majority. He accepts that he has no right to act according to his own opinions, different from the opinions of a majority.

A representative of the integrative vision of law reasons otherwise. He also thinks that a judge should not usurp the competence of legislature, but he relies on his own opinions in that he relies on their fairness or consistency on the grounds that his opinions are those of a judge and not of someone else.

However, he can also decide that his institutional responsibility has to give way to the opinions of others. While taking a decision, he must rely on the rightness of his own judgement in order to make any judgement at all (in contrast to the situation when he relies on his own belief trusting in its truthfulness or rightness). However, assuming this attitude, he is still convinced that his decision is not entirely determined by his views or political preferences. Since he has his own morality, other people's opinions may influence a judge's verdict although his judicial technique does not exclude taking a decision contrary to common morality. Then, too, he does not follow his own views—he makes a judgement presuming that in this respect social morality is inconsistent.

Jurisdiction theory of such a judge is, therefore, a discursive one. So one cannot say that he creates, in an arbitrary way, legalisation corresponding to morality, although he relies on the rightness of his own judgement and his own sense of social morality.

It should be here noted that the theory of judicial action described is an individualistic one, in which a decision results from the moral consensus of a community. And although the opinion is formulated after the arguments have been considered, it is still the opinion of a judge. Taking the right decision requires subjective certainty that does not result from any inter-subjective unity of the moral opinions of judges. A judge's opinion and the confidence in its rightness is for a judge the only point of reference in passing verdicts, and his intuition about moral principles of a society does not have anything to do with the conviction as to the rightness of the opinions of the majority. Firstly, he might not even be able to define that majority. Secondly, if he acquired any knowledge of the opinion of an ordinary person, he might consider it wrong.

Even when the legal rules are unclear, the authority of the parties is incorporated into the law through the normative context of a social life, although not directly. For a judge, the nature of the law is argumentative, and therefore he believes that he has to uncover it by relying on his own judgement as someone participating in a process of argumentation.

He does not define what binding law is by describing something that objectively exists as the law. For him, the law is not complete and closed at the

moment it is released by a lawmaker. He formulates arguments supporting the thesis on rights and duties of legal subjects. Therefore, he does not need to declare in favour of a majority since he is the rightful participant in a process of argumentation, and thus has the right to give an opinion. As a participant of the practice of jurisdiction he does not utter descriptive statements about the law but normative statements about rights and duties. Since he argues, that while defining the subjective rights of the parties, he takes moral traditions of the society into consideration. His jurisdiction is thus an activity of axiological engagement. He, therefore, does not have to declare in favour of a popular opinion, the opinion of a majority.

Dworkin does not support the recommendation, devoid of the axiological point of view, that one should refer to principles. He believes that the subjective rights of an individual are not, in fact, only a legal invention, but that they are embedded in the norms of culture. Taking those rights seriously does not mean restricting their role to the legal dimension, but rather perceiving them in even deeper layers of social life. A serious understanding of individual rights contained in legal rules themselves is only attainable through an understanding of these normative layers of a social life.

7. PARTICIPATION IN LEGAL CULTURE

The positivistic concept does not account for the phenomenon, common in countries undergoing the so-called transformation, that in the same set of legal texts, courts of law will identify legal norms with completely different contents. It is worth pointing out that the problem of the continuity of law was not discussed there. It was assumed from the very beginning that as far as validity was concerned, the law was the same, though the content of the legal norms derived from it was differently identified.

This phenomenon cannot be explained through concepts that view the law from a perspective of the opposition of the lawyer studying the law from the object of his study. In those concepts the law is presented as 'given' and 'complete', while the role of a lawyer is only to apprehend it through a cognitive act. In fact, there is no significant difference between the examining of the law and the direct examining of natural objects. This is, after all, where the idea of scientific legalism originates.

As a consequence of epistemological assumptions introduced by legal positivism lawyers were granted limited participation in culture, consisting solely of an examination of law based on the methodology clearly based on a scientific vision of cultural objects. The only serious attempt to challenge this concept of legal culture and the way lawyers participate in it can be found in legal hermeneutics which rejects the myth of the law as of an objective and external reification, and the myth of a lawyer as of a subject studying the law externally, with no possibility of influencing the normative

dimension of culture.[15] The presumption of the rationality of a lawmaker becomes also one of the significant elements of the reification of the law. The hermeneutical criticism of the legal culture allows for the outlining of a communicative vision of law and legal culture, in which the law is not presented as 'complete' and studied only by a lawyer, but as universal meanings and symbols constituted within a discourse. From this perspective, legal positivism and accompanying presumptions of the rationality of a lawmaker are forms of a legal discourse, the acceptance of which is not a prerequisite for the cognition of law. Hermeneutics points out that there is no clear border between cognition and ethics, and that the prerequisite for the participation in legal culture based on communicative dialogue is the acceptance of certain moral values that make a discourse possible, rather than the objectivisation of the law. It appears that the ethical quality of judges is just as important for their proper apprehension of law as is the institutional separation of the judiciary.

The hermeneutical criticism of legal culture makes it possible to outline the communicative vision of law and legal culture, in which law is not presented as a 'finished' object, recognised only by the lawyer, but as such common senses and symbols as are constituted in discourse. Such hermeneutics rejects the external, third-person account of the law as generally irrelevant. One has to take the internal participant's point of view in order to recognise the law. The internal hermeneutics perspective rules out theories such as Marxism, radical feminism, Critical Legal Studies, and postmodernism, which do not privilege the judge's perspective and cannot be applied by judges in their professional capacity. It shows that there is no sharp borderline between cognition of law and commitment in ethics and politics. The acceptance of some moral values allowing for discourse is a necessary condition of participating in narrative legal culture based on dialogue.

[15] Cf J Stelmach, *Współczesna filozofia interpretacji prawniczej* (Contemporary Philosophy of Legal Interpretation), (Krakow, Jagiellonian University Press, 1995).

4

Epistemology and Comparative Law: Contributions from the Sciences and Social Sciences

GEOFFREY SAMUEL

THE PURPOSE OF this chapter is to examine the extent to which theories of knowledge fashioned in the realm of the natural sciences and social sciences can be of relevance to the question of what it is to have knowledge of law in the context of comparative law. In particular, the examination will focus upon the relevance of these theories to methodology in comparative legal studies. Care must obviously be taken here since transference is fraught with danger. But given the central role that comparative law is now seen as having with regard to legal knowledge and methodology, it may be opportune to look in some depth at several of the contributions being made to epistemology from outside of law, always bearing in mind of course that, in the common law tradition, law is, anyway, very much a part of social science and is often located in social science faculties.

1. INTRODUCTION

Comparative law is, intellectually speaking, undergoing something of a renaissance thanks to a number of factors. Leaving aside the obvious point about its centenary, the calls for harmonisation of private law within the EU and the counter-current of dissent that these calls have attracted is one such factor.[1] The increasing awareness of the poverty of comparative law theory is another.[2] A third factor, admittedly interrelated with the theory question, is the lack of any serious recent work on comparative methodology;

[1] B De Witte, 'The Convergence Debate', (1996) 3 *Maastricht Journal of European and Comparative Law* 105.
[2] P Legrand, 'Comparative Legal Studies and Commitment to Theory', (1995) 58 *Modern Law Review* 262.

and this third factor, again together with the second, has generated a fourth. This fourth factor can be labelled the ontology and epistemological dimension. These terms are perhaps not of central usage in legal studies and thus it might be valuable at the outset to define what one means by these words. Ontology is about the *existence* of things—the term 'things' being understood in its widest sense and thus embracing beliefs, desires and the like—whereas epistemology is concerned with *knowledge* of things.[3] Ontology, then, deals with what exists while epistemology poses the following basic question: what is it to have knowledge of law?[4] These ontological and epistemological dimensions become strikingly evident the moment one poses the two fundamental questions associated with the term 'comparative law'. What is meant by 'comparison'? And what is meant by 'law'?

Pierre Legrand has shown that both of these questions can only be answered from, so to speak, outside of law.[5] This is perhaps relatively obvious with respect to 'comparison'. However when it comes to the 'law' question it would be idle to say that there is not a considerable body of work, by jurists, on the definition and nature of law. Yet this huge body of work by legal philosophers is less helpful to the comparatist than might first appear. As Richard Susskind has observed, most of it premised on the assumption that to have knowledge of law is to have knowledge of rules;[6] the debate in legal philosophy has largely been one focusing on what constitutes a valid source of legal rules. This rule thesis is not of course irrelevant to comparative law. But once it is recognised that, whatever its ideological strength, the thesis is epistemologically quite fragile, then recourse to a strictly internal thesis of what constitutes law becomes problematic for the comparatist. In short comparative law will never ever move beyond being an exercise in comparing rules unless the rule-thesis, which, as we have mentioned, has traditionally been the dominant model in respect of what constitutes legal knowledge, is abandoned as the sum-total of legal knowledge.[7] Legrand questions this rule-model and to support his arguments he has, by definition, had to move beyond the traditional boundaries of positive law. Locating himself in a tradition of law-as-culture, his definition of 'law' embraces the 'deep structures of legal rationality';[8] positive rules, for

[3] J-M Berthelot, 'Programmes, paradigmes, disciplines: pluralité et unité des sciences sociales', in J-M Berthelot (ed), *Épistémologie des sciences sociales* (Presses Universitaires de France, 2001), 457, 550 (this latter work herein after cited as Berthelot, *Épistémologie*).
[4] See generally C Atias, *Épistémologie juridique* (Presses Universitaires de France, 1985); *Épistémologie du droit* (Presses Universitaires de France, 1994).
[5] See generally P Legrand, *Le droit comparé* (Presses Universitaires de France, 1999).
[6] R Susskind, *Expert Systems in Law* (Oxford University Press, 1987), pp 78–9.
[7] G Samuel, 'Comparative Law and Jurisprudence', (1998) 47 *International & Comparative Law Quarterly* 817.
[8] P Legrand, 'European Legal Systems are not Converging', (1996) 45 *International and Comparative Law Quarterly* 52, 60–1.

Professor Legrand, are merely superficial. Any kind of comparative law that seeks to investigate culture and mentality must therefore by its very nature be interdisciplinary; and while this might not as such imply any need to have recourse to epistemology and (or) philosophy in the natural sciences, it certainly suggests that social science theory ought not to be ignored.[9] In truth comparing legal cultures raises a host of questions about the paradigms, concepts, schemes of intelligibility, processes of explanations and so on with respect not just to the various social sciences themselves relevant to the cultural question, but to the trans-disciplinary 'science' of comparison and comparative law.

Even some of the more traditional comparatists—that is to say those who appear at first sight to be functioning largely from an internal position in law—might well be implicitly advocating methods and practises that are trans-disciplinary. In particular Markesinis' assertion that what comparatists should be comparing are cases[10]—in effect putting the emphasis on litigation facts—raises fundamental ontological and epistemological questions about how 'facts' are to be perceived and understood. Again this is hardly a matter upon which social science theorists have been silent.[11] However the relation between science and reality is one of the issues that is central to epistemology in the natural sciences and this suggests that the natural sciences may have contributions to make to legal epistemology. One obvious contribution, it should be said at once, is with respect to the definition, domain and approaches of epistemology itself.[12] Yet the *perception* of fact by lawyers and the more general relationship between science and object of science are matters that ought to interest not just the comparatist but any jurist keen to understand legal reasoning. For example the debate, so central in the epistemology of the social sciences, on the dichotomy between holism and individualism finds expression in legal analysis from Roman to modern times,[13] thus confirming a view expressed in the philosophy of the natural sciences. This view is that at a certain level of reflection one sees reappearing old metaphysical controversies and these controversies would seem to respect no subject boundaries.[14] The comparatist who wishes to compare the facts of cases must ask him or herself exactly what constitutes the object of comparison. What are the entities upon which the mind fixes

[9] J Bell, *French Legal Cultures* (Butterworths, 2001), pp 1–24.
[10] B Markesinis, 'Comparative Law—A Subject in Search of an Audience', (1990) 53 *Modern Law Review* 1.
[11] See generally Berthelot, *Épistémologie* above n 3.
[12] On which see R Blanché, *L'épistémologie* 3rd ed, (Presses Universitaires de France, 1983), pp 12–45.
[13] D.5.1.76. For a modern example see G Samuel, *The Foundations of Legal Reasoning* (Antuerp, Maklu, 1994), pp 149–51; G Samuel, *Epistemology and Legal Method* (Aldershot, Ashgate, 2003), pp 318–29.
[14] Blanché, *L'épistémologie*, above n 12, p 20; B Valade, 'De l'explication dans les sciences sociales: holisme et individualisme', in Berthelot, *Épistémologie*, pp 357–405.

and to what extent do such entities have a reality independent of the science of which they are the object? Do civil lawyers and common lawyers, for instance, perceive money in the same way? Or what about an accident, or indeed the formation of an agreement, in a supermarket?

What the theorists from the natural sciences and the social sciences can contribute to this fact issue is an appreciation of the complexity of the relationship between a science and its object. At first sight it might well seem that the natural sciences can offer approaches that fix upon objective and independent realities, whereas the social sciences concern themselves only with weak facts because such facts include not only the observers themselves but subjective notions such as beliefs, desires, preferences and the like.[15] Yet as Granger asserts this is misleading in as much as scientists do not work directly upon actual facts; they construct abstract schemes or models based on a reaction to these facts and it is these models that act as the object of science.[16] Granger talks of *virtual facts* which are schematically determined by the conceptual model acting as the object.[17] At first sight this idea of virtual fact might appear appealing to the social scientist as well. Yet Jean-Michel Berthelot has specifically rejected such reductionism on the basis that an historical or sociological fact can only be properly understood in the context of all its surrounding details.[18] He proposes instead a number of specific schemes of intelligibility brought to bear on social fact.[19] Now what is interesting about both these contributions to the understanding of fact in epistemology is that, arguably, they have a direct relevance to law and go far in explaining not just the construction of fact by lawyers but differences between juristic doctrinal and reasoning methods.[20] In addition, the epistemological reflections of Berthelot suggest that work on comparative methodology is seriously underdeveloped. It might be useful, accordingly, to start with this underdevelopment.

2. FUNCTIONAL METHOD

Zweigert and Kötz, in their chapter on method, state categorically that the 'basic methodological principle of all comparative law is that of *functionality*'. And it is from 'this basic principle [that] stem all the other rules which determine the choice of laws to compare, the scope of the undertaking, the

[15] R Ogien, 'Philosophie des sciences sociales', in Berthelot, *Épistémologie*, pp 521–75.
[16] G-G Granger, *La science et les sciences* 2nd ed, (Presses Universitaires de France, 1995), p 70.
[17] *Ibid*, p 49.
[18] J-M Berthelot, *Les vertus de l'incertitude* (Presses Universitaires de France, 1996), p 73.
[19] J-M Berthelot, *L'intelligence du social* (Presses Universitaires de France, 1990), pp 43–85; summarised in Granger, above n 16, pp 90–2.
[20] G Samuel, *Sourcebook on Obligations and Legal Remedies* 2nd ed (London, Cavendish, 2000), pp 169–77.

creation of a system of comparative law, and so on'.[21] This would be a fairly extraordinary claim to make even if the authors had exhaustively considered the various methods which might act as an alternative to functionality. In the context of a complete absence of any discussion of other methods one can only conclude that the authors are overstating their case in order to highlight an important point. This point is that legal notions such as 'trespass' or 'natural obligation' are rarely to be understood in terms of a strict definition; indeed, and this no doubt is Zweigert and Kötz's main point, comparison of concepts—voidness with *nullité* for example—is often dangerous. Concepts and rules need to be contextualised within a range of factual situations so that their function can become evident. The comparatist can then ask how a particular factual situation in one system would be handled in another. Thus one *function* of say trespass is to provide a cause of action by which a person can obtain compensation for a physical injury deliberately caused. Another function is to provide the basis of an action to test a property right in a piece of land or in a chattel. Yet, as important as this functional approach is, research and reflection in the social sciences in general suggest, as we shall see, that it is only one scheme of intelligibility amongst several. Comparative methodology, if it is to be a serious focal point for the comparatist, would need to embrace and reflect upon these alternative schemes.

In stressing functionality, then, Zweigert and Kötz wish to make the not unreasonable point that the comparatist needs to investigate the facts behind the law. Yet research and scholarship in the natural and social sciences show that facts themselves are not unproblematic. The relationship between science and reality is a relationship fraught with difficulty and part of this difficulty lies in the actual methods employed by both natural and social scientists in comprehending and in representing fact.[22] Again such difficulties can hardly be ignored by the comparatist. Indeed, in asserting the principle of functionality, Zweigert and Kötz, actually locate the problem centre-stage. The authors make the valid point that the comparatist must move far beyond 'purely legal devices' if only because he might find 'that the function performed in his own system by a rule of law is performed in a foreign system not by a legal rule at all, but by an extralegal phenomenon'.[23] What perhaps is less valid about this assertion is that it seems to assume that the frontier between the legal and extralegal is the same with respect to both systems. This is dangerous and not just because it runs counter to the general comparative methodological principle concerning

[21] K Zweigert & H Kötz, *An Introduction to Comparative Law* 3rd ed (Oxford, OUP, 1998; trans T Weir), p 34.
[22] L Soler, *Introduction à l'épistémologie* (Paris, Ellipses, 2000), pp 74–88. And see J Revel, 'Les sciences historiques, in Berthelot', *Épistémologie*, pp 44–52.
[23] Zweigert & Kötz, above n 21, p 38.

cultural imperialism. It is dangerous because it assumes that the reasoning processes in law itself are based on a clear distinction between legal rules and extralegal phenomena.

The difficulty can be illustrated by recourse to the facts of an English case. A local authority invited tenders for the running of a small airport and the claimants spent time and money preparing a submission. There were strict conditions of tender, one of which stipulated that the tenders had to be delivered to the local authority before a strict deadline. The claimants put their tender into the authority's letterbox several hours before the deadline but, owing to the carelessness of the local authority employees, the box was not cleared until some time after the stipulated hour; as a result the claimants' tender was deemed late and was rejected from consideration. The Court of Appeal upheld an award of damages to the claimants.[24] Now these facts are interesting for the European comparatist in that they can, from the position of a jurist trained in the civilian tradition, appear to be a set of facts clearly falling within the domain of two or more categories of abstract rules. The first category, particularly relevant for a French jurist, is administrative law where the situation could be analysed in terms of a public body making a decision (to reject the tender) not in conformity with the law for reasons of its own fault. The situation could be conceptualised, in other words, in terms of an abusive exercise of political power. The second category, perhaps relevant for civilians coming from systems where the distinction between public and private law is less rigid, is pre-contractual liability, or *culpa in contrahendo*. Here the abstract rule could be seen as being founded in some kind of contractual obligation, perhaps based on good faith, or upon the extra-contractual obligation not to cause damage through fault. However if the comparatist applies these legal categories to the facts of the airport case there is a real danger that the actual reasoning processes used by the Court of Appeal could be eclipsed by the formal nature of the legal rules seemingly relevant. There is no doubt that the case can be analysed *ex post facto* in terms of either civilian category, but this is the very problem that can distort the comparison. Of course, the division between administrative and civil liability is difficult if not impossible to make in English law, partly because strict public law remedies (judicial review) cannot normally be used to obtain compensation.[25] The claimant must establish a cause of action in private law.[26] Yet the functionalist is likely to conclude that contract and tort remedies against local authorities are simply fulfilling an 'administrative liability' function. Similarly the French contract lawyer might conclude that the Court of Appeal was applying an obligation of good faith to the facts, particularly as *bona fides*

[24] *Blackpool & Fylde Aero Club Ltd v Blackpool BC* [1990] 1 WLR 1195.
[25] But see Human Rights Act 1998 s 8.
[26] *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633, 730.

was mentioned in passing by one of the appeal judges.[27] Functionalism, in short, suggests a frontier between legal rules and principles on the one hand and a set of facts on the other.

At one level it has to be stressed that this functional approach does not lack analytical relevance in respect of the airport case. It can be valuable to conclude that the collateral contract held to exist by the Court of Appeal has the same function as rules to be found elsewhere in the system in say German or French law. One is comparing different patterns of rule models to similar fact situations. However, if one looks in detail at the reasoning employed in the main judgment in the Court of Appeal, the rule-model comparative approach becomes more problematic in that Bingham LJ does not actually start out from a legal rule. He does not apply a pre-exiting rule to the facts before him. He starts out from what appears as a detailed description of a tendering procedure. Accordingly he asserts first of all that:

> A tendering procedure of this kind is, in many respects, heavily weighted in favour of the invitor. He can invite tenders from as many or as few parties as he chooses. He need not tell any of them who else, or how many others, he has invited. The invitee may often, although not here, be put to considerable labour and expense in preparing a tender, ordinarily without recompense if he is unsuccessful. The invitation to tender may itself, in a complex case, although again not here, involve time and expense to prepare, but the invitor does not commit himself to proceed with the project, whatever it is; he need not accept the highest tender; he need not accept any tender; he need not give reasons to justify his acceptance or rejection of any tender received. The risk to which the tenderer is exposed does not end with the risk that his tender may not be the highest or, as the case may be, lowest.[28]

He then continued:

> But where, as here, tenders are solicited from selected parties all of them known to the invitor, and where a local authority's invitation prescribes a clear, orderly and familiar procedure—draft contract conditions available for inspection and plainly not open to negotiation, a prescribed common form of tender, the supply of envelopes designed to preserve the absolute anonymity of tenderers and clearly to identify the tender in question, and an absolute deadline—the invitee is in my judgment protected at least to this extent: if he submits a conforming tender before the deadline he is entitled, not as a matter of *mere expectation* but of *contractual right*, to be sure that his tender will after the deadline be opened and considered in conjunction with all other conforming tenders or at least that his tender will be considered if others are.[29]

[27] Stocker LJ in *Blackpool & Fylde Aero Club Ltd v Blackpool BC* [1990] 1 WLR 1195 at p 1204.
[28] *Blackpool & Fylde Aero Club Ltd v Blackpool BC* [1990] 1 WLR 1195 at pp 1201–02.
[29] At p 1202 emphasis added.

And he supported this shift from 'expectation' to 'right' in observing:

> Had the club, before tendering, inquired of the council whether it could rely on any timely and conforming tender being considered along with others, I feel quite sure that the answer would have been 'of course'. The law would, I think, be defective if it did not give effect to that.[30]

The interface here between fact and law is by no means clear. Certainly one can locate the exact point where Bingham LJ jumps from the descriptive ('mere expectation') to the normative ('contractual right'), but this 'right' is not given expression as part of a set of contract rules. Indeed an examination of the whole judgment will reveal little in the way of rules or precedents about collateral contracts and the like. What appears to be happening in the judgment is that a fact is being transformed into a legal concept by a kind of 'descriptive' sleight-of-hand that allows the judge to conclude in favour of the claimant. This sleight-of-hand shift is then immediately justified by reference to another factual notion, the hypothetical local authority employee giving the 'of course' answer. Now if one locates the legal and extralegal frontier between 'expectation' and 'right' this will have the effect of excluding 'expectation' from the gallery of legal concepts, which would be as serious error as excluding say 'damage' or 'interest' from the world of law. The truth is that these kinds of notions exist at one and the same time in the legal and extralegal with the result that reality and law become merged within the same scientific discourse. In other words law is not applied to facts as such; the facts get transformed into a kind of legal 'reality' which allows them to assume a normative dimension with greater ease. Thus Bingham LJ was able to establish a contractual right not through the application of a pre-existing rule abstracted from precedents. He did it through the creation of a factual 'expectation' capable, by its very nature, of attracting a normative relation. Functionalism as a method could, if it is not used carefully, eclipse this process in implying a model in which legal rules and concepts have certain functions in a world beyond law (social reality). To an extent this can be helpful in that one can certainly talk about the function of 'descriptive'—or 'quasi-normative'[31]—concepts such as an 'interest', 'fault' or 'damage' in the world of fact. But to say that the collateral contract is performing the same function as a rule based on *culpa in contrahendo* or on some principle of administrative liability is to set up a kind of tool-function dichotomy which can so easily create a distorted image of legal methodology as a whole.

Once one starts to see the ambiguity in any frontier between the legal and extralegal one begins to appreciate, also, that one of Zweigert and

[30] At p 1202.
[31] On which see P Dubouchet, *Sémiotique juridique: introduction à une science du droit* (Presses Universitaires de France, 1990), pp 144–5.

Kötz's own, rather interesting, comparative examples is problematic. The authors present the reader with an example showing 'how the comparatist must sometimes look outside the law'.[32] The example concerns the German land registry system set up to protect purchasers of interests in land from harm which could result from the assertion of real rights held by third parties but unknown at the time of purchase. In the United States such a general and comprehensive system is on the whole non-existent; instead there are 'Title Insurance Companies' which offer private insurance against the kind of harm envisaged in respect of land purchases. These insurance companies, having been in business for almost a century, have their own very comprehensive files and books that give a virtually complete picture of land conveyancing throughout America. Zweigert and Kötz are implying, when they observe that 'the function performed by the German land register is performed in the United States by the files and books of Title Insurance Companies',[33] that the latter are somehow extralegal. This may be true to a lawyer whose definition of law is limited to positive rules arising out of strictly defined sources; but it is by no means clear why an insurance company and its archives, whose whole business, if not existence, is based on contract, should be located outside of the law. The companies are as much legal institutions as the German land register. Functionalism has the effect, once again, of distorting the notion of law so as to make it conform to a particular culture-specific image.

3. VIRTUAL FACTS

It is in respect of this interface between legal science and reality that thinking in the natural sciences may have an important contribution to make to legal epistemology. For the question of the relationship between science and reality is one that has been reflected upon by epistemologists. According to one such theorist, who has specialised in this question, the actual object of the empirical sciences is never reality itself. The object consists of an abstract model or scheme of this reality and it is the abstract relations and elements that make up this model, rather than the empirical phenomenon, which acts as the basis of knowledge.[34] This is because it is the model—often a mathematical one—and not reality that can be manipulated to produce explanations and predictions. One important role, then, for the philosophy of science is this. It is to examine the relationship not just between the structure and content of the model and the actual experience of reality but between the model and scientific theories.

[32] Zweigert & Kötz, above n 21, p 39.
[33] *Ibid.*
[34] Granger, above n 16, pp 70–5.

A further role, particularly for the epistemologist, is to investigate the procedures by which the model and the information that it produces can be validated. Here there are several possibilities.[35] A model can gain its force and credibility from its *correspondence* with one's perception of reality. Thus a model which plots the movement of comets and predicts when and where they will be at any given moment is likely to be treated seriously if the predictions can be independently verified by observation. However a model can also gain its validity from its own internal *coherence*. Here the emphasis is on the formal qualities of the abstract elements and relations; and if an explanation or prediction is exempt from internal contradiction in respect of all the other explanations and predictions that can be drawn from the model then this will act in itself as a means of verification. In truth few scientists will be satisfied with such a test and will use coherence as just one, minimal means of verification.[36] A third method of verification is *consensus*. A model or indeed theory will gain its force and credibility if members of a specified community are agreed amongst themselves that it is valid. Of course, of all the three verifications, this is undoubtedly the weakest in as much as it unlikely that many members of the scientific community will accept a model or theory as valid or true simply on the basis that the members say that it is. Nevertheless the historian of science Thomas Kuhn has shown that, from an historical and social viewpoint, consensus has been of immense importance within the scientific community. He has talked of accepted paradigms in science; and when these consensual paradigms no longer prove adequate, because they are clearly out of say correspondence with the perception of reality, they get discarded and replaced. This process of replacement of one paradigm with another was, to Kuhn, a scientific revolution; but it is a revolution in respect of consensus.[37]

What emerges from these epistemological reflections is that all three forms of validation have their relevance and that this in turn impacts upon the relationship between science and reality. Objects of science are always abstract objects which are more or less *indirectly* connected to empirical phenomena. Science is about the construction of schemes and models and empirical reality is understood not so much by imposing the model onto this reality but by schematising an empirical phenomenon and inserting it into a system of concepts where it gains its scientific and referential sense.[38]

[35] Soler, above n 22, pp 43–5.
[36] Mathematics of course gains its epistemological force entirely from its internal coherence, but in its role as the basic language of science and technology mathematical errors will often have very clear implications in terms of correspondence with the real world. A small mathematical error can send a spacecraft crashing into the planet upon which it was supposed to soft-land.
[37] See generally T Kuhn, *The Structure of Scientific Revolutions* (University of Chicago Press, 1970) 2nd ed.
[38] Granger, above n 16, pp 110–15.

The emphasis, then, is on systems of concepts and advances in scientific knowledge often depend upon the invention of new concepts, or at least the extension of existing ones. The French epistemologist Gilles-Gaston Granger has developed out of this modelisation the notion of *virtual facts*. By this he means that science does not take as its object *actual facts* but facts which have been schematised, that is to say completely determined within a system or network of concepts.[39] These *virtual facts* are different from *actual facts* because they are idealised; that is to say that their connection with actual reality is not complete because they are deliberately 'simplified' by the process of schematisation itself. Thus the object of science cannot ever retain the full richness of the empirical object as conceived directly by the mind. Granger gives as an example the theory that objects of different weights nevertheless fall at the same speed; this, he says, is true only at the level of virtual facts since the theory leaves out of account the actual factual reality of say wind speed and air resistance. In terms of method, this is not to suggest that actual facts have no role. They might, for example, be relevant in the falsification of a theory. Yet even here, in the realm of falsification, the science is not as such responding to actual facts; it is a question of how accurate are the concepts in relation to what they are trying to represent.[40] Actual facts are being modelled once again, but this time by a theory of verification Weak concepts that cannot be proved or falsified are not true scientific concepts, but the falsification process is one that is achieved only through a modified model.

How does any of this impact on law or, more particularly, on comparative law and its methods? The point must be made at once that transposition is always very dangerous; some might well argue therefore that epistemological notions fashioned within the empirical sciences might well have no relevance, or at least limited relevance, to the social sciences. In fact this kind of argument, as important as it is, must in turn be treated with caution, particularly by the comparatist; for models, as we have seen, have been said to have an important role to play in comparative law. Indeed scientific models can themselves be used directly to secure a decision. Take the following observation:

> Scientific thought is, starting out from the observation of reality, to construct a model. Then, within this model, to make deductions, calculations, developments, sequences of theorems, to get results and then to forecast … I give you another example: in the Paris constituency a candidate in the legislative elections suspected fraud in a number of voting offices. He thought that in these offices there was this risk because he did not have confidence in those running the offices. He had taken some very precise opinion polls, he had studied

[39] *Ibid*, p 49.
[40] *Ibid*, p 80.

> previous elections and, armed with these figures and results, hundred upon hundred, he went to the administrative court and said that chance could not have produced any of this … The court thought he was right. On simple probability, it estimated that the chance of fraud was stronger than the presumption … that everything had gone according to the rules.[41]

A similar argument has been used quite recently in English criminal law to secure a (now quashed) conviction of a mother in respect of the cot deaths of two of her children. The prosecution case was based upon the statistical model that the chance of two cot deaths in the same family was so remote that the deaths had to be attributed to another cause.[42] Are these models not in effect creating 'virtual facts'?

It is of course very tempting to reply positively to this question and such a reply might indeed be justified. Yet the point of these examples is not actually that they should act as direct support for the virtual fact transposition. These two examples are basically statistical models and few would argue that such mathematical data have no role to play in the social sciences including law. They are raised here therefore only to make the point that one should not dismiss out of hand what might be termed epistemological transposition. What is arguably more interesting for the comparatist is the extent to which models of traditional legal concepts act as schemes for constructing the objects of legal science. These models are not mathematical but institutional. That is to say they use concepts based in natural (rather than mathematical) language and they establish relationships that are visual or metaphorical in the way they attempt to mediate between law and reality.[43] However such visual or metaphorical images lack neither relative precision nor a powerful ability to mediate, like mathematics, between science and reality. In short, institutional legal models are capable of constructing sets of facts which are schematic in the sense that they are abstractions from actual facts.[44] As such they qualify as a kinds of virtual facts.

At a very general level one might refer to Article 1384 of the *Code civil* which states that a person 'is liable not only for the damage that one causes by one's own act, but also for that which is caused … by things which one has in one's keeping'. The factual structure in this proposition is centred on 'damage', 'cause', 'thing' and 'keeping' (*sous sa garde*) and while these are seemingly descriptive terms—that is to say they describe aspects of social reality—they are equally abstracted from particular circumstances to transcend any single set of *actual facts*. For example, this text was drafted at the end of the eighteenth century, evidently well before the advent of motor vehicles; but in the early

[41] J-L Boursin, in É Noël (ed), *Le hasard aujourd'hui* (Éditions du Seuil, 1991), pp 37, 39.
[42] For the background of this, and other, quashed convictions see eg *The Observer* 25 January 2004.
[43] Samuel, *Foundations*, above n 13, pp 171–90.
[44] Samuel, *Epistemology*, above n 13, pp 335–7.

twentieth century the article was held to apply to damage arising out of traffic accidents.[45] No doubt an argument could have been advanced that the article should have no relevance to motor vehicles since the legislature could not possibly have envisaged this particular 'thing'. Yet the comparatist knows that one key to the success of the great codes is that they have been flexible enough to be adapted to changing conditions; indeed one of the drafters of the *Code civil* actually wrote that the long-term success of a code depended on its being able to escape from what might be called the tyranny of detailed fact.[46] When viewed from the position of descriptive terms within the legal propositions which make up a code—terms such as 'person', 'thing', 'fault', 'damage' and so on—it is possible to see such factual realities as 'virtual' in the sense that they are factual models which transcend actual factual reality. Some kinds of damage may not amount to 'damage', while some types of things may not amount to a 'thing'.[47] Indeed, commercial law is now dependent upon what might be termed the 'virtual' person (or *la personne morale* as the French jurists would express it), whereas slavery in Roman law was founded upon the non-actuality of the real person. In Roman law a slave was of course a 'thing' and it was the *décalage* between this 'virtual' fact and the 'actual' reality itself that went far in stimulating new developments within the law. For example, principles dealing with the assessment of damages with regard to a slave gradually got transposed to the assessment of damages with respect to injuries caused to free persons.[48]

4. DEGREES OF ACTUALITY

However, despite the attraction of the virtual fact analogy, care must be taken. In the natural sciences it is possible to see the distinction between schematic model (virtual fact) and perceived reality (actual fact) as a clear-cut dichotomy. The object of science is the schematic model. In law, on the other hand, the comparatist is aware that differences between legal traditions can depend, to an extent, on the distance between legal conceptualisation and perceived reality. As Zweigert and Kötz observe in respect of the difference between civil and common law thinking, on 'the Continent lawyers operate with ideas, which often, dangerously enough, take on a life of their own; in England they think in pictures'.[49] What the authors are recognising here is the tendency of common lawyers to think at much lower levels of

[45] *Jand'heur* cass. civ. 13.2.1930; DP.1930.1.57.
[46] J Portalis, *Discours préliminaire* (1799).
[47] For some interesting English cases see *Lazenby Garages Ltd v Wright* [1976] 1 WLR 459; *Ex p Island Records* [1978] ch 122; *In re Campbell (A Bankrupt)* [1997] ch 14.
[48] F Lawson, *Negligence in the Civil Law* (Oxford University Press, 1950), pp 21–22.
[49] Zweigert & Kötz, above n 21, p 69.

abstraction; and so, for example, there are many fewer rules that are code-like in their style.[50] Common lawyers have no general principle of liability for damage done by a thing under the control of another; they prefer, instead, to think of individualised—some might be tempted to say 'actualised'—objects such as bottles of ginger-beer, flagpoles, aircraft, lorries, walls, dwelling houses and so on.[51] In other words common lawyers can easily appear to be operating with more 'actual', as opposed to 'virtual', facts.

Such appearances are probably misleading. Even if the common lawyer functions more that the level of species than genus it may well be that the different individualised objects are still idealised conceptions of perceived reality. The concrete is, as a French epistemologist observed, the abstract rendered familiar through usage.[52] Thus for example where a jurist justifies liability for wrongful damage to, say, a will by reference by way of analogy to wrongful destruction of an IOU both the will and the IOU are in effect being turned into abstract things (*res*) where one can replace the other.[53] The same is true for objects dropped onto a public highway which cause injury to a passer-by. The law might be expressed in terms of individual factual examples such as a pruner who throws down branches or a workman on scaffolding who carelessly drops a tool; but clearly the analysis is structural in orientation. Liability will attach to any *persona* who allows a *res* to fall onto a place where he ought to have appreciated that members of the public might be passing.[54] Persons, things and public spaces are in truth generic notions.

Nevertheless there is something of a tension, as Zweigert and Kötz indicate, in Western legal thought between legal systems that tend to function at different levels of abstraction. And thus Roman law can be contrasted with modern civil law just as the *mos Italicus* can be compared to the *mos Gallicus*.[55] With respect to English law, Lord Simon once explained how the rule in *Rylands v Fletcher*[56] functioned. It was not a question of starting out from some established proposition about 'anything likely to do mischief if it escapes' and applying it deductively to all factual situations involving 'things' escaping and doing damage. Rather one moves outward from the facts (which of course in *Rylands* involved the escape of water) of *Rylands v Fletcher* itself. Thus, said Lord Simon, when some years later a case

[50] The increasing complexity of rules in English law can be observed if one compares s 14 in the original Sale of Goods Act 1893 with its modern amended version in the Sale of Goods Act 1979 (as amended).
[51] See eg Animals Act 1971.
[52] R Blanché, *La science actuelle et le rationalisme* 2nd ed (Presses Universitaires de France, 1973), p 54.
[53] See D.9.2.41.
[54] See D.9.2.31.
[55] See A Wijffels, 'European Private Law: A New Software-Package for an Outdated Operating System?', in M Van Hoecke & F Ost (eds), *The Harmonisation of European Private Law* (Oxford, Hart Publishing, 2000), pp 101–16.
[56] (1866) LR 1 Ex 265 (Ex); (1868) LR 3 HL 330 (HL).

subsequent to *Rylands* arose concerning the escape of electricity, it was necessary to compare the facts of this new case with those of the *Rylands*. Was electricity analogous to water? If so, not only would the rule established in the precedent apply but the new case, with electricity as its material fact, would act as the point of reference for the next case involving any object that was neither water nor electricity.[57] These facts may therefore be less 'virtual', or more 'actual', in as much as the common lawyer is forced to compare one specific object with another specific object; and such factual comparisons appear to be operating directly on the actual objects themselves.

How does this tension compare with the virtual and actual fact thesis from the natural sciences? One approach is to say that civil law has, as an historical fact, always been much more closely identified with science in general. Thus the importance of the Humanist revolution was, according to some civilians, that it took legal thinking from the world of fact to a level of rational systematisation; the law is the product of reason said Grotius (*dictamen rectae rationis*) and is not to be drawn from things.[58] It is, like mathematics, a question of deduction.[59] The analogy between law and mathematics was a powerful one in the minds of the seventeenth century civilians and their successors and the importance, of course, of this analogy is that mathematics does not have as its object any specific reality.[60] It is a science based upon *coherence* rather than *correspondence* and thus the science, in a sense, becomes the object of its own science.[61] In civilian thinking there are echoes of this *mos geometricus* tradition in as much as conceptual coherence remains a fundamental characteristic of the German and (to a lesser extent) French mentalities.[62] Put another way, advances in legal science from the humanists to the German Civil Code were largely measured in terms of ever-greater internal coherence. The common law, which escaped the influence of the legal humanists, can from this perspective be seen as belonging to an 'older' stage of science; its methods are closer to the *Mos Italicus*,[63] the school of legal thinking against which the humanist jurists were reacting. The more descriptive the legal mentality the more actual the facts.

5. EXAMPLE: MISTAKE IN CONTRACT

This idea of stages of legal science needs examination in itself. However before leaving the dichotomy between actual and virtual facts something

[57] *FA & AB Ltd v Lupton* [1972] AC 634, 658–9.
[58] M Villey, *La formation de la pensée juridique moderne* 4th ed (Montchrestien, 1975), p 538.
[59] F Wieacker, *A History of Private Law in Europe* (Oxford University Press, 1995), trans T Weir p 204; Dubouchet, above n 31, p 55ff.
[60] Wieacker, above n 59, pp 343–4.
[61] G-G Granger, *Essai d'une philosophie du style* (Odile Jacob, 1988), p 117.
[62] Wieacker, above n 59, p 439; Dubouchet, above n 31, p 155ff.
[63] See Wijffels, above n 55 pp 105–8.

further should be said about the relevance of these notions to comparative law. The degree of 'actuality', or 'virtuality', always assuming the dichotomy to be a valid one, might be useful to the comparatist in that it can help determine the extent to which codification, or at least textualisation, of law is valuable in representing legal knowledge. Take for example the complex subject of mistake in contract. In the leading English authority on this area the House of Lords had to decide whether contracts made between a corporate employer and two of its directors were void. The company decided that it wanted to end the employment contracts of two of its directors and negotiated an agreement whereby the two employees agreed to terminate their employment in return for large compensation payments. After this termination contract had been executed by both sides, the company discovered that there were grounds upon which they could have legally terminated the directors' contracts without having to pay them compensation. It appeared the directors had been guilty of misconduct but had kept silent about this behaviour. Accordingly the company brought an action against the directors to recover the compensation payments on the ground that the termination contracts were void for mistake. The House of Lords refused to accept the company's claim.[64]

Now, before turning to the reasoning of the House of Lords, it might be useful to examine the facts of the case in the light of the new European contract code, the *Principles of European Contract Law* (PECL). This states in article 4:103 that:

(1) A party may avoid a contract for mistake of fact or law existing when the contract was concluded if:
  (a) (i) the mistake was caused by information given by the other party; or
  (ii) the other party knew or ought to have known of the mistake and it was contrary to good faith and fair dealing to leave the mistaken party in error; or
  (iii) the other party made the same mistake, and
  (b) the other party knew or ought to have known that the mistaken party, had it known the truth, would not have entered the contract or would have done so only on fundamentally different terms.
(2) However a party may not avoid the contract if:
  (a) in the circumstances its mistake was inexcusable, or
  (b) the risk of the mistake was assumed, or in the circumstances should be borne, by it.

From the company's point of view, this text would appear to support their argument that the contract should be avoided in that sub-section (1)(a)(ii) seems to cover the facts in issue. Did the other party know of the mistake?

[64] *Bell v Lever Brothers* [1932] AC 161.

Given that it was the directors' own behaviour which formed the foundation of the error, the response must surely be positive. Indeed, the doctrine of good faith would suggest that the two employees might even have been under a legal obligation to disclose to the company their past misconduct.[65] Furthermore it appears evident that the company, had it known of the misconduct, would never have contracted to pay the employees large compensation sums. It is possible to go even further. It could just be argued that the facts fall within sub-section (1)(a)(i) in that the failure of the directors to speak out about their past misconduct amounted to 'information given'. Admittedly this is prima facie a weak argument in as much as lawyers traditionally draw an important distinction between positive statements and silence; yet, taken together with sub-section (iii), it could, so to speak, add weight to the company's claim. For their part, the defendants could argue that the facts fell within sub-section (2)(b): the company, in failing to investigate the employment records of the directors, simply took the risk that the employment contracts were watertight. What can be said with certainty is that it is by no means clear from Article 4:103 what the solution should be. Much will depend upon the background of the judges deciding the case. Those coming from the civilian tradition might well feel that a party to a contract is under a good faith obligation to disclose information; those whose mentality have been formed at the commercial Bar might well, in contrast, view the facts strictly in terms of the distinction between positive (representations) and negative (silence) acts and of risk.[66]

The point to be stressed therefore is that the text itself is insufficient with regard not just to the legal knowledge but equally to the various factual situations envisaged by the proposition. It is extremely difficult to construct, simply on the basis of the article, a paradigm set of virtual facts. Indeed the text is worse than this. For sub-sections (1) and (2) largely contradict each other with the result that the methodology implied by the article must involve different kinds of schemes of intelligibility; deduction is impossible without first the employment of, for example, dialectical and hermeneutical techniques. One might note therefore that a comparatist trained only in the functional method will be at a serious disadvantage. Again this topic of differing schemes of intelligibility is something that will need to be investigated in more depth. For the moment one can observe how the dialectical method implied by a text like Article 4:103 has the effect not of actually envisaging a set, or sets, of virtual or actual facts, but of allowing each individual jurist to construct his or her own set of facts. The solution to any mistake problem where the PECL apply is dependent entirely upon a construction of fact in the mind of the person applying Article 4:103; the

[65] P Malaurie & L Aynès, *Cours de droit civil: Tome VI: Les obligations* 10th ed (Éditions Cujas, Paris, 1999) n° 634.
[66] See eg *University of Nottingham v Eyett* [1999] 2 All ER 437.

employees can be fashioned as *personae* lacking *bona fides* within a relationship that requires each side to consider the other's interests and within a society that is communitarian in outlook.[67] Alternatively the two directors can be regarded as entrepreneurs in an individualistic environment looking after their own legitimate interests.[68] 'Actual' facts seem to make little sense here.

When one turns to the reasoning of the House of Lords the ability to construct individual factual situations becomes evident. Lord Atkin begins the substantive part of his reasoning by making an important procedural observation: that it

> is essential on this part of the discussion to keep in mind the finding of the jury acquitting the defendants of fraudulent misrepresentation or concealment in procuring the agreements in question.

For grave

> injustice may be done to the defendants and confusion introduced into the legal conclusion, unless it is quite clear that in considering mistake in this case no suggestion of fraud is admissible and cannot strictly be regarded by the judge who has to determine the legal issues raised.[69]

Article 4:103 does not of course require any fraud before the mistake can operate to avoid the mistake. Yet what Lord Atkin was seemingly doing was to construct a factual environment in which the interests of the company were not being placed at the forefront of economic environment. He then continued by stating that in his view it would be wrong to determine a definite specified contract where 'the party paying for release gets exactly what he bargains for' and where it 'seems immaterial that he could have got the same result in another way, or that if he had known the true facts he would not have entered into the bargain'.[70] Lord Atkin justifies this conclusion in referring to a number of factual situations:

> A buys B's horse; he thinks the horse is sound and he pays the price of a sound horse; he would certainly not have bought the horse if he had known, as the fact is, that the horse is unsound. If B has made no representation as to soundness and has not contracted that the horse is sound, A is bound and cannot recover back the price. A buys a picture from B; both A and B believe it to be the work of an old master, and a high price is paid. It turns out to be a modern copy. A has no remedy in the absence of representation or

[67] See eg C Jamin, 'Plaidoyer pour le solidarisme contractuel', in *Études offertes à Jacques Ghestin: Le contrat au début du XXIe siècle* (LGDJ, 2001), 441–72.
[68] See eg Lord Ackner in *Walford v Miles* [1992] 2 AC 128, 138.
[69] *Bell v Lever Brothers* [1932] AC 161, at p 223.
[70] At pp 223–4.

> warranty … A buys a roadside garage business from B abutting on a public thoroughfare: unknown to A, but known to B it has already been decided to construct a by-pass road which will divert substantially the whole of the traffic from passing A's garage. Again A has no remedy.[71]

And he continued:

> All these cases involve hardship on A and benefit B, as most people would say, unjustly. They can be supported on the ground that it is of paramount importance that contracts should be observed, and that if parties honestly comply with the essentials of the formation of contracts ie, agree in the same terms on the same subject-matter they are bound, and must rely on the stipulations of the contract for protection from the effect of facts unknown to them.[72]

It is tempting to say that Lord Atkin is going to the other extreme from the PECL text. His legal solution is founded on concrete—on actual—facts and not on some dialectical contradiction between moral good faith and economic risk, a contradiction that makes the envisaging of even virtual facts difficult. However two points need to be made here. The first is that Lord Atkin could indeed be said, from a structural viewpoint, to be constructing an idealised 'virtual' factual situation and one that, once the structure is pointed out to a reader of the PECL, might well be said to be inherent in Article 4:103. It is probably true to say that nearly every lawyer brought up in the Western capitalistic tradition would have few hesitations about affirming the validity of a sale of goods contract where a buyer purchases an article from Shop A only subsequently to discover that he could have got the very same thing at half the price from Shop B. Even if the seller in Shop A knew that Shop B was selling at half the price no one would assert that A is under a duty to inform. Now the dialectical contradiction in Article 4:103 clearly tries to capture this 'paradigm' mistake problem and to this extent it could well be said that what separates the PECL code provision from the House of Lords precedent is one of schematic method. The 'virtual fact' situation captured by the structural foundation to Lord Atkin's factual examples is simply being translated into a linguistic propositional form. In other words all mistake cases are to be constructed and deconstructed in relation to these paradigm facts. What makes the directors case difficult is not so much the law as contained in rules like Article 4:103; it is the possibility of being able to construct two quite contrasting factual situations, one along the structural lines of the Shop A and Shop B example the other conforming to a long-term social relationship between employer and employees. The factual examples used in Lord Atkin's reasoning, not to mention the

[71] At p 224.
[72] At p 224.

facts of the case before him, are no more 'actual' than any other schematic model of elements and relations and thus it would be very dangerous to assert that the law Lord was working directly upon actual facts.

6. STAGES OF LEGAL SCIENCE

The second point is more mundane from a methodological viewpoint. The difference between the approach of the House of Lords to the mistake problem in the case of the two directors and the approach of a court having to apply Article 4:103 to the same facts is one of reasoning technique. Codes involve the movement from a universal proposition—the general—to a particular set of facts and the reasoning technique traditionally associated with going from the general to the particular is deduction. Now few civilians still believe today that legal reasoning is purely deductive; argumentation is as, if not more, important[73] and such a dialectical methodology conforms, as we have seen, to the structure itself of texts such as Article 4:103. Nevertheless the starting point is a general proposition. The technique to be found in Lord Atkin's judgment, in contrast, is reasoning by analogy; the proposition that a definite specified contract should not be set aside is seemingly arrived at, and certainly justified, by reference not to some universal principle but to specific concrete examples. The reasoning is of a type that goes from the particular to the particular. From an historical point of view this difference of technique between jurists working within the codified systems and those in the common law reflects a more general distinction between scientific stages; analogy was once seen as a primitive form of reasoning which produced unreliable results and was eclipsed by an epistemological revolution, associated with rationalists like Descartes, who stressed analysis, synthesis, induction and deduction.[74] What the history of science can offer, then, to legal reasoning is a conceptual framework that encapsulates methodology within differing stages of development.

These stages go further than a mere two part model of the scientific or rational and the pre-scientific or primitive. According to the epistemologist Robert Blanché:

> Rather than a binary division [between concrete and abstract science] it is necessary to deal here with a continuous development. One should speak more of the distinction between deductive science and inductive science. Mathematics started out by being inductive, and the sciences said to be inductive often take, and always aspire to take, the deductive form. Deduction

[73] See eg J-L Bergel, *Méthodologie juridique* (Presses Universitaires de France, 2001), pp 362–4.
[74] D Durand, *La systémique* 5th ed (Presses Universitaires de France, 1992), p 52.

> and induction mark two stages in the development of science, the stages themselves being framed within an initial stage and a final stage. In fact it appears that all the sciences follow, in distinguishing themselves only by their degree of advancement, a similar course, passing or being called to pass, successively through the descriptive, inductive, deductive and axiomatic stages.[75]

This four-stage process seems particularly relevant to the history of legal thinking in the West. The very earliest legal texts such as the XII Tables could be seen as little more than descriptive in style and structure; by the time of Ulpian, however, the methodology had clearly moved to a second, inductive stage. Ulpian himself provided a leading example when he observed that *conventio* is to be found within all the different Roman contracts;[76] another example is perhaps Paul's reporting of Mucius' assertion that *culpum autem esse cum quod a diligente provideri potuerit non esset provisum*.[77] Michel Villey argued that the medieval Romanists continued these methods and that the great intellectual revolution came with the humanists. In turning law into a rational discipline analogous to mathematics, that is to say a discipline completely divorced from fact, it would seem that law had now arrived at the third scientific stage. The 'law is not drawn from things, with their variable nature; it is the product of reason separated from man (*dictamen rectae rationis*), what can be deduced by the wise'.[78] With this 'rejection of fact outside of legal science' the law was ready to 'take the form (as Grotius at least tended towards) of an axiomatised system, deduced from principles of reason'.[79] And this final 'axiomatised' stage was apparently achieved by the Pandectists who considered law as a closed system of institutions and rules where 'one only had to apply logical or "scientific" methods in order to reach the solution of any legal problem'.[80] Thus the German Civil Code has been described as nothing but 'the legal calculating machine par excellence'.[81]

Despite the apparent fit, the idea of a movement from a descriptive to an axiomatic stage in law is, of course, fraught with difficulty. For a start, the notion that code provisions are analogous to mathematical axioms is nothing but a myth. As we have seen with the PECL provision concerning mistake in contract, an 'axiom' consisting of an abstract linguistic proposition is incapable in itself of containing the precise and definitive knowledge information needed to make it a genuine universal. It is quite simply too

[75] Blanché, *L'épistémologie*, above n 12, p 65.
[76] D.2.14.1.3.
[77] D.9.2.31.
[78] Villey, *Formation*, above n 58, p 538.
[79] *Ibid*.
[80] Zweigert & Kötz, above n 21, p 140.
[81] See Zweigert & Kötz, above n 21, p 145.

weak to allow knowledge to be reliably obtained through rigid and formalised deductive logic. As Professor Bergel has observed:

> Mathematical logic implies not only an axiomatic presentation and a deductive form of method, but also symbolisation substituting calculus based on signs for reasoning based on ideas, in such a way that mathematical type deduction is of indeterminate inventiveness. Now this method is irreconcilable with legal method. The law is teeming with departures from logical solutions deduced from an axiom These exceptions result from other preoccupations, other principles and other axioms whose sheer number, confusion and differing intensity render impossible an expression of positive law in mathematical form.[82]

Moreover, continues Bergel, legal concepts are not at all susceptible to precise definition. In fact there are a range of notions like public policy (*ordre public*) or good morals (*bonnes mœurs*), which play the role of correcting elements and of translators from the legal rule to the facts and whose contours are deliberately uncertain, so much so that one talks now of the 'fuzziness of the law'.[83] In short, the four stage process appears more as an ideological rather than a genuinely epistemological scheme.

A second difficulty, given Bergel's observations, is that a four-stage process is clearly inadequate in itself of encapsulating the complete historical picture of legal methodology. If an axiomatic approach is now regarded as a myth, this implies that legal thinking has moved on to a stage beyond the axiomatic. One might talk here either of a fifth 'post-axiomatic' stage or of a return to some earlier state of development. Thus a careful analysis of the methods employed by the Glossators and Post-Glossators—jurists who worked within the inductive stage if one employs the Blanché and Villey schemes—would indicate that lawyers were not just inducing general principles from specific cases. They were employing methods that can be labelled 'hermeneutical' and 'dialectical' and, as we shall see, these are schemes of intelligibility that can be said to be epistemologically *sui generis*. In other words simply to place the various legal methods under categories such as 'inductive' and 'deductive' is inadequate; what is required, when it comes to 'legal science' is a scheme of analysis that is more sophisticated in structure. What is needed is a scheme that can capture the true complexities of legal reasoning.

Nevertheless the Blanché scheme ought not be totally discarded by jurists, if only because in suggesting a fifth 'post-axiomatic' stage the scheme is indirectly providing a positive epistemological insight. Moreover the scheme might be of help to the comparatist in that it can go some way in explaining what Zweigert and Kötz see as stylistic differences between civil and common lawyers or what Pringsheim saw as an 'inner relationship'

[82] J-L Bergel, *Théorie générale du droit* 3rd ed (Paris, Dalloz, 1999), p 273.
[83] *Ibid*, p 274.

between English and Roman law.[84] Rather than talking, as Pringsheim did, in terms of some 'spiritual' affinity between Roman practitioners and common lawyers, it would surely be more rational to say that what unites the two groups of jurists is that they both function within the inductive stage. Modern civil lawyers, in contrast, in passing to a deductive and axiomatic stage were bound to adopt methods, even if motivated unconsciously by ideology, that were different. To this extent, then, epistemology in the natural sciences has something genuine to offer legal 'science'; it is providing a framework that does account, on the one hand, for the Cartesian school of jurists who tried to discipline law with *mos geometricus* methods[85] and, on the other, for the medieval (*mos Italicus* and common law) practitioners who were little interested in systems-building.[86] The absence of common law faculties in England before the end of the nineteenth century meant that there was never a corps of professors interested in prising law from its procedural forms, themselves determined largely by patterns dictated by commonly occurring factual situations.[87] Descriptive and inductive approaches are closer to actual facts than deductive and axiomatic methods even if, in the end, one is, as we have already suggested, talking of different degrees of 'virtual'.

7. SCHEMES OF INTELLIGIBILITY

One problem, then, with the Blanché scheme is that it is too general to explain the intricacies of legal methods. This shortcoming, it must be said at once, is not a matter of something inherently inadequate about the four-stage scheme; rather it is a question of transposition from the natural to the social sciences. In the natural sciences the passage from the descriptive to the axiomatic was a matter of ever increasing conceptual formalisation marked by an equally increasing rigour and precision. The social sciences, in contrast, are characterised by a lack of such formalisation, rigour and precision. 'A multitude of schemes of intelligibility (explanation, comprehension etc)—and not one single and reliable method—are', so it is commonly said, 'at work from one science to another or within the same science—a clear sign of immaturity'.[88]

Whether or not the qualification of 'immaturity' is helpful in this context is by no means clear, although in fairness the writer is simply stating what

[84] Zweigert & Kötz, above n 21, pp 63–73; F Pringsheim, 'The Inner Relationship Between English and Roman Law', [1935] *Cambridge Law Journal* 347.
[85] On which see S Strömholm, *A Short History of Legal Thinking in the West* (Lund, Norstedts, 1985), pp 175–91.
[86] See Wijffels, above n 55.
[87] On which see M Lobban, *The Common Law and English Jurisprudence 1760–1850* (Oxford University Press, 1991), pp 9–10 and R Cocks, *Sir Henry Maine: A Study in Victorian Jurisprudence* (Cambridge, 1988), pp 46–51.
[88] Soler, above n 22, p 198.

she sees as a common prejudice. Other epistemologists talk for example of a lack of mathematical formalisation in the social sciences.[89] What is clear is that the idea of a multitude of schemes of intelligibility is a characteristic of social science epistemology and it is these schemes that need to be the object of attention, at least when it comes to legal methodology, for two main reasons. First, because the history of legal thought has, as we have seen, already revealed the failure of the *mos geometricus* as an epistemological route; the reduction of law to a formal logic would, as Bergel has asserted, be contrary to the essential purpose of any legal system since its function is to regulate social life. It 'cannot ignore concrete reality nor can it ignore the evolution of facts and desires'.[90] This concrete reality, with its mass of interrelating and contradicting interests, together with the need for law to embrace the diversity of social situations to be found in human desires, decisions and acts, cannot be reduced to an axiomatic scheme of algebraic symbols existing in its own abstract world. Secondly, because the grand theories of social science such as Marxism or game theory, as useful as they are, are limited in their explicative power. They assume too much uniformity either, for example, in terms of class interests (the differing interests of men and women are eclipsed by notions such as 'working class') or, say, in respect of desires such as the desire to maximise profit or act rationally.[91] Methodological pluralism, in other words, is probably a more promising route when it comes to social science since it is not a question of immaturity but one of diversity of objects,[92] of complexity, of natural (as opposed to mathematical) language and of impossibility of separation between *intellectus et res* (humans studying humans).

Two main questions need to be considered: what are the various schemes of intelligibility and what is their relevance to law? With regard to the first question, the leading contribution, recognised not just by social scientists but equally by a leading epistemologist in the natural sciences,[93] is by the social theorist Jean-Michel Berthelot. He has isolated six schemes themselves reducible to a duality representing one of the fundamental ontological and epistemological oppositions. Bethelot himself has recently very briefly summarised these six schemes of intelligibility. They are:

> the *causal* scheme (if x, then y or $y = f(x)$); the *functional* scheme (S→X→S, where one phenomenon X is analysed from the position of its function—X→S—in a given system); the *structural* scheme (where X results from a system founded, like language, on disjunctive rules, A or not A); the *hermeneutical*

[89] See eg Granger, above n 16, pp 92–7.
[90] Bergel, *Théorie générale*, above n 73, p 274.
[91] Soler, above n 22, p 200.
[92] *Ibid*, p 199; R Boudon, *Les méthodes en sociologie* 10th ed (Presses Universitaires de France, 1995), pp 125–6.
[93] Granger, above n 16, pp 90–2.

> scheme (where X is the symptom, the expression of an underlying signification to be discovered through interpretation); the *actional* scheme (where X is the outcome, within a given space, of intentional actions); finally, the *dialectical* scheme (where X is the necessary outcome of the development of internal contradictions within a system).[94]

These six schemes can in turn be distributed between the two grand opposing categories of holism and individualism.[95] Thus the functional, structural and dialectical schemes put the emphasis on the totality of the system in play; the elements upon which they depend cannot, in other words, be understood individually and outside of the scheme of elements and the relations between them as a whole. The causal and actional—together with, to some extent at least, the hermeneutical schemes—are based on the individual element or 'atom'. From this perspective, there is no such thing as society, only individual men and women. This methodological individualism

> is opposed head-on the explanatory model common to functionalism, to structuralism and to dialectical materialism that can be categorised, by simplification, as *culturalism*: these are the cultural norms and values of the group or of the society which, across the mediation of socialisation, culturalisation or inculcation define the sense of behaviour or, according to certain vocabularies, of practices.[96]

One might add that this dichotomy between holism and individualism reaches far beyond sociology. It has philosophical and methodological implications that underpin many of the great debates and not just in the social sciences and humanities; the ontological argument between nominalists and universalists reappears as a metaphysical question in the natural sciences each time one arrives at a certain level of reflection.[97]

This nominalism versus holism debate has a direct connection to the second main question: what is the relevance of Berthelot's schemes to law? Michel Villey, in his history of legal thought, used the nominalist revolution, associated with the medieval philosopher William of Ockham, as the key focal point in the development of modern rights thinking in law, a technical development he seemed to abhor for its philosophical consequences.[98] 'The nominalist education that we have received has', he said, 'the consequence of restricting our catalogue of values only to those

[94] Berthelot, 'Programmes, paradigms etc', in Berthelot, *Épistémologie*, p 484.
[95] For a full account see Berthelot, *L'intelligence du social*, above n 3, pp 43–85, 152–61. For a more detailed discussion in English see Samuel, *Epistemology and Method in Law*, above n 13, pp 295–334.
[96] J-M Berthelot, 'Les sciences du social, in Berthelot', *Épistémologie*, p 247.
[97] Blanché, *Épistémologie*, p 20.
[98] See generally Villey, above n 58, p 199ff. However Villey's thesis has now been seriously challenged: B Tierney, *The Idea of natural Rights* (Scholars Press for Emory University, 1997), pp 13–42.

values of interest to individuals—or to groups fictionally conceived as individuals, having the status of 'corporate persons' (*les personnes morales*)'. And he continued:

> Only individuals exist for nominalism. The only values that can serve, in a word, will be the economic or moral well being of individuals or corporate groups; which are the ends of moral or economic policy; whilst the law is reduced to no more than a mass of rules with a coercive function, a technique, an instrument in the service of the economy or individual morality. It has no end in particular.[99]

At a lower level of abstraction, the dichotomy between a whole and its parts can be found as a technique in legal reasoning and in legal conceptualisation.[100] For example the notion of a patrimony is based on the idea that the whole remains a permanent and unchanging *res* while the individual things that make it up freely come and go without affecting the form; subrogation is founded upon the same type of structural reasoning.[101] In one famous English case involving the interpretation of a will the difference between the majority decision, as represented in the judgement of Russell LJ, and Lord Denning's dissenting opinion, is to be found in the dichotomy between a universalist and nominalist view of facts. Lord Denning considered that when a small ship sank taking with it a the two testators the deaths were 'simultaneous'; however Russell LJ viewed the facts as a series of individualised events pointing out that when a disaster occurred at sea people could die at different times through different causative events.[102] Now these oppositional forms of reasoning have been discussed in detail elsewhere.[103] And so it might be more valuable for present purposes to move to the level of the six schemes identified by Berthelot. Is Berthelot's work providing a means by which comparatists can start to think seriously about alternatives to functionalism?

8. COMPARATIVE LAW AS A HERMENEUTICAL EXERCISE

Zweigert and Kötz, as we have seen, emphasise the functional method as the most appropriate for the comparatist. This approach has, however, been seriously challenged by Pierre Legrand who argues that comparative law is largely a hermeneutical exercise.[104] The job of the comparatist is not simply

[99] Villey, above n 58, p 400.
[100] See eg D.5.1.76.
[101] G Samuel, *Law of Obligations and Legal Remedies* 2nd ed (Cavendish, 2001), pp 165–8.
[102] *Re Rowland* [1963] ch 1.
[103] G Samuel, *Foundations*, above n 13, pp 149–51.
[104] See generally Legrand, *droit comparé*, above n 5.

to compare rules since these are nothing more than strings of words; they are the surface appearance of law.[105] And what the comparatist must do is get below their surface in order to discover the cultural *mentalité* that these rules express. It is not the rule itself that should be the focus of comparison but what the rule *signifies* in terms of the political, social, economic and idelogical context from which it has emerged. This exercise is not some quest for a positive truth attaching to the existence of this or that rule; it is not, in other words, a search for function. The comparatist is involved in a *démarche herméneutique* that goes well beyond a jurist just reading other jurists.[106]

Berthelot explains that the hermeneutical scheme is different from the functional approach in that it involves a *vertical* relationship between two elements (A and B) in which A is the signified (what it expresses) and B is the signifier (what is).[107] Rules, then, represent the element B is this schematic relationship while A is the cultural mentality. The functional scheme, in contrast, is based on a *circular* relationship between A and B (and C etc) in which A has a specific function measured not just in relation to B's specific function but in relation to the function of the system (A→B→C) as a whole.[108] Legrand would seem to see, at least implicitly, functionalism as encouraging the comparatist to be superficial. In looking only at rules, 'comparatists' do not (want to) see: they stop at the surface, looking merely to the rule or proposition—and they forget about the historical, social, economic, political, cultural, and psychological context which has made that rule or proposition what it is'.[109] The price to be paid for this 'unwillingness or inability to practise … "deep" comparative enquiries … is that of an *illusion* of understanding of the other legal tradition within the European Union'.[110] In particular, says Legrand, civilians think they understand the common law, but in failing to indulge in serious hermeneutical investigation 'the "comparatist"… does not realise that the common law of England operates on the basis of epistemological assumptions which are hidden behind the judicial decision or the statute and which determine them, and that these assumptions distinguish in a fundamental way the common law tradition from the civil law world'.[111]

The problem, therefore, with functionalism is twofold. First, it assumes, as we have seen, that there is between two legal systems a common epistemological understanding of what is meant by 'law'. Difference is measured in terms of difference of elements (concepts and institutions) and patterns

[105] See in particular P Legrand, 'The Impossibility of "Legal Transplants" ', (1997) 4 *Maastricht Journal of European and Comparative Law* 111.
[106] Legrand, *droit comparé*, pp 30–1.
[107] Berthelot, *L'intelligence du social*, pp 72–3.
[108] *Ibid*, p 65.
[109] P Legrand, 'How to Compare Now', (1996) 16 *Legal Studies* 232, 236.
[110] *Ibid*.
[111] *Ibid*, pp 236–7.

of relations between systems as measured by functions that are assumed to be common. In asserting the hermeneutical scheme of analysis Legrand in effect cuts across this comparison of a *circular* epistemological scheme to put the emphasis on a *vertical* scheme that immediately leaves the functional approach open to the charge of superficiality. The second problem is the assumption that 'facts' are somehow outside the comparative methodological scheme in as much as the circular discourse is measured in terms of its practical function. To an extent it is of course arguable that an exploding washing machine or a car accident is a factual situation capable of being perceived independently of law in all European countries if not everywhere in the world. However facts, as we have gone some way in showing already, are much more ambiguous to the epistemologist. Are victims of car accidents, for example, victims of acts or activities? Is a dwelling house factually similar to a huge munitions factory? Facts are never evident in themselves; they 'never directly thrust themselves upon one, and it can be said that they exist neither *a priori* nor separately'; they 'have sense only in relation to a system of thought, through a pre-existing theory'.[112]

This is not to suggest, it must be stressed at once, that the hermeneutical scheme is inherently superior to the functional method. It can certainly seem superior in certain contexts and one of the strengths of Professor Legrand's thesis is that comparative legal studies is a 'context' where a vertical analysis cannot be ignored. Nevertheless there are degrees of hermeneutics. All forms of interpretation in law that involve a signifier (for example a word in a statutory text) and a signified (meaning of the word) could be said to be hermeneutical and thus the comparatist needs to distinguish between a 'deep' hermeneutical scheme and a more superficial one. Furthermore, with respect to the idea of 'contexts', one might assert that there is no single 'context' of comparative legal studies. And so, for example, the European law practitioner might be seen to be working within a particularised context that is very different from the academic comparative lawyer interested in legal theory and legal epistemology. This 'practitioner context' is one where there is a shared assumption about the nature of law. This shared assumption might appear superficial and simplistic to anyone who applies a vertical deep analysis and, indeed, may actually generate many misconceptions and errors of the type mentioned by Legrand.[113] But it must never be forgotten that law is an ideology and that international commercial lawyers have an ideological interest, like legislators, in assuming that knowledge of law is knowledge of rules. Indeed it might well be said that they have a professional interest is maintaining a superficial epistemological model, as Christian Atias has suggested. Legal science,

[112] J-P Astolfi & M Develay, *La didactique des sciences* 4th ed (Presses Universitaires de France, 1996), p 25.
[113] See generally Legrand, 'How to Compare Now', above n 109.

he says, 'tends to be eclipsed by the law' in as much as the 'primary, indeed exclusive mission that jurists give themselves is the analysis of constitutional, legislative, administrative or caselaw texts; their ideal is faith to the will [of the legislator] expressed via "sources of law"'.[114]

This rule-based assumption can be strengthened by recourse to schemes other than the functional and hermeneutical. For example criminal lawyers rely heavily on the causal and actional schemes since criminal law itself is premised on free-will and intended actions. Thus a person is not normally guilty unless he or she behaved in a certain manner, with the required intention (*mens rea*),[115] and that the behavioural act caused the harm envisaged by the rule (*actus reus*). The causal scheme is premised on the idea that one phenomenon (B) is dependent upon another phenomenon (A) according to a relation whereby it is impossible to have B without A. As Berthelot points out, it 'follows that A and B are distinct either in reality (different objects or realities) or analytically (different levels of a global reality) and that the element A is conceived as being necessarily prior, chronologically or logically, to the element B'.[116] This individualistic analysis is given added support by the actional scheme in which the phenomenon B is considered the result of the behaviour of implicated actors within a given space. States of mind become matters of objective implication often defined in relation to the objective act. Thus a person who puts a bomb on an aircraft or deliberately sets fire to a house is deemed to have 'intended' any deaths that arise out of the explosion or fire whatever the actual subjective state of the actor's mind. Here culture and mentality become, seemingly at least, rather meaningless; what is important is the system of rules and concepts and the results they are designed to achieve. It thus becomes very easy to compare, say, a modern English tort case about spreading fire or falling objects with similar delictual cases in Roman law.[117]

The great temptation facing the comparatist with these schemes is that a deep *vertical* analysis is both unnecessary and irrelevant since what one is comparing is the pattern of differing systems whose functions are, as between themselves, identical. Indeed this temptation can infect not just the 'law' question but also the nature of the 'comparison'. The deep hermeneutical vertical approach is implicitly premised on the idea of *difference* since comparative cultural studies places great emphasis, inter alia, on time and place. One could not easily assume that third century Rome was culturally similar to twentieth century London. However comparing phenomena via causative, actional and functional schemes of intelligibility is very different. And so 'if we leave aside the topics which are heavily impressed by

[114] Atias, *Épistémologie juridique*, above n 4, p 36.
[115] See eg *Nouveau Code Pénal* art 121–3. See also D.48.8.14.
[116] Berthelot, *L'intelligence du social*, above n 19, pp 62–3.
[117] See eg D.9.2.30.3; cf *The Wagon Mound (No 1)* [1961] AC 388.

moral views or values, mainly to be found in family law and in the law of succession, and concentrate on those parts of private law which are relatively "unpolitical", we find that as a general rule developed nations answer the needs of legal business in the same way or in a very similar way'.[118] The functional method, along with the causative and actional schemes, lead inexorably towards a comparative methodology based on a *praesumptio similitudinis*, 'a presumption that the practical results are similar'.[119] The deep hermeneutical approach, not surprisingly, will lead to quite the opposite methodological presumption. Social science epistemology suggests that this fundamental schism between schools of comparative lawyers results from differing schemes of intelligibility, from a horizontal (cause) and (or) circular scheme (rules and concepts as system) as opposed to a deep vertical analysis.

9. COMPARATIVE LAW AS A STRUCTURAL EXERCISE

Can the epistemological positions on each side of this schism be reconciled? At one level the response is, and ought to be, a negative one. However if one applies to this schism the dialectical scheme of intelligibility it would seem that opposition and contradiction is a fundamental aspect of knowledge. It is to consider a phenomenon (A) as a moment in a future stage (B) and thus can be expressed as A and non-A→B. The Zweigert and Kötz functional method on the one hand, and the Legrand hermeneutical scheme on the other (A and non-A→B), are simply stages for a future position (B) where the contradiction will reveal itself as unreal.

Berthelot himself identifies problems with this dialectical scheme as to whether it is a genuine epistemological model. As he says, the difficulty consists in actually grasping the internal processes at work; if this cannot be done then the scheme becomes simply descriptive.[120] Nevertheless Legrand perhaps offers a means by which some kind of reconciliation could be developed, if not between himself and the methods advocated by Zweigert and Kötz, then at least between a circular and vertical approach. In defining what he means by *mentalité* Professor Legrand says it is a matter of cognitive structures; and the 'essential key for an appreciation of a legal culture lies in an unravelling of the cognitive structure that characterises that culture'.[121] The job of the comparatist is, according to this thesis, to focus upon these structures within any given culture 'and, more specifically, on the epistemological foundations of that cognitive structure'. For it 'is this epistemological substratum which best epitomises … the legal *mentalité*

[118] Zweigert & Kötz, above n 29, p 40.
[119] Above n 21.
[120] Berthelot, *L'intelligence du social*, above n 19, p 82.
[121] Legrand, 'European Legal Systems are not Converging', above n 8, p 60.

(the collective mental programme), or the interiorised legal culture'.[122] Referring to Lévi-Strauss, Legrand talks of bringing to light these 'deep structures of legal rationality'[123] which in effect means that, beneath the surface rules (signifier), there lies a set of deep structures that act as the signified. In other words, the deep vertical hermeneutical approach, when it gets to the required depth, will encounter a set of structures which by definition, or at least by Berthelot's definition, form a scheme of intelligibility, that is to say the structural scheme.

According to Berthelot, the structural scheme is characterised by elements that are inserted into a system of oppositions where objects, properties and relations 'become signs, elements of a system operating as a code'.[124] In such a code one term (A) takes its signification in comparison with other terms within the system (B, C, D) which are in opposition to it. Natural language is, of course, the paradigm example of a closed structural code and it is no accident that structuralism as a theory of knowledge has its roots in the work of linguistics.[125] But codes can be much more simple: a set of traffic lights based on the opposition between 'green light' and 'red light' is as much a structural code as any complex language system.[126] When applied to law the structural scheme manifests itself in a number of ways and at a number of levels. Clearly the idea of law as a closed system consisting of rules and concepts expressed in language allows it to be analysed in terms of opposition between the various legal notions. Thus in the great European codes, structural forms of law *par excellence*, real rights (A) for example gain their significance only in opposition to personal rights (B); moveable property (C), to give another example, can be understood only in relation to immovable things (D). The law of obligations (A) has little or no meaning in isolation from its opposing category, the law of property (B) and these two categories, when taken together as the foundation for the generic notion of 'private law' (C), can be opposed to the category of 'public law' (D).[127]

This kind of structuralism has its immediate roots in the dialectical and hermeneutical methods of the medieval Glossators. As Professor Carbasse has observed:

> In the 12th century, the scientific method in use in all branches of knowledge—scholasticism—was at the base of classification. But there were for sure jurists who practised this art in the most systematic way. In the schools, the students were invited to learn lists of words or concepts presented in contrasting

[122] *Ibid.*
[123] *Ibid*, p 61.
[124] Berthelot, *L'intelligence du social*, above n 19, p 70.
[125] J Piaget, *Le structuralisme* 11th ed (Presses Universitaires de France, 1996), pp 63–81.
[126] Berthelot, *L'intelligence du social*, above n 19, p 70.
[127] See further G Samuel, 'Classification of Obligations and the Impact of Constructivist Epistemologies', (1997) 17 *Legal Studies* 448.

> couples and in an alternative method (either ... or ...): public/private, general/special, common/particular, absolute/relative, moveable (property)/ immovable, paternal/maternal, personal (goods)/community (goods) etc. They were the famous *distictiones*, lists of which were circulating in ever more expanded length, then some systematic collections where the terminological 'pairs' were presented in the form of rhyming verse—this, of course, to facilitate the memorisation of them. It is this old practice of the systematic distinction which explains the jurists' still current preference for the two-part plans, the best of which present clearly a complex law question.[128]

Yet when the humanists, in supposedly reacting against these scholastic methods, switched the emphasis from the 'caselaw' texts of the *Digest* to the systematised 'nutshells' of the *Institutes*,[129] it might be said that they were moving to an even 'deeper' structure. A structure which had been identified by the classical Roman jurist Gaius in his student textbook, the *Institutes of Gaius*.[130] The 'institutional system', founded upon Gaius' *persona*, *res* and *actio*, took structuralism to the heart not just of legal classification but, more importantly, of factual analysis. For the notion of a 'person' and a 'thing', together with the idea of a legal remedy, are notions that have as much meaning for the sociologist and the economist as for the jurist. Gaius had in effect produced a structure that operates at one and the same time in the world of law and in the world of fact and the importance of this structure was that it was capable of acting as the 'scientific' object of law. Gaius, to use a modern scientific idea, had fashioned a model of virtual fact. He had provided the 'bricks' by which lawyers could construct their own juridical worlds.[131]

Are these 'bricks', or institutions, the means by which legal *mentalités* are constructed? Professor Legrand asserts that for the civil law tradition the institutional system lies at the very foundation of its epistemological structure. 'When the Romanist jurist carries the argument from fact to rule', he says, 'he inevitably passes through this Gaian classification of legal subjects, legal objects and legal remedies'.[132] It is this structure which defines the civilian mentality and it is a structure to be found in all the European civil codes.[133] The common lawyer, on the other hand, does not, according

[128] J-M Carbasse, *Introduction historique au droit* (Presses Universitaires de France, 1998), pp 160–1.
[129] Cf A Watson, 'The Importance of "Nutshells" ', (1994) 42 *American Journal of Comparative Law* 1.
[130] On which see P Stein, *The Character and Influence of the Roman Civil Law* (London, Hambledon, 1988), pp 73–82.
[131] The expression is taken from O Kahn-Freund: see his Introduction to K Renner, *The Institutions of Private Law and Their Social Functions* (Routledge & Kegan Paul, 1949; trans. Schwarzschild, A; reprint 1976), p 6.
[132] Legrand, *droit compare*, above n 5, p 92.
[133] Stein, above n 130.

to Legrand, recognise himself through this Gaian classification. The judicial decision is, in the eyes of the common lawyer, not a matter of asking *quid juris* but a question of *quid facti*; and thus the French jurist, never really uncomfortable in any legal system influenced by Roman law, will not feel *chez nous* in English law.[134] The common lawyer, seemingly, does not pass from fact to law through the institutional structure, but 'reserves for thought the liberty of losing itself and transforming itself in its meeting with its object—something which does not allow for the primacy of logical coherence'.[135] Now it is certainly true that the common law has never reached, if one thinks in terms of Blanché's epistemological stages of science, a deductive and axiomatic level and this goes some way in explaining the absence not just of civil codes but of any significant codification movement founded upon ideas from the *mos geometricus*. The English have no need of axiomatic structures. Nevertheless it can be asked if, deep within the love of facts, there are structures at work.[136] As has already been observed, the concrete might well be nothing more than the abstract rendered familiar through usage and while common lawyers may function closer to 'actual' facts than the modern civilian these facts may still be 'virtual' in that they are an abstract model of reality.

If this is so, then the comparatist may well be in a position to compare structures. Yet how might the structures used by common lawyers differ from those employed by the civilian jurists? One possible response, already suggested elsewhere, is that the common lawyer does make use of the Gaian structure founded upon the three institutions of *persona*, *res* and *actio* but in a way that transgresses the 'axiomatic' model developed by the civilians.[137] For example, the common lawyer (or more precisely perhaps the Chancery lawyer) is quite happy to use the proprietary relationship between *persona* and *res* as the basis for a claim against a sum of money; the claimant can assert, in short, that the money in another's bank account is owned by the claimant and should be handed over for that reason alone.[138] This kind of institutional claim is unthinkable in the Romanist systems because money is generic, and consumable, rather than specific and non-consumable; consequently it can be reclaimed only through the law of obligations.[139] Of course it is possible to assert that this type of claim is 'unthinkable' to civilians only because they classify money in a different way than common lawyers.[140] The problem, it might be said, is not so much institutional as

[134] Legrand, *droit compare*, above n 5, p 93.
[135] *Ibid*, p 95.
[136] See eg G Samuel, 'Roman Law and Modern Capitalism', (1984) 4 *Legal Studies* 185; G Samuel, 'Epistemology and Legal Institutions', [1991] *International Journal for the Semiotics of Law* 309.
[137] Samuel, *Law of Obligations*, above n 101, pp 523–59.
[138] *Ibid*, pp 129–33.
[139] See further G Samuel, 'Comparative Law and the Legal Mind', (2001) 21 *Legal Studies* 444.
[140] Money was a consumable item since it could be used only by spending: D.7.5.5.1.

one simply involving a reaction to an ambiguous 'fact'. However two points need to be made here. The first concerns the relationship between fact and the institutional system. Categorising money as a generic *res* goes some way in illustrating, once again, how law, like other sciences, uses as its object virtual rather than actual fact. Money is the same in England and in France at the level of actual fact but not at the level of legal (virtual) fact. Secondly, on closer examination of the whole notion of tracing, the legal structure turns out to be much more complex since remedial and substantive ideas interrelate in a way that is different from the interrelation in Romanist thinking. At common law (rather than equity) a person can assert, it would seem, a proprietary claim to a debt on the basis of a substantive right *in rem*, that is to say on the basis that a debt is not only an obligation but a form of property.[141] Yet the actual *actio*, an action for money had and received, is strictly *in personam*.[142] In short, in the common law tradition, one can base an *actio in personam* on a *ius in rem*, just as one can assert, as a 1991 case illustrates, a claim *in rem* one the basis of a *ius in personam*.[143]

A very similar pattern emerges in relation to another 'axiomatic' distinction in the civil law, the dichotomy between public and private law. At the historical and substantive levels the distinction is very difficult, if not impossible, to find in common law systems; the 'private' law of contract, tort, unjust enrichment and property applies equally to all *personae*, public as well as private. And, as Professor Oliver has highlighted recently, even if one can now talk of an independent Administrative Law in England and Wales, this law is largely based on ideas and principles taken from 'private' law.[144] The distinction, she says, is meaningless. However, despite the force in Oliver's arguments, it cannot be asserted that the distinction between public and private law has no formal existence in the common law tradition. At the level of remedies the distinction between a claim for debt, damages and certain equitable remedies has to be distinguished, as a matter of procedure, from an action for judicial review.[145] Moreover, even in an ordinary damages claim, the courts do differentiate between claims against 'private' persons or bodies, on the one hand, and public organs, such as local authorities and the police, on the other.[146] The distinction can, on occasions, be important in relation to plaintiffs: certain public bodies do not,

[141] This point was particularly well brought out in Lord Denning's judgment in *Beswick v Beswick* [1966] ch 538. He was of course overruled by the House of Lords ([1968] AC 58), but the point seems to have been re-established by Lord Goff in *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548.
[142] Above n 141.
[143] Above n 141.
[144] D Oliver, 'The Human Rights Act and Public Law/Private Law Divides', [2000] *European Human Rights Law Review* 343.
[145] See generally *O'Reilly v Mackman* [1983] 2 AC 237.
[146] See eg *Stovin v Wise* [1996] AC 923.

for example, have the same right to sue in defamation as private or commercial claimants.[147]

10. COMPARING SYMMETRIES

All this is, as Professor Legrand recognises, very strange when viewed from the 'axiomatic' structure of the codes where rights *in rem* and rights *in personam*, and public and private law, are strictly separated both at the substantive and the remedial levels.[148] The question, however, is whether there is in this strangeness a structural thinking that is so different that comparison between the two traditions is, epistemologically, impossible. As suggested, it is possible to say that the difference, which undoubtedly exists, is not a difference founded in the existence in one system of an institutional structure and its absence in the other system. The difference is one of symmetry. In the civil law system, thanks both to a long history of academic legal science and to a legislature which has ordained via the codes a fixed pattern of institutional thinking, there is a symmetry that cannot be transgressed. A claim cannot, for example, be real and personal at one and the same time. In the common law, in contrast, the symmetry of the institutional structure can be transgressed; institutional patterns can be manipulated in ways sometimes unthinkable to the Romanist. For example, a litigation dispute can, in substance, be one located within the *ius publicum* relationship between individual and the state while at the same time the actual remedial claim is one belonging to the *ius privatum*.[149] Thus a claim for money owed pursuant to an employment relationship that is entirely public, rather than contractual, in its legal foundation may, at the level of the remedy, be entirely private in form. A more complex example can be found in the area where equity, remedies, tort and property meet. In one case, now admittedly rendered obsolete by statute, a number of artists and their record companies were granted an injunction against a person who had been making illegal ('pirated') recordings of live performances by the artists. Because of a technicality the injunction could not be based upon a breach of statutory duty in the law of tort, despite the criminal nature of the behaviour. Nevertheless the Court of Appeal granted the injunction on the basis that it was the role of equity to protect property rights and artists had a 'property right' in their live performances.[150] A similar intermixing of conceptual ideas has been identified recently by

[147] *Derbyshire CC v Times Newspapers* [1993] AC 534.
[148] Legrand, *droit compare*, above n 5, pp 94–5.
[149] See eg *Roy v Kensington & Chelsea & Westminster Family Practitioner Committee* [1992] 1 AC 624.
[150] *Ex parte Island Records* [1978] ch 122.

Professor Waddams in his analysis of a famous nineteenth century litigation dispute also involving the world of music.[151]

In an 'axiomatic' institutional system this kind conceptual intermixing of ideas is much more difficult, if not on occasions impossible. The idea that an artist might be granted a remedy on the basis that he or she is the 'owner' of a live performance would create 'logical' difficulties since the civilian would want to know how such a proprietary relationship could exist between a person and a 'thing' as ephemeral as a live performance. Can one 'enjoy' and 'dispose' of such a *res* as required by Article 544 of the *Code civil*? Of course, this is not to say that the civilian would be lost for any suitable conceptual analysis. The French lawyer could well arrive at the conclusion that a live performance by a musical artist is part of the artist's actual person; it is an invasion of a personality right rather than a property right.[152] Nevertheless the point to be made is that the civil law's institutional structure is founded upon the conceptual device of a 'right' (*droit subjectif*) and it is the code and not the remedy that defines these rights. The whole system functions at a single level, or perhaps one might say in a 'flat' two-dimensional world, in as much as it is a structure that has as its foundational element the *droit subjectif*. The common law, in contrast, is able to be more complex, institutionally speaking, in that it is a structure that operates in at least three dimensions; it can in one dimension operate with rights while, in another (third) dimension, create or contradict, the right in issue by use of the institution of the remedy together with the concepts, such as an 'interest', that attaches to this institution. Thus, in one case, a third party to a contract was held to have an interest capable of recognition by the law of actions even although, at the level of the law of things, the party had no rights.[153]

The key, therefore, is the pattern of institutional structures rather than the actual existence of an institutional model in one system and absence in another. To assert this, however, is not to contradict the thesis of Professor Legrand about the need for a 'deep' hermeneutical analysis of legal cultures. Rather, it is to argue that differences between the civil and the common law traditions are to be found in the symmetry of institutional thinking. In one system the pattern of the relationships between persons and persons and between persons and things, together perhaps with the relationship between person and the state (as legal institution), creates a normative structure that leads in turn to certain general types of 'virtual' fact situations. One thinks of the general pattern of liability to be found in Article 1384 of the *Code civil* where liability can be incurred as a result of

[151] SM Waddams, 'Joanna Wagner and the Rival Opera Houses', (2001) 117 *Law Quarterly Review* 431.
[152] A Sériaux, *Les Personnes* (Presses Universitaires de France, 1992), p 70.
[153] *Jackson v Horizon Holidays Ltd* [1975] 1 WLR 1468.

damage done by a thing under the control of the defendant. This structural pattern means that each time there is an accident involving some object—an escalator or an exploding bottle of lemonade for example—the French jurist has the means by which he or she can immediately think in terms of liability without fault.[154] This pattern is not impossible in the common law. However because of a liability system traditionally based on a list of forms of action the pattern of liability is much more 'compartmentalised'.[155] The English mind does not immediately turn towards some abstracted *res*, moving from there to some abstracted 'control' relationship with an abstracted *persona*. It asks, instead, what type of thing, and what class of defendant (and perhaps claimant), are involved and any normative pattern might well be dependent upon differentiating between a dangerous animal and a dangerous item of ordinance.[156] Thus while it might seem odd to a civilian that the actual place where an injury occurs can act as a determining factor between liability and non-liability, it is not at all bizarre to a mind which distinguishes between different kinds of dogs before deciding whether the keeper of the animal is to be responsible for the dog's behaviour.[157] All the same, it would be dangerous to generalise and to assert that the common lawyer is always more 'nominalistic' (methodological individualism) in the analysis of facts while the civilian is more 'univeralist' (holistic). The common lawyer might distinguish between a tiger and an artillery shell for the purposes of liability but might not distinguish between a dwelling house and a munitions factory.

Legrand is, then, right to identify the Gaian scheme as the foundational model in the civil law when it comes to an understanding of the movement between fact and law.[158] But this identification should not be used to imply that institutional structures are absent in the common law; they are simply more complex. This is partly because the institutions of *persona* and *res* are too abstract to act in themselves as focal points—the common lawyer often prefers more specific items—and partly because the still active role of the *actio* has helped create a third dimension in the epistemological institutional model in which the Gaian symmetry can be transgressed. A proprietary remedy does not necessarily, as we have seen, require the invasion of a strict proprietary right.[159] The common law lacks 'logic' because it can create institutional structures that, according to civilian science, it should not be able to do.

The common lawyer is free to do all of this for a range of reasons. The most immediate reason is of course the absence of codes with their

[154] Malaurie & Aynès, above n° 191.
[155] On which see Samuel, *Law of Obligations*, above n 101, pp 27–30.
[156] See eg *Read v J Lyons & Co* [1947] AC 156.
[157] See eg *Curtis v Betts* [1990] 1 WLR 459.
[158] Legrand, *droit compare*, above n 5, p 92.
[159] See recently *Manchester Airport Plc v Dutton* [2000] 1 QB 133.

fixed symmetries. However this absence of an imposed pattern simply allows the history of legal thought in the common law tradition to continue to exert its influence. Lists of remedies and causes of action dominate the textual surface of the judgments.[160] Hermeneutically speaking these lists are signifiers for a complex institutional structure that, as in the civil law, act as the means of translating facts into law. The point is important to stress because one of the lessons that law can take from epistemological thinking in the sciences is the notion of virtual facts. What the institutional structure is doing is something more than merely translating actual fact into legal institutional patterns; the *persona*, *res* and *actio* structure is instrumental in turning actual fact into 'virtual' fact. The epistemological importance, then, of the Gaian system is not just to be found in the way it organises the law; its fundamental role is to be found in the way it organises fact. The common law thus appears more complex, more 'exotic' as one civilian has put it,[161] because its institutional symmetry is far more complex thanks to a much more active law of actions, itself the result of typical fact situations. What the common law can do is to create more complex virtual facts than the civil law because its lists of actions contain many more 'exotic' distinctions than are to be found in the codes. In addition, as Michael Lobban has shown, the strong emphasis on procedural structures in the history of the common law allowed, perhaps ironically, rather greater freedom when it came to substantive legal reasoning.[162] English judges were never constrained, thanks to the absence of a strong *corps de professeurs*, by a legal science dominated, during the Enlightenment at least, by the influence of logic and mathematics. This meant that 'exotic' distinctions could be carried into the heart of legal reasoning with the effect that even when the distinctions between various forms of action gradually became blurred thanks to the growth of general theories of liability based on contract and fault they nevertheless survived within the reasoning structures.[163] For example, distinctions between direct and indirect damage, between acts and words, between different kinds of things, between different classes of parties, can be kept alive within the duty of care question.[164]

The obvious conclusion to be drawn here, for the European comparatist, is the danger of thinking that harmonisation of law can be achieved through the production of European codes. Such codes would simply act as a superficial structure. Much more useful is harmonisation through a deep

[160] See in particular B Rudden, 'Torticles', (1991–2) 6/7 *Tulane Civil Law Forum* 105.
[161] N Rouland, *Introduction historique au droit* (Presses Universitaires de France, 1998), p 306.
[162] Lobban, above n 87, pp 90–8.
[163] D Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford University Press, 1999), pp 294–302.
[164] *Ibid*, pp 188–95.

understanding of epistemological structures and how they relate to institutional elements and how these elements, in turn, relate to actual fact. Why is money a generic and consumable *res* in one scheme of thought and a specific and non-consumable thing in another scheme of thought? Why is a live performance capable of being a 'thing' in one scheme but not in another? Why is a spillage of oil to be treated differently from a spillage of sewage? As Legrand indicates, a vertical approach is the only means of discovering the deep structures that determine these surface differences.

11. SOCIAL SCIENCES AND LAW

It is in relation to these deep structures that epistemological work in other disciplines has its relevance for law. Yet, speaking generally and by way of some concluding observations, what does this work mean for comparative law? What, in short, are the main lessons that epistemology in the sciences and in the social sciences can usefully give to comparative law? Several comparative conclusions can be tentatively asserted. First, comparative methodology framed entirely around the functional method is far too restrictive and can easily result, as Legrand demonstrates, in a comparative enterprise that is, essentially, superficial. To escape from this restricted methodological vision, work by theorists like Berthelot in the social sciences is invaluable. Not only does he articulate a number of schemes of intelligibility alternative to the functional analysis, but his schemes can act as a means by which functionalism in comparative law might be harmonised, in a sophisticated way, with the deep hermeneutical approach advocated by Legrand. In addition, Berthelot's schemes are invaluable for understanding legal reasoning in general. This aspect has not, admittedly, been examined in great depth within this present contribution.[165] Yet one need think only of the methods associated with statutory interpretation, in relation to those used in the analysis of caselaw problems, to appreciate how hermeneutics and, say, a causal analysis are different epistemological models. Again the methods of the Glossators in relation to those of the Humanists or the Pandectists can be categorised and analysed through the Berthelot schemes. Social science epistemology is more than just useful to the comparatist; it is essential to any serious comparative law research.

None of this is to assert, however, that Berthelot's schemes are to be accepted uncritically. There is a range of problems, some of which the author himself is only too aware.[166] Nevertheless they can, for the jurist, and in particular the comparatist, act as a starting point for a deeper

[165] But see Samuel, *Epistemology and Method in Law*, above n 13, pp 295–334.
[166] See generally Berthelot, 'Programmes, paradigmes etc', in Berthelot, *Épistémologie*, pp 457–519.

reflection on method and on knowledge in social science. Indeed, once such deeper reflection is embarked upon it may well be that the jurist will in turn be able to make a critical contribution to social science epistemology. The jurist might well be able to show, for example, how the methods of the Glossators interweaved the various schemes of intelligibility in ways not fully appreciated by the sociological theorist. Berthelot's work might, in other words, encourage participation by the comparatist in intellectual projects that transcend law.

Secondly, epistemology of science has been useful in understanding the 'object' of legal 'science'. This is the old problem, again alluded to by Legrand, of *adaequatio rei et intellectus*;[167] the idea that legal science is a discourse that has as its object actual factual situations is to misunderstand, fundamentally, legal thought. The importance of the Gaian institutional system is that it functions as much within the world of fact as within the world of law and it is this dual role that endows it with its capacity to create virtual facts. Lawyers, like scientists, do not work directly on reality but construct rationalised models of this reality; and it is these models that become the 'objects' of legal discourse. Such models might seem absent in the common law given its apparent obsession with the specific rather than the generic. Yet such a conclusion is arguably wrong; the models of fact upon which the common lawyers work are as 'virtual' as those constructed by the civilian, although it might, as this contribution has suggested, be possible to talk in terms of degrees of 'virtuality'. Legal method might appear to be a matter of categorising facts, identifying appropriate legal source materials and applying these appropriate laws to facts; in truth, epistemologically, the methodology is very much more complex. When viewed from the position of comparative law, one might well say that the real, and most difficult, work of the comparatist is not to compare laws as such; it is to compare 'facts'. More specifically it is to compare how different virtual fact models are constructed and deconstructed within different systems. To the extent that the functional approach encourages a focus on fact, it can be said that the method has much to commend it. The danger, however, is that functionalism can so easily make wrong assumptions about the nature of facts themselves.

A third epistemological contribution from outside law that might prove useful to law is the contribution that emphasises the importance of the history of a science. If one wants to understand the *mentalité* of a legal system in the Legrand sense of the term (deep cognitive structures), then history offers a good means of access since it can identify the elements which have contributed to the formation of any science. However care must be taken here because one is not talking of a history of events as such; the emphasis is on the history of ideas. This means that the objects of this epistemological

[167] Legrand, *droit compare*, above n 5, p 87.

approach to history are not concrete discoveries but the '*genealogy* of "categories" which have successively made up the objects of [the] science'.[168] One is looking at 'an *internal movement* of concepts'.[169] The scheme of Robert Blanché is an important contribution to law in as much as it provides a model which charts the progress of mentalities in the various legal traditions. Teasingly, perhaps, it leaves the present state of this history in an ambiguous situation. With the failure of the *mos geometricus*, is there a retreat into some former stage or is there a progression towards some new, fifth stage? This progression point has, to an extent, been mirrored in the social sciences in general; with the decline of the grand theories associated with modernism, theorists have talked of a 'post-modern' era. Whatever the label—post-modern or post-axiomatic—the point that emerges is that comparative lawyers cannot now be so certain as to what constitutes legal knowledge. There is, in other words, a real and genuine ambiguity as to what constitutes 'law' and this is something that ought to be of concern to those comparatists seeking ever greater harmonisation between different legal traditions. Can this be achieved by a device—codes—whose origins are rooted in epistemological stages where the main characteristic was a certainty as to what constituted legal knowledge?

One temptation might be to label this new fifth stage as 'hermeneutical'. Law is about, and only about, interpretation and thus linguistic propositions (rules and principles) act merely as signifiers. The question here, however, is one that focuses on the signified: what do rules and principles signify? For some legal theorists it is a question of 'rights' where the role of the judge is analogous to an author involved in a literary project;[170] for a comparatist like Legrand, however, it is a matter of going beyond legal concepts and into the deep structures of a cultural mentality. Hermeneutics thus becomes an ambiguous scheme of intelligibility in as much as its structure, signifier and signified, is a formal abstraction whose effectiveness in any given situation depends upon what is assumed as the signified. To this extent it cannot be assumed to be either superior or inferior as an epistemological device to other schemes such as the functional approach. Its main epistemological force is that it can act as an alternative knowledge scheme. However this idea of an 'alternative' is in itself epistemologically important. Knowledge in the social sciences is not absolute in the sense that one 'model' or 'paradigm' is superior to others; it is the possibility of the alternative that acts as the epistemological force and this is no less true of law than it is for sociology or economics. The problem, therefore, with the Zweigert and Kötz insistence on the functional method is that it fails to emphasise the importance of the methodological alternative in

[168] Granger, above n 16, p 114.
[169] *Ibid*, p 115.
[170] R Dworkin, *Law's Empire* (London Fontana, 1986), pp 228–38.

comparative law. Or, put another way, the problem with comparatists who give primacy to a single scheme is that they are, ironically, denying to the comparative law student the one method that ought to characterise comparative law. They are suppressing, rather than emphasising, the importance of the alternative as a knowledge device in its own right.

12. CONCLUDING REMARK

Perhaps, then, the fifth stage ought not to be the era of the hermeneutical. What social science epistemology suggests is that social scientists have entered the stage where knowledge is a question of alternative models whose individual epistemological value is always contingent.[171] This leads to two fundamental questions to be posed by all scientists, using 'science' here in both its restricted and wider meaning. Can this phenomenon be modelled or schematised? And, if the answer is positive, is there an alternative model or scheme that can be applied to the phenomenon? Care, of course, must be taken in the application of these questions since the dichotomy between model and phenomenon is at best a delicate one. Yet once one appreciates that it is the very existence of an alternative that is one of the essential epistemological factors, then the *intellectus et res* element itself becomes one of the objects of the alternative. The danger here, of course, is that knowledge can so easily be seen as relative; Darwin's theory is simply an alternative to those to be found in the Bible. Epistemology, it would seem, must abandon any normative claims. Berthelot's response is to argue for a third way to be found in the 'logic of confrontation'.[172] This confrontation is not, however, just a recourse to the dialectical scheme since the object of the confrontation is not as such a process on the way towards a new and higher element or factor. It is, as Legrand rightly recognises, an epistemology of *difference*. For every 'virtual' fact situation created out of the institutional model there is always an alternative situation to be constructed out of a differently constructed institutional pattern. For every definition of law there is an alternative. For every thesis in favour of harmonisation there is an opposite alternative. And for every identified and asserted comparative law method there is always an alternative. The present epistemological stage cannot, therefore, be labelled hermeneutical since, thanks to social science theory, there is always an alternative scheme of intelligibility.

Where does this leave both epistemology and harmonisation of law in Europe? One answer, of course, is that epistemology can be used as a starting point for either camp in the harmonisation debate and this has two

[171] Berthelot, 'Les sciences du social', in Berthelot, *Épistémologie*, pp 203–65.
[172] *Ibid*, p 260.

particular dangers. First, those comparatists who emphasise the possibility and value of harmonisation are in danger of simplifying legal knowledge, most notably when such harmonisation is advocated via codification. Secondly, however, those like Professor Legrand who are extremely sceptical about a European Civil Code[173] are in danger of slipping, via culturalism, from epistemology towards, if not ideology and myth (although this is a danger), psychological explanations that end up as incomparable with the institutional structures identified as being central to civilian rationality. English law, or say English morality, becomes difficult if not impossible to explain simply because it does not use rationalised and abstract structures. Too great a difference, in other words, courts the danger of undermining the very process of confrontation. Or, to put it another way, rationality versus irrationality can lead one into a zone where knowledge becomes stultified because the process of confrontation, of recourse to the alternative scheme of intelligibility, finds itself outside the very rationalities upon which the notion of epistemology itself is founded. Harmonisation, or non-harmonisation, will then take place as a result of arguments that owe more to ideology than epistemology.

[173] P Legrand, 'Against a European Civil Code', (1997) 60 *Modern Law Review* 44.

5

How to Make Comparable Things: Legal Engineering at the Service of Comparative Law

JUHA KARHU*

1. BACKGROUND

THERE ARE MANY different ways and methods to do comparative law research. This multiplicity is one of the distinctive features of comparative law. The rich multiplicity and plurality resulting from such methods must also be actively fostered. Therefore tentative efforts at developing new approaches potentially useful for legal comparisons may even be inherently valuable.

In this chapter I will first present an overall scheme of certain different types of comparative law research. In the second part I will describe the proposal made by Burkhard Schäfer and Zenon Bankowski. I refer in particular to their idea of combining the activities done under the heading 'artificial societies' and comparative law. In the third and final part I try to continue this kind of tentative approach by placing the 'artificial' with the 'real' society. The concrete area of activity here is the New Economy, and more specifically new forms of business co-operation in e-commerce.

2. MAPPING THE COMPARATIVE LAW APPROACH ADOPTED IN THIS PAPER

Let us take as a typical comparative situation that in which two legal systems are compared. Here there are several possibilities which can be attached to the legal situation of the focus of the comparison. One basic distinction can be made on the basis whether the focal area contains norms which are valid law or whether norms are evolving. This distinction can be

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	Legal system B: *De lege lata*	Legal system B: *De lege ferenda*
Legal system A: *De lege lata*	*De lege lata* / *de lege lata* (1)	*De lege lata* / *de lege ferenda* (3)
Legal system A: *De lege ferenda*	*De lege fesrenda* / *de lege lata* (2)	*De lege ferenda* / *de lege ferenda* (4)

Figure 1. Situations of Comparison

traced back to notions *de lege lata* and *de lege ferenda*. We thus reach the following four combinations.

(1) Comparison *De lege Lata / De lege Lata*

This is perhaps the most typical situation where two legal systems are compared in areas where the norms regulating the focal area are both valid law in the systems in question. One can for example compare in contract law norms which aim at regulating situations of unfairness. Then the normative material needed for the analysis would consist of specific norms for contractual amendment, such as the section 36 in the Nordic Contracts Acts, or the cases and material on the institution of 'unconscionability' in common law systems. It is however obvious that the choice of relevant norm material is not limited to norms directly regulating the unfair situations. So we would also need to consider such kind of norms which could represent, in valid law, an alternative to the norms regulating unfairness. Under Nordic contract law systems several norms on invalidity of contracts could lead to same outcome as section 36, for example section 33 on general good faith (*Treu und Glauben*). Likewise, in common law systems institutions like duress, undue influence, and the emerging duty to bargain in good faith should be included.

What is important here is that comparison be founded on norms forming part of valid law in both systems.

(2) *De lege Ferenda / De lege Lata*

Comparative legal knowledge offers many possible applications which are not always as easy to produce on the basis of one legal system only. One of the most important application is the possibility of evaluating the valid law of one's own system. This possibility is even more relevant between legal systems with essential similarities, for example for historic reasons. In such kind of situation there is a constant possibility of exchanging legal ideas

and plans for legal reforms. This situation can then be used as a means for recognising possibilities for change in one's own valid law: one looks for *de lege ferenda* solutions for one's own system by analysing the *lege lata* solutions of another legal system. Since one is dealing with something already in force in another legal system, the principal question on the very possibility of such a normative solution should not as such rise at all.

For example, in the Nordic legal family, Denmark has adopted new norms regulating questions of liability in relation to the sale of houses between private individuals for housing purposes. The question of liabilities has become more problematic on the basis of improved possibilities to assess the condition of houses. On the basis of the traditional liability norms still valid in other Nordic countries the only possibility is to choose the liable party from the parties to the sale, that is either the seller (*caveat venditor*) or the buyer (*caveat emptor*). Interestingly, Norway, Sweden and Finland have chosen different solutions to this issue, even if the law texts are broadly similar. In the Danish model a third party, namely an insurance company, is taken as a possible bearer of liabilities, supported by strong incentives for both parties to the sale. The seller has to give both a certificate relating to the condition to the house and an insurance offer directed to the buyer to cover defects other than those mentioned in the certificate. Furthermore, the seller has to give a declaration of willingness to pay half of the insurance premium should the buyer choose to take the insurance. Because the experiences of the Danish system have been positive, it is one possible new solution *de lege ferenda* for other Nordic countries.

One's own system can be put in a perspective with another functioning legal system, for the purposes of evaluation, and especially for the purpose to reform one's own valid law.

(3) *De lege Lata / De lege Ferenda*

Sometimes comparative legal knowledge can be meaningful in the interpretation of valid law of one's own legal system. The most typical situation, which belongs in the above classification to number (1), is where several countries have adopted the same convention as regards an international arrangement. Of course, the connection between the different countries depends on the international arrangement in question. A strong link in Europe exists between European Union member states.

Such a situation is not envisaged under this third situation *de lege lata / de lege ferenda*. Instead, it can be characterised with reference to possible consequentalist arguments when reasoning on the basis of one's own valid law. Elaborating further the example on the sale of houses described under (2), one can say that already the plans to reform the Danish system when it still was similar to other Nordic systems offered the possibility of countering

a simple '*ad absurdum*' opposing argument claiming that only the seller and buyer are available to possible parties as bearers of liabilities. Then, existing Danish plans for new legislation, Danish *de lege ferenda*, could have been used as an argument in discussions concerning, for example, Finnish law, Finnish *de lege lata*.

Integration between different legal systems can be achieved not only by common legislation but also with other 'similarities improving means' (sim). One of these is that the reform plans in one country are given significance in argumentation on valid law.

(4) *De lege Ferenda / De lege Ferenda*

The last possibility is to compare the reform plans in two countries. That can be done on the basis of the contents of the reform plans. Then it would be very similar to a comparison of valid laws, only now proposed laws are subject to comparison. I think that there is also another typical situation under this last combination. One could compare the proposed methods used for different regulations of similar problems.

In comparison *de lege lata / de lege lata* there is a natural tendency to be result-oriented. Valid law in the modern era means that law is attached to something positive in the sense of positive law. What is left more in the shadow is the process of production of these positive expressions. Traditional attitudes towards the interpretative use of *travaux préparatoires* of statutory law in the UK, and a similar approach to EU regulation, reflect this orientation towards outcomes.

However, in areas with constant and rapid changes in modes of action, typical for information society developments, there is room for a different attitude. If change is the norm, and being in force unchanged is the exception, then process itself becomes more important. More specifically: the administration, management and governance of the process are central. There are different aspects in this governance, mainly political and legal aspects. One of the main political questions is, whether in situations of continuously-changing activities regulation should be achieved through legislation or self-regulation.

The more the political choice is in favour of the mode of self-regulation, the greater emphasis can be placed on understanding the law in action from inside. To put it another way, where an area under constant change is regulated through self-regulation, *de lege lata* and *de lege ferenda* are intertwined. Then it is not anymore useful to maintain the strong orientation towards outcomes as source material for comparison. Instead, the process through which law in action is produced becomes important. One key to understanding these processes is to look at how private forms of regulation like codes of conduct and standards are produced. In these areas law is

much less legal than it used be. Legal ideas are intertwined with engineering and business models. It would not make sense to try to extricate law back to an independent existence when such processes transform themselves to branch practices etc.

A tentative formulation of what I think could be a new kind of platform for comparative law knowledge could be the following. If law is always from the beginning intertwined with engineering and business thinking, and if one wants to understand the evolving processes, why not try to use such legal core components which contain ideas with strong support in comparative legal knowledge. Through these kind of legal core components the processes would also always bring about modes of action that could be compared on the basis of the same kind of comparative law knowledge. How this happens in more concrete terms is the subject for the third chapter. Before that it is worthwhile to consider in a more analytical manner what this kind of idea of private law model means for comparative law in general.

3. 'THE INTERGRATIVE FORCE OF PRIVATE LAW' ACCORDING TO MR. BANKOSCHÄFER

The basic idea—if that expression is at all suitable for the colourful and 'bricolage' type of style adopted by Bankowski and Schäfer—in their essay 'Mistaken Identities: The Integrative Force of Private Law'[1]—is to oppose a simplistic illusion of a shared frame of reference among European legal cultures. They draw support in part from Pierre Legrand's claim that there are ontological differences between underlying legal mentalities (the priority of the cognitive over the propositional). The main consequence of these differences is not so much in national peculiarities, like the common law trust or the concept of *culpa* in continental systems.[2] It becomes essential when connected to seemingly common notions, like that of contract. It is through the general doctrines (basic concepts and principles) that these differences can really find expression. It is also clear that there are many national mentalities, differing from each other in their interpretation of such general doctrines (inter-mentality disagreements).

Therefore, I agree with Schäfer's and Bankowski's criticism of Legrand[3] that there could be communions of lawyers in the same legal field in spite of the different national legal systems (intra-mentality understanding). A well

[1] M Van Hoecke & F Ost (eds), *The Harmonisation of European Private Law*, (Oxford, Hart Publishing, 2000) 21–45.
[2] See Fritz Jost, 'The Adjudication of Law and the Doctrine of Private Law' in M Van Hoecke and F Ost (eds), *The Harmonisation of European Private Law* (Oxford, Hart Publishing, 2000) at p 168.
[3] Above n 1 p 23–4.

chosen example are environmental lawyers who seem to have a common core in a certain interpretation of the general doctrines of environmental law, like the 'polluter pays' principle. Similar developments can be expected for example in the field of social law where the proposal of the Finnish legal scholar Kaarlo Tuori for a general doctrine for that branch of law could contain material capable of being adopted in every legal system ('Critical Legal Positivism'). And due to the short history of this field as an independent branch of the law, these ideas may become constitutive elements in different national legal systems. Perhaps it would be correct to compare the role of general doctrines to that of the generative capacity of linguistic skills. Thus the explanation of Schäfer's and Bankowski's assertion that a person with a command of one legal system possesses skills applicable to any other legal system would be precisely in the mastering of general doctrines, whatever the concrete content of these general doctrines are. They write:

> The possibility of cross-cultural legal comparison is explained by a cognitive deep-level. The patterns and activities on this deep level are themselves not legal rules, but generate legal rules on the surface level.[4]

What is 'producing' the legal rules on the surface level is, to my mind, the general doctrines, belonging to the cultural level or layer of law. Therefore, in the characterisation of different types of comparative law made in the first section of this paper, I always bear in mind, at least as a possibility, something other than a mere comparison of valid legal rules. But this possibility of being more profound than merely comparing concrete legal rules does not essentially change the role of different approaches on the basis of adopted approaches.

This idea of multi-layered structure of law and legal thinking is elaborated in detail by Kaarlo Tuori.[5] For him, the layers are the surface level, the legal cultural level and the deep structure. This deep structure contains the essential notions of a certain epoch, and in our epoch of modern law it contains conceptual ideas such as legal subjectivity, subjective right, etc but also fundamental and human rights. An important feature of Tuori's model is the interaction between the different levels, which creates the possibility also of understanding dynamic changes in law throughout the model. Changes in the surface level go deeper and make sedimentations in the legal culture. The particular legal culture, on the other hand, constitutes the framework for the concrete legal norms and judicial decisions at the surface level. It is important to stress that the levels interact. Therefore, I do not see essential differences in the overall architecture between the models proposed by on the one hand Schäfer and Bankowski, called a modularised picture of legal mentalities, and Tuori's model of critical legal positivism.

[4] Above n 1 p 24.
[5] K Tuori, *Critical legal positivism* (Aldershot, Ashgate, 2002).

I follow here more closely the search for a 'private law mentality' presented by Schäfer and Bankowski than Tuori's choice through fundamental and human rights. To my understanding the difference between these two alternatives is neither fatal nor exclusive. This means that it is possible to combine them, by seeing inside the 'private law mentality' line a possible framework, or even a means, for the constitutionalisation of private law through fundamental and human rights. A preliminary development of this idea is offered in the third section. Before that a few comments are needed on the Bankoschäfer model.

I think Schäfer and Bankowski are right to criticise the mainstream of European private law integration in its use of the 'top-down' model of regulation. There 'integration *of* private law takes precedent over the integration *through* private law; again, integration is equivocated with uniformity'.[6] According to this kind of thinking, the effect of integration is for the new European law to destroy or replace existing national legal orders. It is precisely this idea that can be called the 'public law mentality' in integration. It might overlook, or even hamper, 'the integrative dynamics of private law'.[7] There are, for Schäfer and Bankowski, three ways of realising this dynamic: it makes up a conceptual framework, it provides a basis for understanding the cognitive impact of the exchange between legal systems as a whole, and thirdly, private law is 'the normative setting within which the exchanges on the first level take place'.

> Integration happens if people make connections. Private law is a mode of making those connections between people. Therefore, one can say that people are integrated through private law.[8]

Adding to this, it can perhaps be said that the paradigmatic mode of connection, if we focus on integration in this sense, is contract. And it is also the concept of contract that Schäfer and Bankowski analyse further. They emphasise that

> community emerges when people make connections. Private law contracts are one important form of making those connections between two (or more, added by JK) parties . ... from the doctrine of mistakes, we know that the meeting of the minds is often also a mismatch of the minds . ... For the purpose of the law, partial understandings are more than enough. But if society emerges out of these contractual exchanges, then it is based ultimately on a set of partial and creative misunderstandings. The private lawyer always knew something the public lawyer never understand; that we are incompletely socialised, that we are living in incomplete communities.

[6] Above n 1 p 28.
[7] Above n 1 p 29.
[8] Above n 1 p 29.

Furthermore, the incompleteness of contracts also has a law-and-economics explanation. The costs of further negotiations to make a planned contract more complete will always reach a point where the surplus value of this added contract planning will be less than the gains of the increased completeness.

For Schäfer and Bankowski it is important to frame a 'democratic' gaming of systems, or 'a sort of polycentric system with all systems mutually influencing each other, though still having their own protocols'.[9] This is essentially what they call the private law point of view. While agreeing in that this is one possible private law point of view, I disagree that it is the only one, and especially the most fruitful one for an interlegality process. As Sousa Santos describes, 'interlegality is a highly dynamic process because the different legal spaces are non-synchronic and thus result in uneven and unstable mixings of legal codes'.[10] All this leads to the notion of Europe being 'an essential contested concept because its (Europe's) identity is never fixed and each new application, every new penetration and adjustment of the interlocking normative spheres that it makes, might change it'.[11]

As Schäfer and Bankowski strongly, and constantly, argue, a genuine integration needs another kind of mode than public law thinking. It is also a plausible argument that this mode should respect legal frames developed in private law. And as a Finn, I also have to have sympathy with their emphasis on the general doctrines as they are presented by a Finnish legal scholar, Thomas Wilhelmsson.[12] To see that contract can legally be understood as social co-operation, and that this co-operation creates the social which then feeds back into the primary exchange, also leaves a role for the public as a distributor of these networks of exchanges. These kind of ideas lead to the inclusion in the private law mode also of the idea that the distinction between contract and organisation becomes gradual, and is not a distinction in kind.

Much of what Schäfer and Bankowski argue resembles the discussion between public and private ordering. This discussion has also concrete models, and more precisely 'The East Cost general regulation model' and 'The West Cost self-regulation model'. Once we realise that integration is a constant need in the United States, the similarities between the 'European' discussion presented above and these American models become apparent. What I try to outline in the next section is to offer something which would be a kind of compromise between these two American regulative models, as well as a compromise between public law and private law models. The kernel of this compromise is to see whether 'the most private could be at the same time the most public.'

[9] Above n 1 p 36.
[10] Above n 1 p 36–7.
[11] Above n 1 p 37.
[12] Above n 1 p 41–4.

My ideas here resemble the Durkheimian way of understanding suicide. Suicide is always the most individual choice there is, but at the same time it reveals, as a collective social fact, structures of society.

To continue the thinking through 'artificial societies', and through that kind of new forms of activities which are developing in networks, one could try also to portray the frameworks as something more dynamic, where the contents would at the same time become more static than in traditional freedom of contract thinking (and its external restrictions for social reasons). What the dynamic framework should guarantee is a route along which the basic values and aims of co-operation can flow. And what are these basic values and aims? I think that in the era of modern law they are the fundamental and human rights. But what is important here is that no single fundamental right, not even the right to freedom of action (including contractual freedom), should have a privileged status. Therefore, the principles framing the route cannot be any one of the rights themselves, but such metanorms as are typically becoming important in an information society. I have elsewhere tried to develop three of these: the principle of prudence, the principle of reliance, and the principle of openness. They are at the same time meant to strengthen the logistically sound idea that one should not have two different legal conceptualisations for contractual and non-contractual forms of co-operation.

4. AGILE CONTRACT IN THE NEW ECONOMY

At the end of their essay Schäfer and Bankowski make a reference to some ideas of Gunther Teubner. Once the border line between contract and organisation is 'thought away',

> even the classical limited liability company is nothing but, and still something more than, a network of individual contracts. When networks reach a certain 'density' law as second order feedback mechanism recognises them as separate entities. But on a conceptual level, there is no natural demarcation line between very loosely and very cohesive networks and both can be dealt with, if so chosen, by the same legal vocabulary.

There are two ways of understanding these networks. In the above quote the emphasis is on the outcomes, meaning that some networks seem to be loose and some cohesive. Another way to understand networks would be to ask how are they constructed, and especially how are they legally constructed.

There have been different economic models which reveal the dynamics of co-operative networks. There are also different engineering methods to realise these models. What is needed is to link these three layers together.

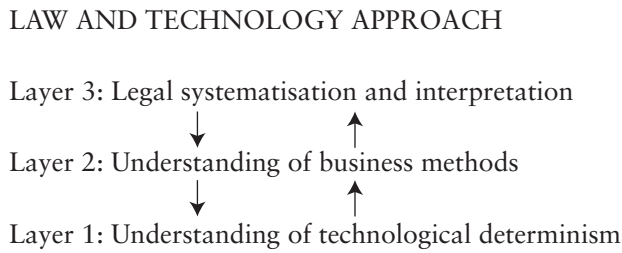

Figure 2. Engineering, Business, and Legal Layers

	Traditional contract	Agile contract
Focus and perspective of evaluation	Failure oriented and backwards looking	Success oriented and forward looking
Mode of attachment to the content of the activity	Single acts; complete rights and duties (outcomes)	Governance systems in networks; risk positions
Mode of attachment to the structure of the activity	Documents	Objects ('core components')
Mode of governance of mass contracts	Standard forms	Planned profiling

Figure 3. Agile Contract in Comparison with Traditional Concept of Contract

These networks are partly created through agreements between the parties involved. The model of these agreements is no longer the traditional idea of a complete contract as a solid basis for a future dispute in a court. Instead, these network contracts are forward-looking and build up to be a fruitful basis for later re-negotiations. The renegotiations are always necessary because changes of circumstances, especially unexpected changes, are the main rule in networks. One can summarise the differences between the traditional and the agile contract as follows (figure 2).

Agile contract combines features from continental and common law legal systems. The idea is that principles are always involved when contracts are used. Because different principles might be in tension with each other, some measure is needed to solve these situations. The measure available is the system of fundamental and human rights. This measure would entail a necessity of weighing and balancing the different interests of various stakeholders against each other.

However, agile contract would also contain characteristics familiar to the common law system. Here the orientation would be towards finding basis to analyse different concrete case situations. A central element is the pro-active use of liabilities always created even in co-operation. Where the duties of

each party to contribute to the controlling measures to diminish the risks are established, these liabilities would be governed by different compliance programmes. If there are sound economic reasons to leave contracts incomplete, as proponents of the law and economics movement have shown, then agile contract would always offer a fruitful basis for further re-negotiations between the parties. Well-planned compliance programs would be an ideal material for these re-negotiations.

The form of agile contract would also be the way to build in the core modes adopted in e-commerce, and more generally ICT-based activities, legal elements producing similarities in different legal systems. The agility in the agile contract would stretch the legal rules and principles as much as possible to a mode of action in compliance with the overall dynamics of the activity.

To understand the arrangements typical for the New Economy from inside, or in their formation phase—ie how the networks are created—it is not enough to consider the role of agile contracts in isolation. Agile contracts are only a part of the dynamic framework; another necessary part consists of the standards and codes of practices adopted in the field of the activity in question. A good example of these are domain names. It is not enough that the interested parties make a contract, but also that the guidelines set up by the private organisations and public authorities are followed.

If one wants to try to form a basis for subsequent comparison the best timing would be to be able to rewrite the legal to be compared as an element of a standard or a code of conduct. This in turn demands that the legal aspect is 'deconstructed and reconstructed' in a way to be able to function as an element and a partner of a business engineering process.

If successful, these kind of activities would make possible a continuous comparison without the need to first deconstruct and then reconstruct for the transfer from one system to another to be possible.[13]

In some distant sense this resembles what happens in Southern Africa when new governmental laws are enacted, and have to be informed to the common people on the countryside. For example in the case of a new law giving daughters the same right to inheritance as the sons had, a group of African female lawyers chose to make information about the new law in the form of dance. While dancing the law they showed respect and understanding to the traditional village culture but were able to transmit the change in a more effective way than through literal means.[14]

[13] BS Markesinis 'Studying Judicial Decisions in the Common Law and the Civil Law' in: M Van Hoecke & F Ost (eds), *The Harmonisation of European Private Law* (Oxford, Hart Publishing, 2000) p 133.

[14] See S Arnfred and H Petersen (eds) *Legal Change in North-South Perspective,* Papers from the seminar held at the University of Copenhagen in November 1995, Roskilde University Centre (Roskilde 1996).

6

Methodology and European Law—Can Methodology Change so as to Cope with the Multiplicity of the Law?

KARL-HEINZ LADEUR

1. METHODOLOGY OF STATE LAW AS A BLUE-PRINT FOR EC LAW?

1.1. The Diversity of Legal Traditions in Europe

A SPECIAL EUROPEAN methodology might make an important contribution not just to the self-illumination of European law in general, but also to the European institutions' conception of the production and application of law in particular.[1] This is true in particular because methodological thinking can, due to the rapid changes in even the structural principles of the law, have far reaching effects on legal practice.[2] The development of methods has however taken place at state level, and is marked by that, albeit on the basis of varying conceptions of the state.[3]

[1] Cf J Bengoetxea, *The Legal Reasoning of the European Court of Justice, Towards a European Jurisprudence*, (Oxford, Oxford University Press, 1993); Th J Möllers, *Die Rolle des Rechts im Rahmen der europäischen Integration*, (Tübingen, Mohr 1999).

[2] Cf the overview of the recent evolution of legal methods KH Ladeur, 'Die rechtswissenschaftliche Methodendiskussion und die Bewältigung des gesellschaftlichen Wandels', *RabelsZ* 2000, 60.

[3] For the evolution of methods in comparative law cf only M Reimann, 'Beyond National Systems: A Comparative Law for the International Age', *Tulane Law Review* 2001, 1103; C Harlow, 'Voices of Difference in a Plural Community', *American Journal of Comparative Law* 2002, 339; R Sacco, 'Diversity and Uniformity in the the Law', *American Journal of Comparative Law* 2002, 171; FG Jacobs, 'Public Law and the Impact of Europe', *Public Law* 1999, 232; H Kötz, 'Alte und neue Aufgaben der Rechtsvergleichung', *Juristenzeitung* 2002, 257; KP Sommermann, 'Die Bedeutung der Rechtsvergleichung für die Fortentwicklung des Staats- und Verwaltungsrechts in Europa', *Die Öffentliche Verwaltung* 1999, 1017; C Starck, 'Rechtsvergleichung im öffentlichen Recht', *Juristenzeitung* 1997, 1021; P Häberle,

While on the Continent we find, or, at least, have found in the past, a rational conception of interpretation of the law which focuses on the notion of the unity[4] of the *will* of the state, the Common Law has developed more from spontaneously produced rules and principles specified and altered through the judicial process, the unity of which is generated more in an inductive, relational mode. In spite of its nature as 'Case Law', it is nonetheless rule-based. In this context, Friedrich von Hayek cites Lord Mansfield, according to whom Common Law consisted not of specific cases, but of general principles 'illustrated and explained' on the basis of cases. This is important for Continental European lawyers in particular, since the consistency of law has been linked to that of the unity of the will of the legislator, while Case Law might look like a collection of individual cases that can only secure coherence with difficulty.[5]

On the other hand, the Continental European model—particularly the German version—has stressed the importance of 'scientific dogmatics', which can be fitted into the practice of 'nterpretation' of the will of the legislator[6] only because the latter is supposed to be based on the rationality of the will of the legislator. Linguistic and systematic interpretation, or in turn teleological interpretation (which are the goals of the legislator which did not find their expression in the text of the law itself), can thus be associated with the immanent rationality and universality of the law.[7] Even more recent legal hermeneutics[8] which stress—beyond the focus on the text

'Grundrechtsgeltung und Grundrechtsinterpretation—Zugleich zur Rechtsvergleichung als 'fünfter Auslegungsmethode', *Juristenzeitung* 1989, 913.

[4] For the idea of the 'unity' of the law cf EA Kramer, *Juristische Methodenlehre*, (Bern/Munich, Stämpfli, 1998), p 220s; K Larenz/CW Canaris, *Methodenlehre der Rechtswissenschaft*, 3rd ed, (Berlin, Springer, 1995), p 25, 133ss; from the point of view of the common law A Glass, 'The Author of Common Law Texts', *Ratio Juris* 1995, 91; for a critique from a European perspective cf C Schmid, 'Desintegration und Neuordnungsperspektive im europäischen Privatrecht', in: *Jahrbuch junger Zivilrechtslehrer* 1999, 36; with a view to the the rise of the new law merchant BL Benson, Justice without the State, The Enterprise of Law, (San Francisco, Pacific Research Institue, 1990); G Teubner (ed), *Global Law without the State*, (Aldershot, Dartmouth 1997).

[5] Cf FA von Hayek, *Law, Legislation and Liberty*, Vol 1, (Chicago, Chicago University Press 1973), p 86; for the idea of a codification of the law in a interdisciplinary perspective see D Foray & R Cowan, 'Economie de la codification et de la différence de connaissance', in: P Petit (ed), *L'économie de l'information*, (Paris, La Découverter, 1998), p 301, 303.

[6] Cf H Sodan, 'Das Prinzip der Widerspruchsfreiheit in der Rechtsordnung', *Juristenzeitung* 1999, 864, 866; D Felix, *Die Einheit der Rechtsordnung*, (Tübingen, Mohr, 1998) in a theoretical perspective G Zaccaria, 'Trends in Contemporary Hermeneutics and Analytical Philosophy', *Ratio Juris* 1999, 274; in a European perspective: U Mattei, 'The Issue of European Civil Codifiation, and Legal Scholarship', *Hastings International and Comparative Law Review* 1998, 883; A Flessner, 'Juristische Methode und europäisches Privatrecht', *Juristenzeitung* 2002, 14.

[7] Cf already FC v Savigny, *Vorlesungen über juristische Methodenlehre* (*1802–1842*), (Frankfurt, Klostermann, 1993).

[8] Cf only F Müller & RC Christensen, 'Rechtsarbeit und Textarbeit in der strukturierenden Rechtslehre', in: *Ars Interpretandi* 2 (1997), 305; J Esser, *Vorverständnis und Methodenwahl in der Rechtsfindung*, (Kronberg, Scriptour, 1974).

itself—the importance of the linguistic horizon as both a basis and a limit of our experience,[9] is based on the maintenance of continuity and unity of the legal tradition founded by the state institutions.[10]

Here, there are points of contact with the analytical legal theory of the English-speaking area; it sees the law-making experience as tied to the observation of language usage within legally constituted situations.[11] At the same time, differences also emerge here between the more practically oriented observation of language usage in situations, and the search for a connection founded in the history of rational ideas, associated with the notions of a unity of the subject and culminating in the state.

1.2. The Evolution of State Based Law in the 1960s—Reactions to the Fragmentation of its Knowledge Basis

In the 1960s, this methodological development had to deal with a rise in the pluralisation of public institutions and their decision-making practices (even within parliamentary legislation).[12] In Germany, for instance, this evolution supplemented the interpretation of the will of the legislator by recourse to the concept of 'Legal Concretisation'.[13] Recognising the creativity of the 'application' process as a legitimate element in the reproduction of the legal system under the pressure of accelerated technological change, management and the life circumstances of individuals has also on the Continent[14] led to a relativisation of the traditional approach to 'interpretation' which was focused on the maintenance of the continuity, stability and the unity of the law. Law is not just to be supplemented exceptionally by 'judge-made law'[15]—'filling *lacunae*'—but is permanently under pressure to adapt itself to the continually changing forms of social practice: in environmental and technological law, labour and social law, law of relational

[9] Cf Zaccaria, *ibid*, fn 6 275.
[10] For a general theory of interpretation cf G Vattimo, *Jenseits der Interpretation*, (Wien, Passagen, 1997).
[11] Cf Zaccaria, *ibid*, fn 6, 275.
[12] Cf P Häberle, *Die Verfassung des Pluralismus*, (Bad Homburg, Athenäum 1990); J Esser, *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts*, 4th ed, (Tübingen, Mohr, 1990); F Müller, *Richterrechtliche Elemente einer Verfassungstheorie*, (Berlin, Dunker, Hombolt 1986) id, *Strukturierende Rechtslehre*, 2nd ed, (Berlin Dunker Hombolt, 1994).
[13] Cf K Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland*, 20th ed, (Heidelberg, CF Müller, 1995), p 45s, 60ss.
[14] Cf for the practice of German courts *Bundesverfassungsgericht Reports* 34, 269; the *Bundesverfassungsgericht* regards judicial activism of the European Court of Justice as legitimate with respect to the constitutional law of Member States: Bundesverfassungsgericht, *Neue Juristische Wochenschrift* 2001, 2323; cf generally JHH Weiler, 'The Transformation of Europe', *Yale Law Journal* 1991, 2409; JHH Weiler & U Haltern, 'The Autonomy of the Community Legal Order—Through the Looking Glass', *Harvard International Law Journal* 1996, 411.
[15] Cf generally Esser, above, fn 8, 12.

contracts, the hybridisation of market and organisations, new social forms, etc, there is increasingly less reliance on established experience, while in its place hypothetical assumptions of knowledge and problem-oriented strategies have to be designed with a view to the generation of new options[16]—eg for the legal control of risk based decision making.

The law, in turn, being built on the continuity of knowledge and expectations, finds it hard to adapt to this. It has to adjust dogmatics to operate with partial knowledge in order to be able to stabilise expectations even under conditions of uncertainty.[17] At the same time, innovative forms of law (new contracts, models of mediation, supervised self-regulation etc) are developed by lawyers and social actors. The traditional methods which focused on unity, ultimately guaranteed by court practice, are already finding difficulties in for instance adjusting to the complex processes of adapting the liability system to technical risks and their management. Problems arise here, for instance, from the fact that the production of risk knowledge becomes increasingly science-based.[18] The law can no longer draw on a body of shared experience the reproduction of which in the past was based on openness to a multiplicity of actors. Instead it has to acknowledge its dependence on cooperation with private actors which generate specialised types of dynamic experimental knowledge which is no longer accessible to everybody.

The result is a new challenge of coordinating law and social knowledge: knowledge and conventions have always been relevant for legal dogmatics through its references to social expectations in legal concepts ('error', 'negligence' etc). However today they can no longer refer to a stable knowledge basis: for instance, in liability cases this instability finds its expression in a more reflexive, open, dynamic attitude which the law takes both to its own practice and its cooperation with the private practice of generating new knowledge. It tries to observe it in a forward-looking fashion that goes beyond the spontaneous accumulation of new knowledge, through strategic decision-making, particularly in the form of reference to private standards.[19] The evaluation of risks etc, must increasingly be linked to strategic and proactive risk management, so that a collective social conception of how to respond to a new risk situation has to be developed beforehand, because there is no

[16] Cf V Vanberg, 'Rational Choice v Program-Based Behavior', *Rationality and Society* 2002, 7; F Laville, 'La cognition située. Une nouvelle approche de la rationalité limitée', *Revue Economique* 2000, 1301.

[17] Cf from the perspective of economic and social sciences HA Simon, 'Bounded Rationality in Social Sciences: Today and Tomorrow', *Mind and Society* 2000, 25.

[18] Cf generally G Brüggemeier, *Prinzipien des Haftungsrechts. Eine systematische Darstellung auf rechtsvergleichender Grundlage*, (Baden-Baden, Nomos, 1999); KH Ladeur, 'Die rechtliche Steuerung von Entwicklungsrisiken zwischen zivilrechtlicher Produkthaftung und administrativer Sicherheitskontrolle', *Betriebsberater* 1993, 1302.

[19] Cf only C Joerges, KH Ladeur & E Vos (eds), *Integrating Scientific Expertise into Regulatory Decision Making*, (Baden-Baden, Nomos, 1997).

longer any spontaneous agreement about what is 'negligence', 'due diligence' etc. This can no longer be tried out from case to case or otherwise be determined *ex ante* by relatively general rules. Risk knowledge must be produced through reflexive, systematically self-observing practice whereas the possibility of waiting for the spontaneous emergence of conventions (experience) is no longer a meaningful alternative.

1.3. The Rise of Standards and the Pluralism of Law

It is for this reason in particular that private standards are becoming increasingly important for the law, and adopting them requires new procedural rules. The distinction between public and private legal decisions on the one hand, and law-making, hitherto monopolised by the state, on the other, loses much of is pertinence.[20] The decision as to whether something is regulated by governmental law or private standards is not completely without significance, but in practice this often no longer plays any part. State-based law in the traditional sense becomes—particularly if we consider cross-border legal transactions—a component in a complex network of national, transnational and international private and public norms. The plurality of legal sources, the relativity of their impact on decision making can no longer be ignored. Soft law, private standards or 'best practices' generated in professional networks become components of a legal practice which undermines the homogeneity of the legal system, and even more so the presupposition of the unity of the will of the legislator.

In this context focusing on the methodological debate, we cannot go into details of the transformation of the legal system. Instead, we shall emphasise the hypothesis that the unity of law, dependent on the creation of continuity through dogmatics, is being called into question within the nation state itself, and not just in the process of Europeanisation, particularly by the '*explosion des savoirs particuliers*'.[21] This development, which has been demonstrated in the example of civil law, can be noted with much greater intensity in public law. It questions the distinction between public and private interest:[22] this is reflected in the emergence of a multiplicity of new actors beyond the institutions of the pluralistic group-based welfare-state

[20] Cf G Teubner, 'Ein Fall von struktureller Korruption? Die Familienbürgschaft in der Kollision unverträglicher Handlungslogiken', *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft* 2000, 388; G Teubner, 'Breaking Frames: The Global Interplay of Legal and Social Systems', *American Journal of Comparative Law* 1997, 149; G Teubner, Global Bukowina: 'Legal Pluralism in the World Society', in: G Teubner (ed), *Global Law without a State*, (Aldershot, Dartmouth, 1997), p 3; see also U Drobnig, 'Rechtsvergleichung und Rechtssoziologie', *RabelsZ* 1953, 295.
[21] JM Guéhenno, *L'avenir de la liberté*, (Paris, Flammarion, 1999), p 90ss.
[22] Guéhenno, *ibid*, p 90.

of the 1950s and 1960s.[23] The decline of the unity of law has become a multifaceted phenomenon, and is ultimately an expression of the fragmentation of the sovereignty of the state as the supreme decision-maker in Western societies. This is a consequence of both the fragmentation and the rapid self-transformation of the process of knowledge generation.[24] One of the consequences consists in the fact that the hierarchically graded structure of the law and the state crumbles. There is in particular no longer a stable distinction between statutory law (norms) and the application of law in the individual case. There can only be an entangled hierarchy imply the 're-entry' of the individual decision in the process of the interpretation of the norm. The 'application' process itself reframes the 'applied' norm itself.

Hierarchical control, whether through state law or through the classical organisational structure of the state, and the separation of powers have become dysfunctional. The guidance effect of stable 'boundary concepts' (separating general and particular, public and private interests) is undermined by a new 'relational' network-based rationality which emerges bottom-up from a network of discrete decisions and does not claim any longer to stick to a top-down approach referring to the norm as its stable frame.

2. TOWARDS A 'LAW OF OPEN STATES' (U DI FABIO)

2.1. New Forms of Co-operation between Public and Private Actors in the Creation State Based Law

In Germany, U Di Fabio, a judge at the Federal Constitutional Court, has invoked the emergence of a 'Law of Open States'[25] that changes the state's unity not just from outside—by the Europeanisation and Globalisation processes—but also from within: the state's legislation is itself dependent on negotiations with social groups, firms, professional interests etc in order to gain knowledge requisite for regulatory decision making. This knowledge is increasingly difficult to get in a heterarchical society;[26] this is due to the devaluation of general empirical knowledge and the fragmentation of new knowledge which is linked to the practical networks in which it is generated and in which it remains implied. In the past there was a much clearer separation between general experience and implicit practical knowledge used in firms etc. In this respect in particular, we may speak of a necessity of breaking up statehood and setting up hybrid private-public forms of co-operation,

[23] Guéhenno, above n 21, p 94.
[24] Guéhenno, above n 21, p 112.
[25] U Di Fabio, *Das Recht offener Staaten*, (Tübingen, Mohr, 1999).
[26] Cf Di Fabio, *ibid*, fn 25, p 59s.

of competition between public and private decisions, of exchangeability of public-law decisions (statutes, administrative acts, etc) and private rules (standards, contracts, etc). To summarise: it has to be acknowledged that national legal practice is, even if we set aside the process of European integration, thus embedded in a network of norms and practices of varying scope and origins.[27]

It seems important, most specifically with the prospect of the emergence of a European methodology, to emphasise this self-transformation of the nature of the state and the weakening of the paradigm of the unity of the legal system, which initially has little to do with Europe and very much to do with technology and the economy. This assumption also has an impact on the methodological development: in the debate on the harmonisation of law in Europe, reference is made to the need to respect the 'cultural identity' of states and their law.[28] This concept is often invoked against the European law, it is said that the law's cultural ties are so strong that more far-reaching Europeanisation (in particular, the production of joint codifications say, for example, in civil law) *de facto* has narrow limits.[29] Many authors take the opposite view, namely that there is an unwritten implicit common core of European legal culture[30] which would allow the taking of further steps towards a pan-European positive law.

This assumption can seemingly be based both on a set of common ideas which remains hidden behind the differentiation of the legal evolution in Member States, and it could be explained in a functionalist way with reference to a shared logic of economic, social, technological and cultural transformation.

[27] Kötz, above, fn 3, p 267; Flessner, above fn 6, 16; RD Cooter, 'Decentralised Law for a Complex Economy', *Pennsylvania Law Review* 1996, 1643.

[28] M Van Hoecke, 'The Harmonisation of Private Law in Europe: Some Misunderstandings', in: M Van Hoecke & F Ost (eds), *The Harmonisation of European Private Law*, (Oxford 2000), p 1; M Van Hoecke & F Ost, 'Legal Doctrine in Crisis: Towards a European Legal Science', *Legal Studies* 1998, 97; M Van Hoecke & M Warrington, 'Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law', *International and Comparative Law Quarterly* 1998, 495; P Glenn, 'Are Legal Traditions Incommensurable?', *American Journal of Comparative Law* 2001, 133; C Joerges, 'Die Europäisierung des Privatrechts als Rationalisierungsprozess und als Streit der Disziplinen', *Zeitschrift für Europäisches Privatrecht* 1995, 181; WH Roth, 'Generalklauseln im Europäischen Privatrecht', *Festschrift für U Drobnig*, ed by J Basedow, KJ Hopt & H Kötz, Tübingen 1998, p 135.

[29] P Legrand, 'Against a European Civil Code', *Modern Law Review* 1997, 10; id, 'European Legal Systems are not Converging', *International and Comparative Law Quarterly* 1996, 52; for a critique Sacco, fn 3; Glenn, above fn 28; Van Hoecke, above fn 28; cf generally PC Müller-Graff (ed), *Gemeinsames europäisches Privatrecht*, 2nd ed, (Baden-Baden 1998).

[30] G Teubner, Legal Irritants: 'Good Faith in British Law or How Unifying Law Ends up in New Divergences', *Modern Law Review* 1998, 11; also BS Markesinis, 'Why a Code is not the Best Way to Advance the Cause of European Legal Unity', *European Review of Private Law* 1997, 519; id, 'Studying Judicial Decisions in the Common Law and the Civil Law: A Good Way of Discovering Some of the Most Interesting Similarities and Differences that Exist Between these Legal Families', in: M Van Hoecke & F Ost (eds), above fn 28, p 117; Kötz, above fn 3.

2.2. Is the Reference to 'Cultural Identity' of Legal Systems Useful?

On the basis of the perspective taken in this chapter, both views fall short. Undoubtedly, those who in particular refer to the law's association with the 'cultural identity' of states and societies are right in so far as they—over and above functional logic—point to the law's ties with an infrastructure of implicit rules, practices, doctrines, principles and forms of practice[31] we might talk of a 'path-dependency' of the law, just as is the case in the economy.[32] Societal institutions are 'embedded' in a context that consists of the accumulation of culturally differentiated patterns and rules, which give the general model of evolution ('capitalism', 'rule of law', 'civil law' etc) its shape, and in this way makes further specification of experience possible. Continental civil law too, or Anglo-American law, is clearly a reflection of the practices which have developed in particular societies.

Within this context, supra-national intervention in the legal process focused on a unification of the legal system can neither be judged (critically) as being nothing but an attack on 'cultural identity' nor as a merely functional adjustment to a unification of technologies and markets. The extreme form of the first thesis in particular, in P Legrand,[33] overestimates the rigidity of the legal system's 'embeddedness'. However, harmonisation as a kind of devaluation of domestic practices of law in turn comes at a cost. This infrastructure consisting of conventions, knowledge, etc, is itself involved in a transformation process, the direction of whose development is—as has been demonstrated above—determined not primarily by the EU institutions but by changes in the economy, in technology and in forms of life in the Member States themselves. Because a 'Law of Open States' is forming itself *internally*, the corresponding outward opening is not only possible, but is also in full swing. The methodological development is certainly lagging behind the changes emerging in the domestic sphere, making it all the more difficult to develop new methods for the complex multi-level system of the EU and its law. We have to acknowledge the tendencies towards this sort of fragmentation of statehood and towards an increasing heterogeneity of the legal system which come to the fore in all Member States. This is a precondition for the development of European legal methodology which has to be dealt with and cannot be ignored.

However, it should not be overlooked that, clearly, a great part of the legal structure of Member States remains relatively unaffected by this, even though it is undoubtedly the central components of law that are subject to

[31] Cf Van Hoecke & Warrington, above, fn 28.
[32] Cf for the concept of a 'regime' of capitalism D Soskice, 'Divergent Production Regimes', in: H Kitschelt et al (ed), *Continuity and Change in Contemporary Capitalism*, (Cambridge, Cambridge University Press), 1999, p 101.
[33] M Granovetter, 'La notion d'embeddedness', in: H Jacob & H Vérin (eds), *L'inscription sociale du marché*, (Paris, Harmattan, 1995), p 9, 16.

this change. In other respects, in handling the new pluralism we can see clear differences among the EU Member States, in which the 'path-dependency' that we have diagnosed is also expressed in ways of coping with trends to 'hybridise' private and public mixed forms.

The general structure of substantive and procedural administrative law in particular (function of administrative procedure, degree of juridification of decisions, discretion and its legal control in particular[34]) has certainly remained relatively stable, while the new challenges either appear in entirely new informal arrangements or are reflected in the inclusion of informal or private-public procedural components in the existing system. Accordingly, the developments here should not be understood as being to the effect that the Member State's legal system is being completely changed. On the contrary, what is happening is a heterogeneous, unevenly running development whose manifestations also happen in part outside the traditional forms. This development might even contribute to an underestimation of the impact of the transformation process on the legal system.

2.3. What does Europeanisation of Law Mean in the Context of Legal Pluralism?

Based on the view taken here the point is, more specifically, to overcome the mere counterposition of national and European legal systems, and instead to ask what consequences may arise from the self-transformation of national law for methodical and theoretical considerations about the development of European law. It immediately follows that the assumption underlying the counterposition of national and European legal levels, with regard to the narrow cultural 'embeddedness' of law, as well as the opposing thesis of a de-contextualisation of law which is suggested by functional requirements and made possible through a common European tradition,[35] both have to be called into question.

On the view presented here, the reproduction of state-based law is changing because its infrastructure[36] which is the basis for the applicability of law

[34] Cf generally KH Ladeur (ed), *The Europeanisation of Administrative Law*, (Aldershot, Ashgate, 2002); PL Lindseth, 'Democratic Legitimacy and the Administrative Character of Supranationalism, The Example of the European Community', *Columbia Law Review* 1999, 628; S Kadelbach, *Allgemeines Verwaltungsrecht unter europäischem Einfluss*, (Tübingen, Mohr, 1999).

[35] Cf for the importance of common European legal traditions R Zimmermann, *Roman Law, Continental Law, European Law. The Civilian Tradition*, (Oxford, Oxford University Press, 2001); Kötz, above, fn 3, 259; J Basedow, 'Codification of Private law in the European Union', *European Review of Private Law* 2001, 35.

[36] Cf J Mansbridge, Social and Cultural Causes of Dissatisfaction with the US Government, in: J Nye, PD Zelikow & DC Kling (eds), *Why People don't Trust Government*, (Cambridge (MA), Harvard University Press, 1997), p 133.

and which consists in a shared knowledge-basis and as a consequence allows for the stabilisation of expectations in practice, is undergoing a fundamental process of transformation. Methodological reflection of law in the European 'multi-level system' also has to take this into account. This is particularly important for the European level. Member State law has a whole range of institutions and meta-rules which have already learnt to cope with the new developments; eg courts have adjusted to the new flexibility and plurality of the legal system in developing new forms of judicial activism.[37] But it is most questionable whether, and how far, the European Court can take on a function of actively developing the new plurality within the legal system in a way that is functionally equivalent to that of the highest courts of the Member States.[38] This is doubtful not just because of the number of legal disputes and the multiplicity of interpretative problems in a Europe that is enlarging; a new problem arises because, specifically at European level, there is no 'variety pool' of ideas or dogmatic forms with which the European Courts might be able to operate.[39] This can be seen in the ECJ's justificatory style: it cannot be a European Court in the narrower sense, because its judges have gained their experience in their own domestic systems, and they can only develop common orientation-building dogmatics within narrow limits,[40] whereas the practical divergence among Member States' legal systems seems to be much less of a threat to a productive coordination.

2.4. Can the EU Ever Transform Itself into a State?

If we may then consider the state-based character of the legal system as being in any case in crisis, then the capacity of a European legal system to stabilise itself and to define and defend its autonomy vis-à-vis the assertive national legal systems has to be seen as limited.[41] For a better understanding we would need a theoretically informed work of comparative law which focused on the interaction of a plurality of sources of law. Because of the

[37] Cf for the theoretical preconditions of the Europeanisation of law Kötz, above, fn 3, 260; for a critique of the lack of methodological ambition of the ECJ in its approach to the requirement of 'consistent interpretation' of European Law see G Betlem, 'The Doctrine of Consistent Interpretation—Managing Legal Uncertainty', *Oxford Journal of Legal Studies* 2002, 397ss.
[38] Cf for the relationship between national and European Courts AM Slaughter, A Sweet Stone, & JHH Weiler (eds), *The European Court and National Courts*, (Oxford, Hart Publishing, 1998).
[39] Cf for the astonishingly few practical divergences in European law with regard to comparison of cases Zimmermann, above, fn 35.
[40] Cf generally Schmid, above, fn 4; Joerges, above, fn 28.
[41] Cf W Ewald, 'Comparative Jurisprudence (I): What was it Like to Try a Rat?', *University of Pennsylvania Law Review* 1995, 1889; H Kötz, 'Towards a European Civil Code: The Duty of Good Faith', in: P Cane & J Stapleton (eds), *The Law of Obligations. Essays in Honour of John Fleming*, (Oxford, Clarendon, 1998), p 243.

transformation taking place in the legal system as a whole the traditional orientation towards its state-based unity is questionable as a basis for an innovative approach towards a methodology of construction and interpretation of European law. The latter cannot be regarded as being the law of an emergent European Super-State. Europe will never be a State in the traditional sense—if only because the States themselves are involved in a process of fundamental self-transformation. If at national level the legal system is marked by the above tendencies towards fragmentation that can only be met with difficulty through the available dogmatic forms, then it is even harder to do this in traditional state forms at European level. Even something like a European Federal State would itself be affected by the crisis of statehood. Moreover, *founding* a federal legal order[42] under conditions of increasing complexity would be far more difficult than adapting the *existing* national systems to cope with uncertainty and build new co-operative forms of action and patterns, along with the appropriate institutions.[43]

On the other hand, it is important for a European methodology to accept the challenge of legal pluralism from the outset and to search for a new paradigm which might be more open to the institutional requirements of a European multi-level system of law. This perspective might give the development of European methodology its appropriate direction just as the fundamental conception of the unity of law in the will of the state previously did. European law should therefore take the lead in shaping a new era of legal pluralism instead of trying to remodel the traditional state-based unitary system of law. The conception of the EU as a state or quasi-state system would not just have effects on the understanding of the European legal system by legislature and judicature, but also affect the practical process of concretising European law.

As mentioned before, such a conception of a methodology cannot follow the model of the nation-state whose unity is exposed to erosion by the dissolution of the boundaries between public and private, and consequently also by a process of fragmentation of the legal system. Even federal states within the EU cannot in any way be taken as models for a European Federal State:[44] Federalism is by itself subject to its own phenomena of erosion. In Germany, federal and state competencies are more and more interwoven, a process which tends to block both the federal and the level of the states. Such a development makes trust in the possibility of a stable rational distribution of powers in the EU, for instance, scarcely justifiable, and consequently also calls into question the effectiveness of the subsidiarity principle.

[42] For the theory of federalism with respect to the European Union cf A von Bogdandy, *Supranationaler Föderalismus als Wirklichkeit und als Idee*, (Baden-Baden, Nomos, 1999).
[43] Flessner, above, fn 6, 14.
[44] Von Bogdandy, above, fn 42.

3. WHAT COULD A METHODOLOGY OF EUROPEAN LAW BE LIKE?

3.1. Different Dynamics in the Europeanisation of Law

Against this background, we have to ask whether a methodology of European law-making ought not, particularly in view of the open process of the development of the European institutions, drop the orientation to the unity of law from the outset, particularly as being rooted in a presupposed homogeneous legislative will. Here, too—at the level of legislation—we can see one of the tendencies that constitute a challenge to the unity of national law: the problem that law-making is not based on common traditions and a shared knowledge basis which could in the past be referred to in the Member States.[45]

This is not too problematic where the law is answering new, especially technical, requirements and cannot in any way follow national patterns and examples. An example of this would be the development of telecommunications law, which has been defined almost entirely by the EU (though undoubtedly following an American model).[46] There is a similar situation to be seen where national law is under strong pressure to change and EU law then responds by developing new legal models and patterns (eg for product liability). In such cases European law can initiate a productive process of legal reform.

But it is harder to cope with cases where national law has developed its own structural forms, and unification comes about more in the interest of the internal market, which then interacts with new legal norms in an infrastructure consisting of established national patterns of law and conventions. The more EU law affects the general principles of Member State private and administrative law, the more urgent it is to answer the question of how far these effects should go and what specifically European methods are to be developed for the interpretation and the design of the necessary cooperative schemes. Not least, the self-transformation of the legal system at national level and the pressure of uncertainty that has made national law's dependency on both social and public practical conventions and co-ordination patterns visible is a reason for questioning the possibility of transferring traditional presupposition of the unity of law to a European legal system. The Member States must increasingly open up the paradigm of the unity of law to cope with the diversity of plural normative systems; it can hardly be regarded as promising here to build up a new unitary European legal system that cannot even start from the historical core of the unity of nationally based law.

[45] Zimmermann, above, fn 35; Kötz, above, fn 3.
[46] The example of the Europeanisation of telecommunications law: J Scherer, Die Umgestaltung des europäischen und deutschen Telekommunikationsrechts durch das EU–Richtlinienpaket, (Kommunikation & Recht 2002), 273; 329; 385.

Particularly as regards the need to improve international co-operation among states, AM Slaughter has gone to so far as to bring forward the notion of a 'disaggregation' of the state:[47] this means that, in international legal transactions, states and individual organs have to be considered and located as nodes in a *network* of co-operation that reaches through the unitary 'legal veil of the state'. This conception could also be linked with the development of a European methodology for the pluralised legal system.[48] European law ought not to be shaped according to the pattern of classical national law, since a European Federal *State* of classical type cannot become functional, not only because of the aforementioned processes of change, but also on account of the size of the EU.[49] Instead, the EU legal system has to be constructed as a non-hierarchical open network of overlapping relational patterns among varying dimensions of normativity in a multi-level system. Here, we might even place a question mark at the term 'multi-level system': it would be more appropriate to speak of a 'multi-*polar*' network of networks with various nodes (private and public) and various linkage patterns, the modelling of which requires the co-operation and harmonisation of various legal and non-legal social norms.

A new paradigm of a plural co-operative system might form the framework for a methodology for European law.[50] There are already several elements which are constructed in this perspective and which can be observed in the judicial practice. For example the ECJ often in practice tends to favour interpretations that do not require any Member State to abandon its existing approach to problem solving. This might be taken as a pivotal principle of respect of diversity and pluralism. Beyond this, the risk of overloading the supra-national 'node' in the European 'network of networks' could be coped with by designing examples of a specific European law which is kept separated explicitly from the existing infrastructure of national, social norms and co-ordination patterns, not only in civil law but also in administrative law. One might think of partly leaving the option of more or less integration to the choice of the parties (in civil law) and offer optional 'unofficial rules',[51] for instance, a European codification of civil law as a guiding framework, with separate courts or public institutions for its interpretation and development. This might be a version of 'competition of institutions' that could invite comparison and practical evaluation. This approach might even be acceptable in public law, eg for contracts between

[47] Cf AM Slaughter, 'Governing the Global Economy through Government Networks', in: M Byers (ed), *The Role of Law in International Politics*, (Oxford, Oxford University Press, 2000), p 177.
[48] Cf generally Möllers, above, fn 1.
[49] Cf U Di Fabio, *Der Verfassungsstaat in der Weltgesellschaft*, (Tübingen, Mohr, 2001).
[50] Cf D Vogel, 'Die Harmonisierung des europäischen Wirtschaftsrechts—Mythos oder Realität?', *RabelsZ* 2001, 591.
[51] Markesinis, above, fn 30, (1997) p 523.

public organisations and private persons. The problems of legal integration could then be better observed and coped with by developing new patterns of interpretation. One might further think of encouraging private organisations, even outside the cumbersome procedure of 'comitology', to create norms by way of self-regulation through which practical co-ordination patterns could be generated, observed in application and evaluated with regard to their success. This applies, for instance, to legal transactions on the Internet. The 'country of origin principle' eg in the E-Commerce Directive deserves the attention of methodology, as well: its concrete impact on the limits of consumer protection etc has to be modelled in the light of the general idea of cooperation of European and Member States law.

3.2. The Value of 'Supervised Self-Regulation' in the Europeanisation Process

Especially with an eye on the legal structuring of new fields of action, for instance, through the E-Commerce Directive and similar norms, one might think of a legal principle of interpretation through the encouragement of self-regulation or self-protection by individual users. This is connected with the fact that the conditions for the emergence of stable expectations and the delimitation of spheres of interest in an environment marked by rapid change require experimentation with new legal forms. It is then necessary to induce those concerned to adapt themselves flexibly to their rapidly changing environment and utilise the associated information, and not primarily to stabilise expectations through decisions on individual cases. Problems specifically of European law arise in operating with general clauses as pivotal concepts of both private law and public law,[52] which ultimately refer either to evaluations that are contained in the given legal system,[53] have been tested against many individual cases and have been stabilised in practical co-ordination patterns and conventions generated through the practical networks among the actors.[54] Here, the European Courts are often required to try to develop principles and rules without a shared knowledge basis being available. This would require access to the practical rules and the stock of decisional knowledge accumulated in the given national legal systems, which would not necessarily be transferable to the European level.

3.3. Accepting Diversity of Law in the EC

One would here instead have instead to accept the possibility of differing interpretations existing alongside each other. In favour of this is the fact

[52] Roth, above, fn 28.
[53] Schmid, above, fn 4.
[54] Roth, above, fn 28.

that it is the national courts themselves that can more easily generate the knowledge needed to concretise the law from case to case drawing on a rich 'variety pool'. Conversely, one might reintroduce the European interest in harmonising the legal process at a separate level: for instance, one might think of imposing on Member States the requirement to consider the interests of other Member States as a special decisional criterion. This would lead to a practical approach to legal comparison which might be required from Member States before making decisions based on their own law. The practical application of such a principle by the Member States should in practice be subject to control by the ECJ as a sort of 'Court for jurisdictional conflicts'.[55] For this, of course, new filtering rules would have to be formulated in order to structure access to the European courts. This flexible conception would be oriented on a more network-like structure of European law which would differentiate 'nodes' of intense coordination and loosely coupled sub-systems.

Often the interest in a unitary conception of European law reaching down into individual cases is merely fiction. Courts could make an important contribution to the development of such an open multi-polar network of legal systems through a practical variant of comparative law[56] and foster a transnational process of self-coordination of Member States law and European law instead of sticking to a simplistic conception which regards 'supranational law' as just a higher level of law being superimposed on the level of domestic law. This might be helpful particularly in dealing with new legal problems which are not structured through a continuity of dogmatic interpretation: one cannot, for instance, properly understand why the German Federal Court of Justice, when seeking an answer to the question of whether a guarantee declaration could be given by fax, did not take account of the prevailing legal practice in most Member States—which in fact differs from the German practice.[57]

In reviewing the implementation of European law, one might also first distinguish with greater exactitude the practical impact of Member State law on the internal market. One should separate from this the questions of interpreting and concretising general clauses, vague legal concepts in European law and the link between specifically European law and the general law and legal principles of Member States[58]: here, much greater account should be taken of the need to make European law fit the infrastructure of social conventions, expectations and practice in Member States. In this respect Member States should be given more leeway in the design of the framework for coordination of European and domestic law. This idea

[55] Lindseth, above, fn 34.
[56] Markesinis, above, fn 30.
[57] Flessner, above fn 6.
[58] Schmid, above fn 4.

does not go back to 'cultural identity' but rather to the possibilities and costs of learning, and the distribution of requirements to change into practices that have become more complex and have also to be re-introduced into the interpretation.

Traditional 'conflict of laws' of different States in international private law impose on private parties or courts the requirement to make a choice. In European law a new approach to a kind of cooperation and coordination of laws is required. It cannot be reduced to a problem of legal homogeneity which has to be imposed on Member States.

4. TOWARDS A LEGAL METHOD WHICH COPES WITH DIVERSITY

4.1. New Types of Knowledge—New Forms of Law

Classical liberal law stressed the unity of the legal system, and, to this day, this perspective continues to guide methods and practical interpretive approaches in developing the law. It should, however, be noted here that modern liberal law itself has brought about a de-localisation of law, thereby also exposing the narrower local customary laws to a test for their generalisability as 'rules of commerce', and as as a shared stock of knowledge for a broader market. The learning process that this has fostered[59] has both put the law under practical pressure to innovate and opened it up to new knowledge, new legal references, and new co-ordinating patterns which go beyond traditional legal practices: the development of liberal law above all set in motion a process of searching for new spontaneous organisational patterns and produced new general conventions, as well as stimulating new knowledge. It is not to be expected that such an evolution can also be repeated at European level in the same way. Though one should not forget about the 'revolutionary' traditions of continental law which might be revitalised for a much more complex process of legal integration taking place at different levels and between different 'poles' of the European system.

The law's new evolutionary step is, however, much more determined by reflexive processes of private self-organisation that do not always operate in straight lines. This evolution can neither be steered top-down by abstract European rules nor can this new transformation process be concentrated at the European level, as then the possibility of learning in practical knowledge-generating relational networks would get lost. The enhancement of the flexibility of markets cannot come about following the same pattern as the transition to classical liberal law.

This is, for instance, reflected at the level of the European institutions in the comitology procedure, which was introduced for the harmonisation of

[59] ER May, 'The Evolving Scope of Government', in Nye et al (eds), above, fn 36, p 21.

European standards: building up risk knowledge in line with practice for firms, consumers and the state itself cannot simply be left to a spontaneous process of building up experience nor be imposed by legal rules alone.

Here, one must also bear in mind that the generation of new knowledge through technical procedures did not come about without state involvement in the nineteenth century either. In Germany in particular, it was the state that first began the self-organisation of private expertise in technology, building construction, etc.[60] whereas it did not impose abstract legal rules on the private sector. *A fortiori,* in conditions of enhanced complexity, such processes cannot fully be transferred into explicit standards at the institutionalised European level. This is only possible once a legally structured learning process has been set in motion. This suggests the more realistic assumption that the social and national infrastructure of the European legal system must be used systematically as an autonomous component of the self-organisation and self-coordination of action patterns, practices, conventions, administrative routines, etc, since no functional equivalent for this can exist at European level.

4.2. European Law as an Overlapping Network of Incomplete Harmonised Law Making Processes

This is the background to the assumption that the European legal system will constitute an overlapping network of incompletely harmonised law-making processes both in private and public law, and that this will not just be transitionally: this is true, for instance, of standards applying alongside each other within a range of fluctuation, which can only be made compatible through abstract meta-rules (substantive minimum standards, procedural informational duties, etc). This is also the basis for the assumption of the possibility of a competition of rules and institutions[61] which operate with differing practical hypotheses and then develop a path dependency that makes it seem productive not to look for a single rule, since the costs of this would be far too high. For firms too, relearning the adoption of new standards could be so costly that even the unambiguous advantages of the new unitary law would necessarily lose weight.

For consumers, the advantage of a unitary legal system might be small in comparison to its costs for firms, which would, after all ultimately be

[60] Cf for the development of the relationship between law and technological expertise R Wolf, *Der Stand der Technik*, (Opladen, Westdeutscher Verlag, 1986) for the distribution of technical knowledge in construction law R Strecke, *Anfänge und Innovation der Preußischen Bauverwaltung*, 2nd ed, (Köln, Böhlau, 2002).

[61] Cf EM Kieninger, *Wettbewerb der Privatrechtsordnungen im europäischen Binnenmarkt*, (Tübingen, Mohr, 2002) and the contributions in: C Ott & HB Schäfer (eds), *Vereinheitlichung and Diversität des Zivilrechts in transnationalen Wirtschaftsräumen*, (Tübingen, Mohr, 2002).

passed on to them. This notion has long since entered the practice of harmonisation of law in the EU: since the ECJ's *Cassis de Dijon* judgment in particular,[62] it is this flexible method of mutual recognition that has mainly been employed in harmonisation. This is also helped by the 'country of origin principle'[63] (for instance, in the E-commerce Directive), which, in the same way, is ultimately based on considerations of sharing the costs of learning: for firms, particularly small firms, the problem of having to comply with the private law in force in each other Member State when going into that Member State's market would be difficult to overcome.[64]

A solution which accepts greater diversity should not be seen as just a transitional 'second best'. Instead, it is much more important to accept the multi-polarity of the European legal system itself, which, in turn cannot find expression in a hierarchically graded system. To this extent, as demonstrated above, the comparison with a federal state model would be misleading: between European and national institutionalised law, and the social infrastructure of standards, empirical knowledge, expectations, public and private action patterns etc, a strategic co-operative relationship has to be aimed at.[65] This might be taken account of, for instance, in the methodological distinction between legal disputes concerning the compatibility of specific Member State law with specific EU law on the one hand,[66] and various patterns of co-ordination the application of general clauses and principles of domestic law on the other hand.[67]

4.3. The Example of 'Diagonal Conflict' of Laws

The assumption mentioned above does not exclude the development of European guiding principles for the coordination of court practices in domains in which a process of mutual adjustments of may be necessary for the integration of a European market, such as the 'consumer model' (active/passive-information oriented) etc.[68]

The complexity of the multi-polar legal system of the EU can also be demonstrated with reference to the emergence of a new type of

[62] Cf the Cassis de Dijon-Case, *ECJ Rep* 1979, 649; cf generally HP Schwintowski, 'Auf dem Wege zu einem Europäischen Zivilgesetzbuch', *Juristenzeitung* 2002, 205.
[63] Cf for the country of origin principle in internet commerce A Thünken, 'Multi-State Jurisdiction over the Internet', *International and Comparative Law Review* 2002, 909.
[64] Generally Roth, above, fn 28.
[65] Cf KH Ladeur, 'Flexibility and Cooperative Law: The Coordination of Member States' Laws—the Example of Environmental Law', in: G De Búrca & J Scott (eds), *Constitutional Change in the EU: From Uniformity to Flexibility?*, (Oxford 2000), p 281ss.
[66] Cf Also for the methodological question of an integration of European and domestic law through homogeneous interpretation G Betlem, 'The Doctrine of consistent Interpretation—Managing Legal Uncertainty', *Oxford Journal of Legal Studies* 2002, 397.
[67] Roth, above, fn 28.
[68] For administrative law the authors quoted above fn 34.

'conflict of laws', so-called 'diagonal conflicts', where principles of seemingly unrelated legal norms overlap and conflict with one another in concrete cases. The latter is true, for instance, in the relationship between European anti-trust law and Member State broadcasting regulatory law. The regulatory law assumes that the media economy is subject to special rules which protect diversity of content. By contrast, anti-trust law takes media content to be a product like anything else, while on the other hand for instance market power becomes a problem even when exercised by public broadcasting on the basis of a special content-related link.

The latter problem arises in federal states as well and is dealt with in Germany through a presumption in favour of the more specific norm. By contrast, anti-trust law is often seen in the EU as a guiding norm, as a kind of an economic *constitutional norm*. This gives rise to a conflict which is not easy to solve but has, at least primarily, to be made methodologically transparent. One might think of a certain priority to be attributed to Member State law eg in cultural domains, whereas in the field of economy (for instance in the case of the 'consumer model') this might be seen the other way round.

The examples show that there is a need for new systematic methodical meta-rules which are both able to guide and control the interpretation of European law.[69] As in the comparative-law literature, one can also see here an under-development of theoretical thinking about European law.

Primarily, the point at issue here is not one of respect for Europe's 'cultural plurality'. This would not go far enough; it would again mean unquestioning respect for tradition. Instead, the point is to observe legal development itself, which no longer gives the idea of unity to/with the same central position as in the past. The peculiarities of the European multi-polar legal system enhance the trend towards plurality of the legal system but, in principle, do not bring anything new to legal development. If this is accepted, a new prospect opens up for the possibility of European legal development much better adapting itself to the self-transformation of law, which may be usable in the search for meta-rules for a co-operative law.

Among these rules, we might, for instance, find explicit recognition of the possibilty of experimenting with differing rules: parallel existence of differing national rules might, on condition that observation and monitoring duties were complied with, be both permitted and accepted if losses caused by pluralism were demonstrably compensated by corresponding 'gains'. Conversely, dysfunctional developments for the internal market should have a stronger weight in interpretation.[70] Often, the cost-benefit consideration is no more than fiction, since the existing barriers to the internal

[69] Kötz, above, fn 1; Ewald, above, fn 41.
[70] Roth, above, fn 28.

market are already so high that additional marginal regulatory costs hardly count (for instance, language in culture: broadcasting, books, etc).[71]

Similarly, one might think of compensation of the cost of legal harmonisation through other advantages: unequal adjustment and learning costs in administrative law will, for instance, not significantly affect the relocation of firms in view of other cost factors, whereas sizeable product-related cost fluctuations might on the other hand have more far-reaching consequences. In practice, this means that, when interpreting national and European law and in developing co-ordination rules, the permeability of law to the observation of the interests of other Member States must be upheld in/when concretising such concepts as a European 'public interest'. Consequently, this requires a balance of competing interests in a trans-national perspective that considers the pluralised public interests.

4.4. The ECJ and its Strategic Use of Subjective Rights

In methodological terms, this should be distinguished from the question of the conformity of national legal norms and European law in the stricter sense. The types of collision and incompatibility mentioned above should be distinguished and dealt with by specific rules. Such interpretive rules have in fact already spontaneously developed in the ECJ's case-law, and could be incorporated in building up a set of cooperative methods and principles of European law. Thus, the ECJ has consolidated the ability of the individual to bring actions in administrative proceedings,[72] thereby simultaneously consolidating the impact of European law on domestic law. Here, the construction of subjective rights is utilised to improve the co-ordination of overlapping legal areas (national/European law). The case of the infringement of a national norm which implements a European directive might not be brought to court in countries in which this is only possible where citizens can invoke a subjective 'right' (eg to environmental protection of property, but not to protection of the environment as such).

The ECJ has also developed a more subtle approach to enhancing the procedural elements of public law[73]: the requirements to give reasons and to include the public in national administrative procedures make the importance of procedural law in Europeanising the legal system in Europe lie, first and foremost, in making transparent both the interests taken into account in national administrative law and the balancing of them.

[71] KH Ladeur, 'Die Kooperation von europäischem Kartellrecht und mitgliedstaatlichem Rundfunkrecht', *Wirtschaft und Wettbewerb* 2000, 965; cf generally KH Ladeur, 'European Media Law: A Perspective on the Challenge of Multimedia', in: F Snyder (ed), *The Europeanization of Law*, (Oxford, Hart Publishing, 2000), p 101.
[72] BW Wegener, *Die Interessentenklage im europäischen Umweltrecht*, (Baden-Baden, Nomos, 1998).
[73] Jacobs, above, fn 3.

In a national context one can, and indeed *must*, entrust the definition of the public interest primarily to the administration, building on control mechanisms other but than legal ones. In the European multi-polar system, however, it is far from obvious that European interests play a sufficiently large role here. It is only through requirements on the obligation to give reasons that it becomes at all apparent whether and how decisional practice at national level is considered and can be adapted to a transnational perspective. Procedure may be used—also in a methodological perspective—to break down the barriers of the national decision making systems with the intention of according a greater priority to European integration.

Only in this way can European legal systems become permeable to each other, and only in this way can there be mutual learning from the different practical approaches. This means that interpreting European law is largely dependent on progress in comparative law, and may set in motion a 'dialogue' between legal systems.[74] Above all, EU-specific methodological rules might start by taking into account the pluralisation of public interests in the administrative procedures of Member into account. In administrative law the point is also systematically to go beyond normative harmonisation and its control in court practice in order to provide incentives for the self co-ordination of the administration through informal procedural rules (*eg*, rules of technique) which are able to effect more than a superficial involvement of the European courts is able to, with consequences that are hard to access in complex administrative practices.

4.5. The Example of Consumer Protection in the Integration Process

In private law, the change in the image of the consumer from the ECJ's case law (particularly in the area of advertising) cannot simply be reduced to a decision on the conception of consumer protection. This development of the case law is connected with the fact that the image of the consumer being strongly oriented to the idea of protection can become a considerable market barrier to supplies from other Member States. The point at issue here is the sharing of the cost of learning, which the consumer can be better expected to put up with than firms. For small and medium-sized firms, the requirement to adapt the offer to the requirements of 15 different legal systems, say in competition law, can scarcely be satisfied. The country-of-origin principle, according to which each firm 'takes along' its own competition law to other markets, has now entered the E-Commerce Directive. However, the underlying legal idea of facilitating market entry has also been taken into account in interpreting non-harmonised law, especially where implementing EU law needs support action from general national law.

[74] Kötz, above, fn 3; Sacco, above, fn 3.

Here, it is not just the restriction on consumer protection that is taken into account, for which the E-Commerce Directive, for instance, makes a reservation in respect of the regulations of the Member States. Varying standards of consumer protection may also become a competitive advantage where the consumer becomes more active and compares offers more attentively. He will be encouraged to do so by the possibility of selecting from among the products of various countries.

In a Belgo-Luxembourg case, the ECJ[75] has considered the peculiarities of a transnational overlapping of markets and advertising practices in the Belgo-Luxembourg border area, which had become an everyday matter for consumers: where consumers regularly cross the border to shop, advertising transported from the neighbouring country into theirs will be met with less rigid expectations oriented to their own traditions.

Correspondingly, the need for protection and thus the interest in applying the severe protective standard of one's own country becomes smaller. Individuals become accustomed to handling new information, legal forms and contexts. This might lead to a further meta-rule for determining the relation between unity and plurality in the multi-polar European legal system: the various national legal and administrative systems must specifically develop more transparency, but then the cost of learning must be more precisely determined and included in the conception for harmonising Member State and European law.

Plurality is something hard to cope with for courts, so the need would be to develop a broader European objective of guaranteeing the permeability of the domestic legal systems towards the supranational and transnational influences.[76] Just as purposive considerations (beyond the interest in reconstructing the will of the legislator) were in the past brought into the law's understanding by using teleological interpretation, the overlapping 'network effects' that interpretation of national law in the multi-polar legal system may bring will have to be taken into account now. For citizens, this also means that they will increasingly have to adapt to handling overlapping legal systems.[77] This cannot be regarded as *a priori* incompatible with the idea of consumer protection or with the protection of legitimate expectations, eg in cases of unlawful subsidies. The ideas of public interest and the rule of law are undergoing a process of transformation within the open network of European law: the competition and coordination of legal practices will in the long run benefit all citizens.

Such flexible forms of co-ordination can, at the same time, have a mitigating effect on the requirements to make the European legal system unitary.

[75] Cf *ECJ Rep* 1990, I–667; M Poiares Maduro, 'Reforming the Market or the State? Art 30 and the European Constitution: Economic Freedom and Political Rights', *European Law Journal* 1997, 55.
[76] Kötz, above, fn 3.
[77] Thünken, above, fn 63.

Competition among differing rules will be allowed. This is also the rationale of general rules and principles, interpretations etc for the strategies of cooperation in an open approach to European law. The productivity of such a conception may be demonstrated with reference to the '*effet utile*'[78] that any given national legal system has not only to implement European law but to open up the whole of its legal system including general rules, principles, etc for a strategy of cooperation. Europe can afford much more plurality if the range of fluctuation of possibilities is controlled by a set of meta-rules which focus on observing the costs of both plurality and unity of law for the internal market. However, this is only possible where methodologies are disposed to taking network effects into account. In developing meta-rules related to Europe, one also has to consider the fact that 'European Law' is often more of a reformulated legal model of a single European Member State or that, at any rate, it arose in the context of one and was then transplanted into other legal systems.[79] This would also mean that more account would be taken of the autonomy of the response of national legal systems to such 'irritations'[80] in a network of overlapping legal orders.

5. AN EXAMPLE FROM ENVIRONMENTAL LAW

5.1. The Co-ordination of General Administrative Law and Specific European Environmental Law: an Example of 'Diagonal Conflicts' and its Productive Resolution

Environmental law may serve as an example of a productive form of co-operation of European law and Member State law in the EC multi-polar legal system and may in turn help to illustrate what an 'open method of co-ordination' in Europe could be like.

The acceptance of a distinction between general norms and specific regulations is of decisive importance for the viewpoint that has been taken here of the linkage between specific European (environmental) law and general national administrative law.[81] The various procedural and decisional conceptions (openly or implicitly referred to) which constitute the conceptual infrastructure of a European norm should be distinguished from the special

[78] KH Ladeur & R Prelle, 'Judicial Control of Administrative Procedure Mistakes in Germany—A Comparative European View of Environmental Impact Assessments', in: Ladeur (ed), above, fn 34, p 93ff.
[79] Teubner, above, fn 31.
[80] Teubner, above, fn 31.
[81] Cf on the method S Kadelbach, *Allgemeines Verwaltungsrecht unter europäischem Einfluss*, (Tübingen, Mohr, 1996), p 114ss, 276ss; CD Classen, *Die Europäisierung der Verwaltungsgerichtsbarkeit*, (Tübingen, Mohr, 1996); Th von Danwitz, *Verwaltungsrechtliches System und europäische Integration*, (Tübingen, Mohr, 1996), p 334ss.

regulation itself. No regulation of specific administrative law can do without a conception of the implementation in the procedures and decisions that must be supplied by the general administrative law. There is a need for a specific European method of linking Member State and European law, and this cannot be reduced to requirements relating to the implementation of the specific legal rules. Since there is no unitary administrative law in Europe, we must necessarily expect the conflicts of law—broadly termed as 'diagonal conflicts' in the literature[82]—that arise alongside the problems of the conflicts to be coped with through interpretation in conformity with directives or Community law.

When applied to the individual case, European law must make use of the respective general administrative law (or also civil law!) of the Member States. European law is, therefore, dependant on national law.[83] Even if EC law must make presumptions about the effects of general administrative law with regard to the existence and performance capacity of particular national institutions (administrative act, general legal rule, margin of assessment, discretion, review through the administrative courts, *etc*), it does not have the competence to establish any binding framework with regard to general administrative law and administrative procedural law (except for its own administration).

This creates a problem, specific European law and general administrative law will not always be compatible. In order to overcome this situation, the ECJ has developed a general requirement to guarantee '*effet utile*': the general administrative law of Member States must support the practical effectiveness of specific EC law, though without being bound to the utilisation of particular institutions. This seems entirely appropriate, but the concept seems so vaguely shaped that the claimed respect for the procedural autonomy of Member States can *de facto* be undermined. This is because an adjustment constraint arises from specific expectations of the European law concerning co-operation efforts by general national administrative law and, even more than the trend towards uniformisation in a federal state, it might call the balance within the EC multi-level system into question.[84] Lack of precision about the underlying goals of the '*effet utile*' case law can also bring a lack of clarity to national general administrative law which is questionable in terms of rule of law; national law that is incompatible with it can be reduced to an empty shell in decision-making procedures that have

[82] Cf C Joerges, The Europeanisation of Private Law as a Rationalisation Process and as a Contest of Disciplines, *European Review of Private Law* 1995, 178ss; for public law KH Ladeur, above, fn 64.

[83] For a critique cf E Schmidt-Assmann, 'Allgemeines Verwaltungsrecht in europäischer Perspektive', *Zeitschrift für öffentliches Recht* 2000, 159ss.

[84] Von Danwitz, above n 81, p 144; R Wahl, 'Die zweite Phase des öffentlichen Rechts in Deutschland—Die Europäisierung des öffentlichen Rechts in Deutschland', *Der Staat* 1999, 495, 517.

reference to European law.[85] The examples of environmental-impact assessment and Integrated Pollution Prevention and Control (IPPC) clearly show that even the specific EC law in each case is ultimately based on the adoption of particular 'legal transplants' from Member States,[86] which must accordingly involve an examination of the experience that has been gained in the 'exporting' Member State. In principle, the first question is whether—and to what extent—the specific European norm is linked to and shaped by the general administrative law of the Member State and its institutional infrastructure. A second reflection should try to limit far-reaching effects of this 'implicit' presupposition on the legal systems of other Member States.

Another question is whether the presupposed practice of the institutions of a particular European legal tradition (continental, common law etc)—which have possibly been taken as a model in formulating a directive—might find a functionally equivalent effectiveness in the legal system of other Member States: eg there may be a trade-off between intense judicial control and limited access to court or the value attributed to procedural norms. Only when there is a negative in the answer must one consider the adjustment efforts that the Member State should make in the interests of '*effet utile*'. Here, one must ask whether the functional weakness of the given system of administrative law could be compensated by a strength elsewhere. Conversely, could the advantages of a legal system that is used as a model for a European directive be balanced by functional weakness at another point, consequently leading to a reduction of the requirements of cooperation in view of the 'effet utile' guaranteed by the legal system? This is all the more important as systems of administrative law and their 'ordering idea' are based on decades of experience. Ignoring their history might have considerable, unintended, negative consequences.

5.2. The Example of the Integrative Pollution Prevention and Control

The concept of 'Integrative Pollution Prevention and Control' (IPPC) provides an example. The requirements resulting from the relevant Directive regarding the integrative evaluation and control of environmental pollution in the procedure for granting permits are anything but obvious. A case-related integration concept could, for instance, fairly easily be kept compatible with French or British administrative law on the basis of the administration's broad factual discretion which need not be superior to a model that proceeds more strictly according to general standards. In the individual case

[85] Cf ECJ, *ECR* 1999, I 2517ss.
[86] R Breuer, Konditionale und finale Rechtsetzung, *Archiv des öffentlichen Rechts* 127 (2002), p 523, 556.

of overcoming a heterogeneous pollution situation, this tends to use an opening clause rather than dispense entirely with the advantages of a legally-controlled and binding decision. The advantage in having the flexibility of a situationally integrated decision might be balanced by both a lack of transparency[87] and a lack of control over the authorities' exercise of their factual discretion. The fact that the British model can guarantee a certain regularity is combined with the orientation to the individual case only on the basis of methodological rationalisation through cost-benefit analysis. This distinguishes the situation from German law which focuses more strongly on rule-based control of the administration. The ends of a more rigid norm-based instead of a broader flexible approach to environmental decision making may be attributed less weight where one bears in mind that the British approach to methodical stabilisation (cost-benefit-analysis in particular) has in practice hardly ever succeeded.

If the European law calls for a comprehensive situational balance between various levels of pollution, the logic of a rule-bound application of the law could be called into question. But this does not seem acceptable in itself.[88] This would leave decision-making authority within the discretionary competence of the environmental administration. The trade-off for greater flexibility that can compensate for the contradictions among differing norm requirements in the relevant areas of environmental law concerned is loss both of control and of legal—and especially judicial—review. This cannot create an efficient environmental policy. For this very reason, the decision required by the IPPC Directive in accordance with the 'best available techniques' is important, though it can certainly not be equated with the more strongly generalising concept of the 'state-of-the-art' in the German law. The German formula ultimately refers back to the British formula of adopting the 'best practicable environmental option'; it could previously only be partly operationalised through the setting up of an 'integrated environmental index'.[89] These problems are related to the complexity of a cost-benefit analysis; all of this can be a thoroughly respectable method (and is much discussed in the US), but it still has to prove its performance capacity in detail. At the end of the day, both approaches do have their pros and cons themselves and should be tried out and be monitored with a view to their potential effects. However, this divergence should not be overcome by far reaching expectations with respect to the 'effet utile' which the

[87] (Advocate) General FG Jacobs, above, fn 3, 232ss, 239, who in relation to British law feels that European Law requires 'more explicit weighing of interests' in administrative procedures; from a German perspective on British law. Breuer, above, fn 86, 553.

[88] G Lübbe-Wolff, 'Integrierter Umweltschutz—Brauchen die Behörden mehr Flexibilität?', *Natur und Recht* 1999, 241ss; M Schmidt-Preuß, 'Integrierte Anforderungen an das Verfahren der Vorhabenzulassung—Anwendung und Umsetzung der IVU–RL', *Neue Zeitschrift für Verwaltungsrecht* 2000, 252ss; Breuer, above, fn 84, formulates a plea for more respect of domestic systems of administrative law.

[89] Lübbe-Wolff, *ibid*.

domestic legal systems have to bring about: there will almost always be even a plurality of 'effets utiles'!

The problems of linking new European legal forms with Member States' procedural conceptions and the 'ordering idea' of their administrative law can also be demonstrated with regard to environmental impact assessment. The ECJ seeks to solve these conflicts in individual cases between specific European law and national general administrative law again by requiring a guarantee of '*effet utile*' for the respective European law. It considers the Member States as being obliged to provide a productive infrastructure in the form of a national general administrative law that is able to guarantee the practicability of the European legal norms. The requirement for a practical 'effectiveness' of national general administrative law that reaches into general administrative law is in turn limited by the proportionality principle, as discussed in an article by Grainne de Búrca and Áine Ryall.[90] This may be successful from case to case, but a methodologically consistent orientation cannot be achieved in this way. Such an orientation can, however, be provided by a closer look at the general administrative law underlying the respective national specific administrative laws. Here again a comprehensive approach is required which would be focused on the design of a new paradigm for an open strategy of co-operation of Member States and the EU in a multi-polar legal system. Over and above the individual case, a doctrinal ordering structure in the form of construction rules is needed. R Breuer develops an approach to such a coordination also with respect the implementation of European law whose specificity should not just be overruled but laid open in separate domestic and more flexible 'goal-oriented' elements of European law which might allow for a mitigation of domestic rules.[91] Whether this can be regarded as a realistic strategy remains to be seen; the idea as such should be welcome.

6. TOWARDS A CONCEPTION OF PRACTICAL LEGAL COMPARISON AND THE 'COMPETITION OF RULES'

The (limited) comparison between the German and British approaches to pollution control confirms that Europe hosts differing regulatory models which operate with differing optimisation strategies. These models are part of the 'general administrative law' or 'general environmental administrative law', on which European law can act only to a very limited extent. This limit on European law is not one that is to be merely tolerated. It is—as the very comparison between regulatory strategies in Germany and Britain shows—a potential strength of a multi-level European system that does not

[90] G De Búrca & A Ryall, 'The ECJ and the Judicial Review of National Administrative Procedure in the Field of EIA', in Ladeur, above, fn 34, 145ss.
[91] Breuer, above, fn 86, 567.

overestimate the advantages of a unitary legal order. The optimisation problems in the German and British laws might shed new light on the value of competition between legal systems[92] which allows the various models to contend with and rely upon the possibility of mutual learning in a co-operative system. This simultaneously introduces a component of transnational co-operation and harmonisation of the legal systems of Member States which can exist alongside the tension between supranational and national law, in accordance with the EC 'Association of States' (which is not a state itself).

In environmental law the European IPPC office in Seville, where the BAT (Best Available Technology) leaflets are to be produced, could make an important contribution to this development if it does not exaggerate the differences in the methodical approaches but instead makes use of them and encourages the testing of different strategies. It might, therefore, be stimulating for German law to look at the performance capacity of the cost-benefit analysis method and to combine it in part with a method of setting prescriptive standards of conduct. Conversely, it might be stimulating for other Member States to look at the advantages of normative control through standards bought at the expense of a certain lack of flexibility. However, an over-hasty recourse to a case-related 'integrative approach' might prove to be a Pyrrhic victory in environmental protection if the institutional experiences regarding the 'ordering idea' of general administrative law in the European States are ignored. In this way, hybrid legal formations which are more oriented towards realising good but vague intentions than to enhancing the performance capacity of the administrative legal systems could emerge.

This demonstrates a need for specific methodical rules that will bridge the gap between the specific (environmental) law of Europe and the general administrative laws of the various Member States. This link must focus on a co-operative transnational conception of learning and mutual observation. The requirements for co-operation among the European administrations must be raised through a correspondingly polycentric model of a co-operative administrative law with a supplementary transnational 'ordering idea'. It is important to limit the binding effect of directives beyond the sphere of the specific regulatory intention in each case (for example, by implementing a flexible approach that integrates formerly disparate areas of pollution regulation). It would be a mistake for all these directives to impact on conceptual questions of general administrative law without first reflecting systematically on the consequences for both the general administrative law of the Member States and the effective implementation of European law. The recent tendency of European legislation towards more and more detailed

[92] R Wahl, 'Materiell-integrative Anforderungen an die Vorhabenzulassung—Anwendung und Umsetzung der IVU–Richtlinie', *Neue Zeitschrift für Verwaltungsrecht* 2000, 502, 507.

directives should be compensated by a more open methodological approach towards a network-like conception of the different national, transnational and supra-national relationships within the European multi-polar legal system. Such a conception could also contribute to a more realistic idea of the principle of subsidiarity which seemingly presupposes the separability of well-defined levels of national and supra-national law-making. Instead, the perspective of this article would rather take a more differentiated look at the coordination of legal systems and develop rules for the management of overlapping systems without a clear centre.

7. ON THE IMPORTANCE OF PROCEDURAL LAW FOR THE EMERGENCE OF AN 'ORDERING IDEA' OF EUROPEANISED ADMINISTRATIVE LAW

In this way a new perspective of the results of administrative procedural law can also be developed. The German debate has frequently contained descriptions of the ECJ's attempt to strengthen Europeanised procedural law (expansion of subjective rights, general enhancement of procedural law, *etc*) in order to turn the individual citizen into a 'functionary' for the monitoring of the European law.[93] The implications of these observations have often been critical, and might have been an important motive for the ECJ. But the stress on procedural law could be interpreted in another way. Member States act autonomously when creating and developing the general administrative law infrastructure on which specific European laws rest in each jurisdiction, so it seems entirely consistent that the procedural law is expected to be more 'rational' than usual in relation to the effectiveness of specific European administrative laws. This helps to guarantee its implementation in a practical sense. It also has more far-reaching effects for the process of integrating European law as a whole; this is a process that requires greater transparency so that both Europe and its Member States can work towards achieving a co-operative transnational administrative law through a pattern of mutual learning.

Enhancing procedural law would seem to be a goal that is thoroughly compatible with those of the various national administrative legal systems. Such an approach would have the effect of enabling 'autonomy' for different models of administrative procedures to be used in the competition of legal systems in the process of Europeanisation. Against the specific background of the differing decision-making models in Germany and Britain eg, a strengthening of the procedural idea could bring transparency for the process

[93] Cf CD Classen, 'Der Einzelne als Instrument der Durchsetzung des Gemeinschaftsrechts?', *Verwaltungsarchiv* 1997, 654ss; see also F Schoch and G Winter, 'Individualrechtsschutz im Umweltrecht unter dem Einfluss des Gemeinschaftsrechts', *Neue Zeitschrift für Verwaltungsrecht* 1999, 457ss and 467ss; for the French approach see Breuer, above, fn 86, 542s.

of monitoring and evaluating different strategies of environmental-impact assessment. It could also bring transparency for the implementation of the IPPC Directive which would allow an estimate of whether, and to what degree, the various decision-making models are functionally equivalent in their legitimate claims to guarantee 'integrated environment protection' despite using different instruments. The different approaches towards legal 'steering' of administration or a model of more autonomous administrative decision-making must first of all be taken into account.[94]

Debates in Germany and other EC Member States show that more stringent requirements on procedural rationality are also optimal for the maintenance of the specific rationality of the relevant 'ordering idea' of general administrative law.[95] Indeed, they could bring a 'modernising impetus' that would facilitate adjustment to more complex decision-making situations. A gain in rationalisation might also be achieved for Europeanised law by the introduction of self-evaluation of European norms (the German Federal Constitutional Court[96] has imposed duties of subsequent analysis and evaluation of legal strategies in some cases of law-making in conditions of uncertainty). In this way the search for, and testing of, decision-making models for conditions of uncertainty can replace or supplement the supranational monitoring of the national implementation of European law itself. This is the ultimate goal, as cases involving simple administrative procedures regarding relatively certain factual bases and problems of harmonising European (specific) and national (general) administrative law will be rare. This co-operative understanding of law accords with the precept of recognising 'diagonal conflicts' because it respects the procedural autonomy of Member States. It is also an attempt by both European law and the various national general administrative legal systems to mobilise the competition between legal systems within a transnational perspective.

A strongly normative system of administrative law oriented towards the control function of legislation (as is the German one[97]) must abandon a few myths about the function of court control being rights-based.[98] It must also devote greater attention to the rationality of administrative procedure with a view to the creative elements of decision-making. This makes the law more permeable to the autonomy of the procedural idea: procedure then takes on more than an auxiliary function in the 'proper' application of the law. To some extent, the accentuation of procedural law has different effects in the various national legal systems: in Germany it is associated with a shift towards recognising the creative administrative functions

[94] Breuer, above, fn 86, 556.
[95] Cf E Schmidt-Assmann, *Die Ordnungsidee des allgemeinen Verwaltungsrechts*, (Berlin, Spriger, 1998).
[96] Bundesverfassungsgericht Reports 50, 390, 374.
[97] Breuer, above, fn 86, 531ss.
[98] Cf only von Danwitz, above, fn 81.

(at the expense of a one-sided conception of substantive legal binding), whereas the room for administrative discretion in France and Britain might create the opposite effect of creating a procedural *law* that would be more binding than before). The introduction of Integrated Pollution Prevention and Control (IPPC) in Britain is claimed to have had just this effect. Carol Harlow[99] points to the historical reasons for the high level of trust in the British administration and its expertise.)

A similar difficulty arises with the IPPC Directive[100]: its implementation problems cannot be attributed simply to the effects of foreign 'transplants' into German administrative law.[101] The requirement to 'account' in a permit procedure for differing impacts on the environment must ultimately lead to the abandonment of the fiction of strict binding by law (of the one right decision) in the procedure. This does not mean that the doors are now wide open to administrative arbitrariness. The margins for decision can and must be better shaped according to the type and level of decision, and this would be the alternative to a case-by-case system of recognition of 'exceptional cases'. Then, the administration's discretion could be easily limited to a very narrow corridor (in permit proceedings, for example); but this is also necessary in order to adapt the philosophy of administrative law better to the requirements of complex administrative decisions that can no longer be 'subsumed' under a legal norm. However this coordination can only be brought about in a productive way if the legal systems of Member States are given more autonomy and if the concept of the 'effet utile' which the national legal system has to provide is not used in order to overrule the specificities of Member State law.

8. OUTLOOK

The Example of environmental law should at least have demonstrated the potential contribution of a legal method which is fine-tuned to the multipolar system of European law. Methods of both international- and state-based law have accepted the diversity of legal norms.[102] The unity of a legal system can no longer be a meaningful concept in European law once the conception of the sovereign state and its will as its basis have crumbled. The new European methodology of law should instead refer to a network-like open structure of law which could cope with the challenge of a new dynamic of a rapidly changing society in all European countries. It could accept its role as a tool of management of diversity.

[99] Cf C Harlow, 'Proceduralism in English Law', in: Ladeur (ed), above, fn 34, p 46ss; from a comparative perspective Breuer, above, fn 86, 553.
[100] Cf KH Ladeur, 'Integrierter Umweltschutz im Genehmigungsverfahren', *Zeitschrift für Umweltrecht* 1998, 245ss.
[101] Breuer, above, fn 86, 556.
[102] Breuer, above, fn 86, 556, 567.

7

Comparative Law of Obligations: Methodology and Epistemology

CHRISTIAN VON BAR

1. INTRODUCTION

'COMPARATIVE LAW OF Obligations—Methodology and Epistemology'—the organisers of this conference have assigned a difficult subject to me, and I am far from sure whether with the following observations I will meet their expectations. I start from the proposition that the expression 'law of obligations' covers contract law, tort law, unjustified enrichment law and what we in continental Europe call negotiorum gestio, ie benevolent intervention in another's affairs. General contract law has been the subject matter of the Commission on European Contract Law[1] of which I am a member, and the three extra-contractual obligations that I have just mentioned are the concern of our Osnabrück Permanent Working Team which in turn forms part of the Study Group on a European Civil Code.[2] Later on I will therefore come back to the aims of these two groups. They focus on European Private Law which in my mind should be understood as a new discipline, fairly clearly distinguishable from general comparative law.

A second point to be made right from the outset concerns the question of whether or not there is a universal concept of comparative law.[3] I very much doubt it. A comparative law based analysis normally serves a specific purpose, and as there are many different purposes of comparative research there are nearly as many possible methods. Furthermore, comparative law is not the same when applied by academics, by courts or by advisors to a

[1] O Lando & H Beale (eds), *Principles of European Contract Law. Parts I and II* (Kluwer Law International The Hague 2000).
[2] See on this research project eg von Bar, 'Le Groupe d'Études sur un Code Civil Européen', *Revue Internationale de Droit Comparé* 2001, 127–39.
[3] See on this K Zweigert, 'Rechtsvergleichung als universale Interpretationsmethode', *RabelsZ* 15 (1949/50) 5–21.

parliamentary committee or by a ministry of justice involved in drafting a new statute. Comparative law is not even the same in a small country as compared to a big country. In the United States for example comparative law is not a very popular subject. In their own estimation the United States is the leading country in the world. So why look around? They sometimes remind me of the attitude of the Romans two thousand years ago. True, they already had the concept of *jus gentium* which they described as being law everywhere in the then known world. But lawyers in classical Roman times never actually conducted any concrete comparative research; they simply decided themselves what was law in every jurisdiction![4] In the US, by the way, there is no good reason either simply to go for the laws of the neighbouring countries. I have never seen a comparative US-research based on the laws of Mexico, the various Canadian provinces, Russia and Greenland! In jurisdictions like the ones of Belgium and the Netherlands the situation is of course completely different. Having the same Civil Code as France, Belgian judges and lawyers are virtually forced to observe the developments in France, sometimes resulting, however, in the strong will to keep one's distance. *Gardien*-liability is a famous example from tort law,[5] the *convention d'assistance* another one on the borderline between contract law and *negotiorum gestio*.[6] In other areas of the law of obligations, however, rather difficult and, if I may say so, doubtful French solutions based on principles which are not to be found in the Code Napoléon have been accepted in Belgium as well. The principle of subsidiarity governing *enrichissement sans cause* is an example of this.[7]

2. COURTS

In general one can say that courts rather rarely make use of comparative law based arguments. One reason for that may be that they still regard themselves as instruments of national sovereignty, but I doubt it that, within

[4] See further von Bar, *Internationales Privatrecht I* (Beck: München 1987), nos 30–4 (pp 23–8).
[5] Belgian courts apply a much more restricted regime of strict liability than French courts under Art 1384 (1) Cc, cf von Bar, *The Common European Law of Torts I* (Oxford University Press 1998), nos 113–4 (pp 132–4).
[6] Belgian courts do not recognise the French concept of *convention d'assistance* which leads to a strict 'contract'-based liability in damages of the endangered person towards the person who has tried to help but suffered an injury himself, see for France eg Cass. civ. 27 May 1959, *JCP* 1959 no 11187 (obs. Esmein) and CA Paris 25 January 1995, *JCP* 1995 éd G, I, 3867 (p 344) (obs. Fabre-Magnan), and for Belgium Glansdorff & Legros, La réparation du préjudice subi par l'auteur d'un acte de sauvetage, *Revue Critique de Jurisprudence Belge*, 1974 nos 19–20 (pp 60, 82–5) and Cour d'Appel Liège 26 October 1992, *Jurisprudence de Liège, Mons et Bruxelles*, 1993, 798 (note Misson/Baert).
[7] The judge-made rule according to which the *actio de in rem verso* is a subsidiary remedy is accepted in France (ever since Cass. civ. 12 March 1914, *Sirey* 1918.1.41 (note Naquet), cf Cass. com. 10 October 2000, *Bull. civ.* 2000, IV, no 150 (p 136); D 2000 Jur. 409 (note *Avena-Robardet*)) and in Belgium (see, for example, Cass. 25 March 1994, Pas. belge 1994, I, 305; RW 1996–7, 45 (noot *Van Oevelen*).

the European Union, this still stands in the foreground. A more important reason is very often that most of our Supreme Courts are overworked, and a third is that they fear making considerable mistakes and being blamed for them by academics. Furthermore, there are courts in Europe that do not quote from other sources at all, not even from their own earlier judgements. The French Cour de Cassation is an example. Its sometimes extremely shortly reasoned *arrêts* hardly ever discuss a point of law at full length, and the same is true for the decisions of the Danish Supreme Court.

There are, of course, exceptions. They can in turn be divided into two groups: a 'classic' one and a more modern, distinctly pro-European comparative law approach. It has always been the case that a court can find itself under a *duty* to apply comparative law techniques. A famous example of such a duty is furnished by the rules governing the public law liability of the EU as such, because they are to be derived from the general principles common to the EU Member States.[8] Another well known example are private international law rules requiring the application of a more favourable legal system, be it more favourable to the validity of an agreement or more favourable to specific parties. One thinks for instance of choice of law rules governing the form of a contract or the rights and duties arising under a consumer or employment contract, or a lease.[9] A further example stems from tort law. The old English double actionability rule[10] springs to mind here, as does the victim of a distance tort who in some countries can opt for his own law if it is more favourable to him than the *lex loci delicti commissi*.

More interesting from our point of view are, of course, cases that do not factually contain a foreign element. In these some sort of 'comparative law' has always been applied when the rule in question was either 'imported' from another legal system or when it was otherwise shared by other jurisdictions so that one could hope to derive from them some intellectual input. Greek and Portuguese courts refer to German sources relatively often, and Portuguese courts to Italian materials as well.[11] The Scandinavian countries share many a legislative instrument, eg in contract law, and the Swedish and the Finnish Tort Law Acts are very similar; it is therefore only natural to take notice of each other's developments, quite apart from the fact that Finland also has Swedish as one of its two official languages. And what is sometimes called 'comparative law' in English judgments is very often not much more than a reference to Australian, South African, New Zealand or

[8] See Art 288 of the Treaty of Amsterdam.

[9] A very fine example for this sort of comparison can be found in Austrian OGH 10 November 1998, *IPRax* 2001, 47 with a note by *Lurger* (at p 52).

[10] On this see Dicey & Morris (Collins and others), *On the Conflict of Laws II* 13th ed (Sweet & Maxwell London 2000) 35–003 (p 1508). Defamation apart, modern choice of law in matters of tort law is however, placed on a statutory footing; the old Common Law rules are abolished (sec 10 of Part III of the Private International Law (Miscellaneous Provisions) Act 1995).

[11] References in von Bar (fn 5 above), no 403–6 (p 414–8).

simply Irish decisions. The difference between this and the Supreme Bavarian court quoting from the Hamburg *Hanseatisches Oberlandesgericht* is sometimes really rather small!

Of greater significance in a European perspective are therefore court decisions which fall within the second group mentioned earlier on. The Dutch Hoge Raad, for example, had to decide some ten years ago whether or not to substantially enlarge the sums so far awarded as general damages, i.e. as damages for pain and suffering. In the end the Court did so, one important reason being that the sums awarded in the neighbouring countries were much higher at that time than in the Netherlands itself.[12] Other equally interesting examples stem from the UK. There are a few more recent cases in which the House of Lords made use of German and French materials.[13] Furthermore it seems that the House of Lords is the first European national court to quote from the Principles of European Contract Law[14] and from Professor van Gerven's casebook on European tort law.[15] A recent Court of Appeal case dealing with the law applicable to the assignment of claims even extensively explores and cites foreign academic writings.[16] Furthermore one is tempted to assume that the 2001 decision of the Court of Appeal introducing a right to privacy into the Common Law[17] was handed down with the intention of bringing English law into line with the laws of continental Europe. In a way these modern decisions may be seen as a return to the late nineteenth century practice of refering to continental Commercial Codes and foreign jurists such as *Pothier.*[18]

It might well be that the flexibility of the Common Law allows for a quicker adaptation to modern European approaches than elsewhere. But it might also well be that the basis for this more open minded approach is a growing mutual trust, established not at least through various conferences between British, German and (most recently) Dutch Supreme Court judges.[19] During these conferences we have tested and now established a new working

[12] Hoge Raad 8 July 1992, *Nederlandse Jurisprudentie*, 1992 no 714 pp 3088, 3095.
[13] The most famous example is *White v Jones* [1995] 2 WLR 187 (HL), but there are many more.
[14] *Director General of Fair Trading v First National Bank* [2001] UKHL 52, at paras 36 and 45.
[15] *MacFarlane v Tayside Health Board* [1999] 3 WLR 1301, 1310 (HL, per Lord Slynn of Hadley).
[16] *Raiffeisen Zentralbank Österreich AG v Five Star Trading LLC* [2001] 1 WLR 1344, 1348 et seq. (*Mance* LJ).
[17] *Douglas v Hello! Ltd* [2001] 2 WLR 992 (CA).
[18] Cf eg *Appleby v Myers* (1866/67) LR 2 CP 651 and *Metcalfe v Britannia Ironworks* (1875/76) 1 QBD 613. (I am grateful to Dr Stephen Swann for these references).
[19] These conferences started in 1993 in Braunschweig-Riddagshausen (see the reports published in *RabelsZeitschrift* 58 (1994), 421–64 [*v Bar/Cane/Goff/Kirchhof/Kötz/Nieper*] and *Kirchhof,* Erste Tagung hoher englischer und deutscher Richter, *ZEuP* 1994, 352–355). The second British-German conference was held 1997 in London and Oxford (*Zülch,* 'Weitere Fachtagung hoher deutscher und englischer Richter', *ZEuP* 1998, 792–94) and followed by a third conference 2001 in Osnabrück, for the first time with the participation of Dutch Supreme Court judges (a report of this conference will be published by Kreft in *ZEuP* 2002, 645–47).

method: Each team presents to the other(s) the facts of two important cases that have been already decided in their 'home' jurisdiction. The other teams are then asked to present their solution of the case. What has always fascinated me during these conferences was the fact that there was never a confrontation between the national teams. Whenever views were split (and even this rarely happened) the arguments run between the members of each team, seeking support from members of other teams. In other words: it clearly evolved that there is normally not a specific 'German', 'British' or 'Dutch' answer to a case, there are only better and less convincing solutions.

It is true that courts, if at all, will apply comparative law techniques only in cases of great importance. They still think that much of their business is of a rather parochial nature and consequently not worth the effort and costs of comparative research. The rules on pleading are another difficulty because for advocates it is nearly impossible to foresee whether and if so, which, foreign law the court might be prepared to consider. But I do not think that these problems will hinder the growing readiness within the European Union to make use of the decisions of their fellow-courts. It is not just the result that matters, but rather the wish to make sure that all relevant arguments are taken into consideration. I would even go one step further and say that European private law must be built on as many pillars as possible. One of them could be a 'pro-European' method of interpretation. Europe's Supreme Courts should be brought into a position that allows them to have easy access to each other's decisions and to make use of them by granting each other something similar to a 'persuasive authority'. It should become a valid argument for a court to say in a given situation that the vast majority of EU-jurisdictions are moving in a specific direction, and so long as there is no strong reason in one's own legal system for a divergent decision one should follow the mainstream.[20] It is at the heart of a Supreme Court's responsibility to secure the equal application of the law, and why should Europe's Supreme Courts not share the responsibility for gradually developing a more uniform European private law?

3. LEGISLATORS

When it comes to the readiness to take foreign material and experience into account when preparing for a statutory law reform in one's own country (any

[20] The former President of the German Bundesgerichtshof, Professor Odersky, remarked quite rightly: 'Not only is the national judge entitled to consider the opinion of other legal systems and courts; within the boundaries of its national law and whilst weighing up all aspects relevant to the interpretation and development of law, he may also emphasise the fact that the solution in question would help to harmonise European law. In conclusion, he could then use this argument to turn towards foreign legal systems for the solution of the problem. Such reasoning ought to be used increasingly as part of the European process of unification.' (*ZEuP* 1994, pp 1,2).

legislative activity by the EU requires by its nature a thorough comparative law analysis anyway) one can, once again, distinguish between various situations. There are occasions where comparative law simply serves the function of delivering additional arguments for what has politically already been decided. 'Marriages' between homosexuals are an example; if politicians decide to move the governing regime from the law of obligations to family law they will quite naturally hint at those countries who have already enacted such rules and leave aside those that have not. In a second type of situation foreign law as such has repercussions on the functioning of one's own law. Think for example of the question of whether or not to allow for a *renvoi* in the choice of law rules governing extra-contractual obligations. In a third situation a solution is needed for a rather narrow but socially pressing problem. An example is the body of rules governing traffic accidents where numerous parties are involved, or rules governing causation in cases of multiple possible tortfeasors.[21] Here one will try to draw some inspiration from those countries which have already drafted rules on these special issues, check how they have so far been working in practice and assess whether they can furnish a good model for the solution of one's own needs. A national legislator in Europe will normally evaluate the laws of the surrounding countries, but without a specific view of approximation or even harmonisation. The latter, too, has so far been the case in a fourth situation, ie when a national jurisdiction has decided to enact a really substantial reform. Most impressive examples of thorough comparative research stem from Portugal and the Netherlands in the preparatory work for their new Civil Codes.[22]

One lesson to be derived from this is that modern comparative law in Europe has very good reasons to pay more attention to the so-called 'small' or smaller legal systems. They really were the first to give some room to what we today call European Private Law, namely in so far and in as much as they have already tried to build bridges between our different traditions, the broadest gap, by the way, existing not between the Common Law and the Civil Law, but rather very often between the French and the German law of obligations. The needs of present-day Europe go, however, far beyond that. What we need not only at Community level but also on the national level alike is a national legislative policy with an outspoken view on approximation. At present we are witnessing a new wave of national law reforms in the law of obligations. But these law reforms are, once more, very often not realised as a European effort, they are sometimes not even

[21] Cf von Bar, *Empfehlen sich gesetzgeberische Maßnahmen zur rechtlichen Bewältigung der Haftung für Massenschäden?*, Gutachten A für den 62. Deutschen Juristentag Bremen 1998 (Beck: Munich 1998).

[22] In the UK it seems that the Pearson Report on Accidents paved the way for a new culture of comparative research (Royal Commission on Civil Liability and Compensation for Personal Injury, Cmnd. 7054 (1978)).

worked out in co-operation with 'foreign' advisors; they are simply seen as an internal affair. The German *Schuldrechtsreform* is an example of this. But there are signs of hope. Should we manage, as envisaged by the European Parliament in its resolution of 15 November 2001,[23] to draft a European 'Restatement' in time, then, even if the EU as such were not to legislate on them, national legislators might be much more prepared to follow their model. Already today there is no doubt that one of the driving forces behind the German *Schuldrechtsreform* (which really is nothing more than a reform of the rules governing remedies for breach of contract) was to bring our law nearer to the European mainstream. And the same is true for a second major reform, the realisation of which is expected during 2002. A new Act will most probably see the light of day according to which for the first time in German legal history damages for pain and suffering will be available as a general remedy not only within general tort law (based on the culpa-rule) but within the *Gefährdungshaftung* (strict liability) and within liability for breach of contract as well.[24] One of the major arguments was, once more, that Germany had moved itself into a rather isolated position within the European Union.[25] The political importance of this step is perhaps best understood if one appreciates that not long ago our Principles of European Contract Law (PECL) were still attacked for contravening the German *ordre public* in allowing for damages for non-patrimonial losses[26] in contract law.[27]

4. ACADEMIC WRITERS

On the whole, however, comparative law has mainly remained a technique or a method used in academic writings. As far as comparative law in general is concerned, I cannot and do not wish to say much. The variety of research interests is, once more, simply too wide. Many a book or an article simply serves the purpose of furnishing information on a given foreign law.[28] The authors of such books are normally driven by curiosity and by the fact

[23] European Parliament Resolution of 15 November 2001 on the Approximation of the Civil and Commercial Law of the Member States, A5–0384/2001 (to be published in *ZEuP* 2002 with an introduction by the author of this article).

[24] *Entwurf eines Zweiten Gesetzes zur Änderung schadensrechtlicher Vorschriften (Gesetzentwurf der Bundesregierung)*, Bundestags-Drucksache 14/7752 of 7 December 2001.

[25] *Ibid* at p 15.

[26] See Art 9:501 (2) (a) PECL: 'The loss for which damages are recoverable includes non-pecuniary loss'.

[27] See Canaris, 'Die Stellung der, "Unidroit-Principles" und der "Principles of European Contract Law" im System der Rechtquellen', in: Basedow (ed), *Europäische Vertragsrechtsvereinheitlichung und deutsches Recht* (Mohr Siebeck: Tübingen 2000), 5–31 (22).

[28] For a bibliography of literature and judgments in the German language on foreign law see Chr. von Bar, *Ausländisches Privat- und Privatverfahrensrecht in deutscher Sprache* 4th ed (Cologne 1998) yearly updates on CD-ROM; Carl Heymanns verlag).

that they possess exceptional language skills. Questions of methodology, however, hardly ever arise.

The only exception are those books that try to guide their readers through either a whole system of foreign private law or at least through some of its major components. Then the question arises whether one describes the foreign law in question along the lines of one's own system of law or whether one should follow the foreign system in the way its authors tend to describe it. Most of the books of this genre have so far opted for the former approach, taking the obvious disadvantages into account in the belief that there is no other way to attract one's own national readership. One of the most striking examples of this approach is Professor Ferid's '*Das französische Zivilrecht*', which had something very similar to a 'general part' of private law, followed by the law of obligations, by property law ('*Sachenrecht*'), family law and the law of succession.[29] This, of course, is exactly the structure of the BGB, but far away from the structure of the *Code Napoléon*.

Another example is Professor Markesinis' *Introduction to the German Law of Torts*.[30] The astounding success of this book in the English speaking world is partly due to the fact that the author heavily relied on German cases translated into the English language, thus turning the German law into a case law system like the English. We Germans in that book suddenly were confronted with what the author thought to be our 'leading cases', a notion which we really do not have at all. I do have to add immediately, however, that Professor Markesinis in these books created something more, namely a new methodology of comparative law. His message is that comparative law should be taught primarily on the basis of case analysis, and I agree that there is some truth in that. The case law approach of these books in any event helped a lot to open the English door for German law. At this stage I might perhaps add the observation that, when the UK joined the European Union, English Courts 'instinctively' referred nearly exclusively to the judgments of the European Court of Justice, not directly to the text of the ECC-Treaty. They had, perhaps subconsciously, applied their traditional case-law method to the administration of European Community law as well.[31]

The question I myself am even more concerned with is, however, what we academics can do to create an atmosphere in which the taking into consideration not only of a single foreign jurisdiction but rather of the EU as a

[29] M Ferid, *Das französische Zivilrecht* (2 vols Metzner: Frankfurt/M 1971; since 1986 newly edited by *Sonnenberger*).
[30] BS Markesinis, *A Comparative Introduction to the German Law of Torts* 3rd ed (Oxford University Press 1994).
[31] For more details see Chr. von Bar, 'A New Jus Commune Europaeum and the Importance of the Common Law', in: Markesinis (ed), *The Clifford Chance Millennium Lectures. The Coming Together of the Common Law and the Civil Law* (Hart Publishing, Oxford 2000), 67–78.

whole becomes a natural feature of our own legal culture. The answer, I think, is that the time has come to introduce a distinction between comparative research in general and European Private Law in particular. It is the latter that we have to develop, not, as I will explain in a minute, the somewhat outdated concept of 'comparative law'.

5. DEVELOPING A EUROPEAN PRIVATE LAW

What is this emerging discipline of European private law all about, what are its aims, what its techniques (or methods), what does it add to our knowledge of the law? The main idea of establishing such a new discipline is that we in Europe should try to overcome the artificial territorial boundaries introduced into our private law in the nineteenth and the twentieth century. Our intellectual starting point, our 'message' so to speak, should be that the private law systems in the (at least) sixteen jurisdictions of the EU[32] can be understood, described and analysed in nearly exactly the way we are accustomed so far to undertake research in our own 'national' law. Jurisdictions that have always been so closely connected with one other, like the European jurisdictions have been, can and should be understood as variations of the same subject theme. We all are very well aware of the fact that in every jurisdiction there is a variety of opinions on a certain legal issue. Academics (and very often courts as well) discuss opposing ideas and 'theories'; courts within the same jurisdiction can reach different results in cases with nearly identical facts.[33] Many principles, very often principles of a timeless nature, on the other hand are not in doubt as such, although their correct application to the individual case may very well be. Nearly everywhere we find specific schools of thinking, very often opposed to a competing school, and so on. If one now looks at the jurisdictions of the EU as a whole one will find nearly exactly the same situation. Hardly any idea, thought or proposal exists only in one jurisdiction. The borders are not between territories or nations, they are between groups of individuals, and their thoughts transcend all territorial borders.

From this it follows that we should try as far as possible to conceive of Europe as a whole again. We should go one decisive step further than traditional comparative law dared to go. In the long run the idea should be to give no more weight to the classification of a given rule as being 'Swedish', 'French' or 'German' in nature than we today attach to the authorship of a specific thought or theory within each of our legal systems. In the framework of a scientific research into legal issues national classifications do not

[32] There are even more if one counts (apart from Scotland) the other UK-jurisdictions and the Spanish regional laws as separate units as well.
[33] It is mainly for this reason that England, Ireland and Scotland have only *one* Court of Appeal (or High Court/Court of Session respectively).

add much to our knowledge of the law. A European private law lawyer should in other words ideally do exactly the same that our colleagues not involved in comparative law do: trying to describe the law as it stands, keeping control over its internal structure, making sure that contradictions are avoided, accompanying new developments and checking their intellectual integrity by applying the usual test of ordinary methodology, discussing alternative solutions, polishing key notions, proposing new ideas, weighing arguments.

European private law, thus understood, is nothing peculiar or special. It is not about 'comparative law', it is about tort law, contract law, unjustified enrichment law etc. The question of which legal system(s) should be included in the analysis does not arise. It is always 'the whole lot', ie the laws of all Member States plus Community law (and law harmonised by treaties) in the given field. European Private law is not so much concerned with a comparison; it is concerned with collecting arguments and presenting them in one single concept or system, and if need be a new one. In European Private law it is no longer self-evident and axiomatic that private law be national in nature. It is understood as following its own internal logic, not State interests. It means doing what we are all accustomed to do, with one exception however: European private law wishes to broaden the field of discussion and to create a pan-European intellectual network. That, in turn, is of course easier said than done. It requires, at least in its first stage, financial, personal and library resources that are very often far beyond the practical possibilities of an individual researcher. But that does not mean that one should lose that goal from sight. The individual can do a lot, as can our university institutions where they are prepared to accept that European private law will become *the* subject of the future.

What are the main difficulties in pursuing research into European private law? The most obvious one is seldom named explicitly: languages. Who of us can read all the languages spoken in the EU? Who at least four or five? Languages are the most difficult problem, because ever since people have stopped publishing in Latin a new *lingua franca* has not yet emerged. Most of us speak some sort of English, but outside the British Isles none of the really decisive legal texts are published in that language. So, what is the way out? The only general answer I have is: teamwork, teamwork at all levels, whether in drafting principles, writing textbooks, preparing casebooks, offering a collection of translations and introductions to the laws of the EU Member States in a given field[34] or otherwise. That, I know, is contrary to the tradition of our schools. Legal research has always been regarded as individual research. But for the near future (and perhaps only for a transitory

[34] Two examples of this type of literature are *Deliktsrecht in Europa* (Carl Heymanns Verlag: Cologne 1993/1994) and *Sachenrecht in Europa* (Rasch: Osnabrück 2000/2001), both edited by the author of this article.

period) we will have to change that attitude. And teamwork, too, is the only general answer I have to the second major problem of European private law: how to cope with that enormous enlargement of material involved in pan-European legal research?

We are, in my estimation, living in a transitory period. In this period it is important to furnish our universities with teaching material covering the whole of the law of obligations on a pan-European basis. Professor van Gerven's casebook series meets that need very well, although, if I may say so, it still concentrates a lot on the laws of the 'major three', ie Britain, France and Germany. Casebooks, important as they are, will, however, not suffice. They need companions, ie classical textbooks of the sort we are accustomed to, based however, whenever the research possibilities so allow, on the laws of all our Member States. Textbooks of this sort are important because they can and will no longer simply rely on what we are accustomed to call the functional approach to comparative law. We normally do not use that approach within our own national systems, and it will not do the job alone when it comes to European Private Law. The latter is as much about concepts and *Dogmatik* as present day national law. A textbook of this sort will nearly 'automatically' do its best to find one single systematic structure or 'image' in order to be able to reproduce the case law in a sensible manner and to properly discuss diverging opinions. If one manages to find such a structure in which gaps and overlaps are avoided one can nearly be sure to have found at least *one* possible pan-European concept of the part of law in question. This in turn needs to be analysed not in isolation but always in the context of its neighbouring fields. A treatise on the law governing unjustified enrichment law cannot be written without research into contract, tort and property law, and a treatise on *negotiorum gestio* cannot confine itself by saying that the Common Law does not possess this concept; consequently one has to deal with agency, restitution, equity and specific statutory solutions as well.[35] A tort law theory cannot be written without having regard to constitutional law and to the difficult borderline with contract law, and so forth.

Textbooks that include these issues can reveal many surprises. Let me give just one example. It is often noted that the results achieved by our courts are strikingly similar. It is then stressed that they are derived from rules, concepts or systematic approaches that vary considerably. From this it is then concluded that there must be something other than these rules, concepts etc. which 'in truth' governs the outcome of a case. The research into such 'policy factors' became popular some time ago,[36] as did the

[35] See for a start in this direction Chr. von Bar, 'Die Äquivalente des Common Law für das kontinentaleuropäische Konzept der berechtigten Geschäftsführung ohne Auftrag', in: *Festschrift für Werner Lorenz zum 80. Geburtstag* (Beck: Munich 2001), 441–61.

[36] See, for example, BS Markesinis & Chr. von Bar, *Richterliche Rechtspolitik im Haftungsrecht* (Mohr Siebeck: Tübingen 1981).

famous 'economic analysis of the law'. I do not have faith in that course of reasoning any longer, because there is today hardly any evidence for it in the judgments of Europe's supreme courts, and I cannot see how one can build up a proper theory of law on the assumption that our judges hide their 'true' reasons, whether consciously or subconsciously. The answer to the phenomenon I have just mentioned must therefore, I think, be that similar results are normally reached because the rules and concepts from which they are derived *are* indeed the same or nearly the same. As I am running out of time I will restrict myself to one single example. You all know that under French law the relationship between contracts and torts is governed by the principle of *non-cumul des responsabilités*: Liability is either contractual or tortious in nature, but never both. There are only two exceptions to this rule: liability in case of malice (or intention), and liability consequential upon the commitment of a crime. The German (and, eg, the English) principle of concurrence of actions starts the other way round; we have the principle of *cumul des responsabilités*. But we have, in tort law, a special provision governing the breach of a statutory duty (§ 823 (2) BGB), which is of a rather high practical importance because under this provision a claimant can recover 'pure economic losses', a notion which in turn is completely alien to French law. The question then arises what amounts to a 'statutory duty' within the meaning of § 823 (2) BGB. Are those provisions within the Code which govern the correct performance of a contract, 'statutes' within the meaning of the named tort law provision? It is difficult to argue that they are not, but that is the generally accepted result. The reason is the same as in France: as long as we have the distinction between contract law and tort law as part of our positive law[37] the system has to guarantee that not every breach of contract amounts to a tort. The former would otherwise cease to exist as a separate legal concept.

If this is a correct analysis then it follows that the *cumul* or *non-cumul* divide simply discusses the question on the wrong level. It does not matter. In reality we share the same rule. Consequently, it should be possible to express it in a common principle of European Private Law. We have done that in our (not yet published[38]) Principles of Tort Law on which we are working as a part of the Study Group on a European Civil Code. The first head of the rule (Art. 1:102 (1)) reads quite simply: 'The provisions of this Part [= Tort Law] are not applicable in so far as their application would

[37] That in turn is a distinction which is not easily justified. All European legal systems are facing severe problems with it, and none of them has so far come up with a really convincing theory to fix the borderline between the two. In this area, comparative research actually results in notifying a common helplessness, not in a set of good arguments. But that is another matter which cannot be discussed here.

[38] *The Principles of European Tort Law* will not be ready for publication before 2004/2005. See, however, v Bar, 'Konturen des Deliktsrechtskonzepts der Study Group on a European Civil Code', *ZEuP* 2001, 515–32.

contradict the purpose of other private law rules'. The second head of the rule follows nearly automatically (above para (2)): 'The provisions of this Part do not affect legal redress available on other legal grounds.'[39]

For reasons of time I cannot discuss here the Working Methods of the Commission on European Contract Law and of the Study Group on a European Civil Code.[40] I cannot even say a word on the vivid European Civil Code debate. I would, however, like to conclude by saying that the drafting of Principles of the European Law of Obligations and of at least some parts of property law seems to me *the* key goal to be achieved in the years to come. I am saying this today not, at least not predominantly, from a political point of view. The latter is not on the agenda of this conference (and I am grateful for that). I am saying it as a teacher and researcher. Only with a set of properly drafted principles in hand will European Private law be able to become a practical, manageable and teachable issue. Principles of European Private law, once more, change the order and the approach. They *start* with a common rule, or, where that is needed, with a proposal for a common rule, comment upon it and leave 'comparative law' to the notes. That is, in twenty-first century Europe, the place where it should go to.

[39] The final wording is still subject to possible further refinements.

[40] For details see the Joint Response of the Commission on European Contract Law and the Study Group on a European Civil Code to the EU-Commission's Communication on European Contract Law submitted by *v Bar* and *Lando* with *Swann*, in: Schulte-Nölke/Schulze/Bernardeau (eds), *Europäisches Vertragsrecht im Gemeinschaftsrecht* (Nomos Verlag: Bonn 2002), 291–347 (nos 3–7, 65–6).

8

Codifying European Private Law

WALTER VAN GERVEN*

1. CODIFICATION PAST AND PRESENT

1.1. The European Commission's Four Options

ON 11 JULY 2001 the Commission of the European Communities issued a Communication to the Council and the European Parliament on *European Contract law.*[1] Its intention is to broaden the debate on the approach to be applied to the approximation of contract law at EC level. So far, the EC legislation has followed a selective or piecemeal approach, adopting directives on specific contracts or specific marketing techniques where a particular need for harmonisation has been identified.[2] That approach is not so much the result of a deliberate strategy as it is the legal consequence of the limited number of competences which the European Treaties, mainly the EC Treaty, has attributed to the Community and its institutions. In consequence, the European legislature is only empowered to lay down rules where that is needed, to put it broadly, for the establishment and/or the functioning of the common viz. the internal market (cfr Articles 94 and 95 EC). That is mainly, in the area of contract law, insofar as needed to remove obstacles to the free movement of goods,

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[1] COM (2001) 398 final, published in *Official Journal of the European Union*, c 255/1 of 13 September 2000. For an explanation of the background and the aim of the Communication, see D Staudenmayer (head of the working group within the Commission which was responsible for the drafting of the Communication) 'Die Mitteilung der Kommission zum Europäischen Vertragsrecht', *Europäische Zeitschrift für Wirtschafsrecht*, 2001, 485–9.

[2] In Annex I to the Communication the Commission enumerates and describes the various instruments, mainly directives, of existing EC legislation in the area of contract law primarily. In Annex II it enumerates the international instruments relating to substantive contract law issues. Annex III contains a list in which the documents referred to in the preceding Annexes are grouped under different headings.

persons, services and capital, to ensure that competition in the internal market is not distorted, and to strengthen consumer protection (Article 3(1), litt. c, g and t, EC). Beyond those objectives (and others laid out in Article 3 EC), the Community and its institutions do not have any legislative, executive or judicial competences (Article 7(1) EC, last sentence). More specifically, there is no jurisdiction within the Community that is broad enough to enact a Civil Code with the same scope of application as eg the Dutch, German or French Code. This limitation of Community jurisdiction constitutes a crucial point which cannot be disregarded in the discussion about codification at EC level.

The Commission's Communication hardly mentions that issue (at para 41) but does not ignore it entirely. It is reflected indeed in the necessity of finding information

> as to whether problems result from divergences in contract law between Member States and if so, what (divergences).

More particularly, the Commission wants to receive concrete information from all

> stakeholders, including businesses, legal practitioners, academics and consumer groups

as to whether

> the proper functioning of the internal market may be hindered by problems in relation to the conclusion, interpretation and application of cross-border contracts.

It also

> seeks views on whether the existing approach of sectoral harmonisation of contract law [which is the result of the Community's limited jurisdiction] could lead to possible inconsistencies at EC level, or to problems of non-uniform implementation of EC law and application of national transposition measures.[3]

The information sought thus focuses on the identification, in the area of contract law, of *concrete* problems, as is required by the European Court of Justice (hereafter ECJ)'s case law, with a view to eliminating obstacles to the proper functioning of the internal market which are caused by divergences in national legislation, and to inconsistencies in existing EC legislation

[3] Quotations in this paragraph come from the Communication's Executive Summary, at p 2 of COM (2001) 398 final (not published in the *Official Journal of the European Union*).

and the its implementation. The possible solutions which the Commission wants to define with the assistance of 'stakeholders', are formulated in broader terms however (that is particularly so for the second and the fourth option). They are: (i) 'to leave the solution of any identified problems to the market'; (ii) 'to propose the development of non-binding common contract law principles, useful for contracting parties …, national courts and arbitrators … and national legislators'; (iii) 'to review and improve existing EC legislation … to make it more coherent or to adopt it to cover situations not foreseen at the time of adoption'; (iv) 'to adopt a new instrument at EC level';[4] whereby the Commission means 'an overall text comprising provisions on general questions of contract law a well as specific contracts', such overall text to be either purely optional, ie at the discretion of the contracting parties, or 'suppletive', ie applicable unless the contracting parties have discarded it, or mandatory, in which case the text would replace national laws.[5] Let me point out immediately that these options are of a different character: the first, doing nothing, is hardly an option; the second, proposing non-binding common principles, refers to intiatives already realised; the third, improving the quality of existing legislation, is a matter of necessity and should obtain priority; and the fourth, enacting comprehensive legislation, if it is to be binding, needs a firm legal basis in Community law (which cannot at present be found in Article 95 EC. As pointed out below (at 9 and 10) we suggest that the third and the second option be combined and put into effect before the fourth option.

1.2. Modernising Private Law in a Democratic Fashion: The Dutch Code, an Example to be Followed

In 1992 the main part of the new Dutch *Burgerlijk Wetboek* (BW) came into force, thus offering the Netherlands the most recent code in a long row of precedents on the European continent. The BW's most significant characteristics are its comprehensive character covering civil, commercial law, consumer law and labour law, and the large amount of discretion which it grants to the courts: 'on the one hand the courts are free to further develop the law where its provisions are silent; on the other they are explicitly authorised to derogate from specific provisions of the law or of a contract if necessary to avoid an unjust result in the specific circumstances of the case'.[6] The work started with the appointment in 1947 of Professor EM Meijers as government commissioner. The new Code is the result of

[4] The quotations in this paragraph are also drawn from the Communication's Executive Summary.
[5] Paragraphs 65 ff of the Communication.
[6] Thus Arthur Hartkamp, 'Statutory Lawmaking: the new Civil Code of the Netherlands' in *De Lege, Towards Universal Law*, (Iustus Förlag, Uppsala, 1995), 151–78, at 152.

various drafts prepared by legal experts on the basis of a well prepared memorandum and attached questionnaires to be answered by Parliament (52 questions to be precise), extensive parliamentary discussions, first concerning draft bills (*vaststellingswetten*) relating to the introductory part and the eight substantive law parts of the Code, and then concerning the final draft bill of enactment (*invoeringswet*), all this under the stewardship of successive government commissioners.[7] On the first of January 1992 the central part of the Code[8] came into effect, ie more than 40 years after the official start of the project.

Obviously, the enactment of such a comprehensive code takes more time than enacting less extensive legislation for limited areas of private law (and moreover parts which like contract law concern less controversial matters than eg family law); but, on the other hand, enacting a European code will raise 'sensitivities' which are more difficult to cope with than those arising in a purely national context. That is certainly the case if codification it is to be the product, as it should be, of extensive discussions in parliamentary groups and consultations with various groups of 'stakeholders'.[9] Differences in legal mentality will not facilitate that task especially so because in some Member States (that is, in the common law countries,[10] and in the Nordic countries[11]) codification is a technique which does not belong to the constitutional traditions.

1.3. Building a Nation-State by Enlightened Leaders: The French and German Codes, Examples not to be Followed in that Regard

The French and the German Civil Codes are products of Enlightenment at a time when democracy, as we understand it now, was not yet in place.[12] The codification phenomenon has been characteristic for continental thinking

[7] See AS Hartkamp, *Compendium, Vermogensrecht volgens het nieuwe Burgerlijk Wetboek*, 5th ed, (Kluwer, Deventer, 1999), at 2–3.

[8] The central part contains the general part of patrimonial law, the law of property, the general part of the law of obligations and the law of some special contracts, such as sale and agency: Arthur Hartkamp, n 6, at 156.

[9] T Koopmans, 'Towards a European Civil Code?', *European Review of Private Law*, 1997, 541–56, at 541.

[10] For a polite reaction against codification in a common law context, see Lord Goff, 'Coming Together the Future' in *The Coming together of the Common Law and the Civil Law*, The Clifford Chance Millenium Lectures (ed BS Markesinis), (Hart Publishing, Oxford, 1998) 239–49, at 241.

[11] On the situation in the Norlic countries, see L Sevón, 'Statutory Lawmaking: A Nordic Perspective' in *De Lege*, quoted in n 6, at 179–91.

[12] K Zweigert and H Kötz write: Codification, ie 'the idea that the diverse and unmanageable traditional law could be replaced by comprehensive legislation, consciously planned in a rational and transparant order' is a product of the Enlightenment: *An Introduction to Comparative Law* 3rd ed translated by T Weir, (Oxford, Clarendon Press, 1998) at 135–6 where the varying impact of rationalism inherent in the Enlightenment on German, French *and* English law is further explained. See also RC Van Caenegem, *Geschiedkundige*

in the centre and the south of Europe for more than two centuries. Let me just recall the two most famous examples. On 1 January 1900 the German *Bürgerliches Gesetzbuch* (BGB) entered into force, that is, almost one century before the Dutch BW and almost one century after the *Code Napoleon*—which in its final version was adopted by law of 21 March 1804 as the *Code civil des Français*.[13] Both Codes are of a completely different vintage. Whereas the French *Code civil* deals with particular issues in a clear and concrete manner, and is (at least in some respects, not for example with regard to gender) 'instinct with the ideal of equality and freedom among citizens', the German *BGB*, being 'the child of the deep, exact, and abstract learning of the German Pandectist School',[14] adopts throughout an abstract conceptual language and, instead of endorsing progressive tendencies in society, 'seeks to maintain a situation favourable to the establishment'.[15] In other words, whilst the French code contains (a few) revolutionary ideas and is written to be understood also by citizens, the German code was a conservative code written by and for professors. Where the two codes do resemble each other is that they had the same political goal which was to put an end to legal differentiation and thus to contribute to the shaping of a centralised Nation-State.[16] Obviously the Dutch *BW* had a completely different function: it was no longer intended to achieve unity or to strengthen the concept of Nation-State, but rather constituted an undertaking carried out by lawyers with a view to modernising private law by turning judicial and doctrinal innovations into codified law.

If the German example is specifically mentioned here, it is not for style or content of the BGB but because of a controversy which took place long before its enactment. I refer to the 'famous confrontation' in 1814 between von Savigny, the unquestioned head of the Historical School of Law, and Thibaut, a professor at Heidelberg, on the desirability of a unified German civil code (to replace, among other sources of law, the Prussian *Allgemeines Landrecht* of 1794). The latter, Thibaut, had proposed

> in the wave of patriotism which swept Germany after the Wars of liberation … to replace the intolerable diversity of the German territorial laws by a general

Inleiding tot het Privaatrecht, 1985, Story-Scientia, at 121–55, where the role played by Jeremy Bentham, the most skillful defender of codification and his impact on the common law of England is summarised at 146–50. See further the writings of PAJ van den Berg, quoted in n 16.

[13] Zweigert and Kötz, at 83.
[14] Zweigert and Kötz, above n 12, at 144.
[15] Above n 12, at 143–4.
[16] For an exhaustive analysis, see PAJ van den Berg, *Codificatie en staatsvorming*, (Wolters Noordhoff, Groninger, 1996) and, especially on the role of Jeremy Bentham, 'Staatsvorming zonder codificatie, Een vergelijking tussen het codificatiestreven op het continent en in Engeland, met bijzondere aandacht voor Jeremy Bentham en Henry Peter Brougham' in *Recht en geschiedenis, Bijdragen tot de rechtsgeschiedenis van de negentiende en twintigste eeuw*, studiedag Utrecht 1997 (red. CJH Jansen en M van de Vrugt), Nijmegen 1999, 11–30, at 11.

> German civil code, on the pattern of the Code civil, and thus to lay the basis for the political unification of Germany.[17]

Apart from political circumstances (Napoleon's defeat in Waterloo in 1815) which were not propitious to his idea, Thibaut was fiercely opposed by von Savigny who in the name of his concept of the law, seen as a product of history, rejected the idea 'that legislation, being inorganic and unscientific, was not the right way to create a common German law and would do violence to the traditions it opposed'.[18] He maintained that the time was not ripe for the production of a unified civil code. Strangely enough, von Savigny and his followers did not revert to studying the Germanic sources of the law but turned exclusively to ancient Roman law as found in the *Corpus Iuris Civilis* of Justinianus, which they regarded as a 'store of legal institutions of eternal validity'.[19] So it was 'that the Historical School of Law produced the Pandectist School whose only aim was the dogmatic and systematic study of Roman material'.[20]

1.4. Savigny v Thibaut, a Controversy that Bears no Repetition

The opposition between von Savigny and Thibaut, regarded as an opposition between law, seen as a product of *history*, and law, seen as a product of *reason*, is somehow reflected in the opposition nowadays between those who believe that cultural differences between Member States and legal mentalities are such that no codification at European level is possible,[21] at least not for the time being, and those who believe that codification has to be effected without further delay, at least in those areas of the law, like contract, tort and property, where patrimonial considerations prevail. Those are the areas where common rules are most likely to emerge for reasons of facilitating trade relations and, nowadays, economic integration. There is however another opposition which this controversy brings to the fore, as is shown by the following description of the von Savigny/Thibaut confrontation in RC Van Caenegem's *Goodhart lectures* 1984–85:[22]

> … It is when Savigny addresses the question of where the 'law of the folk' is to be found and who is to determine what its content is, however, that the

[17] Zweigert and Kötz, above n 12, at 145.
[18] Above n 12.
[19] Above n 12, at 146. It should be recalled that the *Corpus Juris* was not a real code but a collection of existing texts, some old and some recent, some legislative texts and some writings of jurists arranged according to subject matter: RC Van Caenegem, *Judges, Legislators and Professors. Chapters in European legal history*, (Cambridge University Press, 1987), at 41. In other words a collection which would be called nowadays a Source- or a Casebook rather than a Code.
[20] *Ibid*.
[21] Cf the extreme position of someone like P Legrand, 'Against a European Civil Code' in *Modern Law Review*, 1997, 44.
[22] RC Van Caenegem, o.c., n 19, at 51–2.

> modern reader is in for a great surprise, for it turns out that the learned jurists, the professors of law, are best placed to ascertain this folk-law, a task that cannot be left to ordinary people because of the 'complexities of modern life'. Thus the professors who in Germany were all steeped in Roman law … were proclaimed as the natural oracles of what the people felt. In the background, of course, was the struggle for control of the law. In this case the struggle was between the professors and the legislators (the enlightened princes or the deputies of the people). Savigny was particularly frightened of democratic legislatures as in the French republic. He was a deeply conservative man, believing in noble leaders knowing the law best and speaking for the people: evidently professors of aristocratic descent, as Savigny himself … .

Savigny's outdated opinion concerning the role of professors, as inspired by his contempt for 'democratic' legislatures, finds of course no parallel in contemporary society. It is nevertheless worthwhile to mention it in the context of European lawmaking as it raises the issue of democratic legitimacy within the context of codification—an issue which is also present in the discussion of the so-called democratic deficit characterising the European Community's legislative process as it now stands.[23] Be that as it may, there is no reason whatsoever to re-open the Thibaut/von Savigny controversy but to combine both approaches, the top-down and the bottom-up approach, as we will see hereafter (at 13–14).

1.5. Themes and Propositions. Codification Defined

The foregoing brings me to present four *themes* for further consideration. Those are: (i) European codification, possible and desirable?; (ii) Preserve and improve the legislative 'acquis communautaire'; (iii) Democratic legitimacy of European codification; and (iv) Flanking measures to prepare and accompany codification. The general *propositions* which I would like to put forward herinafter are: 1) that there is a need for European codification, ie comprehensive legislation as defined hereafter, in areas of 'patrimonial' private law; 2) that the *first stage* of European codification consists in improving and broadening existing Community directives and case-law in specific areas by turning those directives and their implementing national legislation respectively, such case-law into Community regulation; 3) that the most appropriate, and presently the only legal, way to carry out the *second stage* of European codification—which consists in general (ie not 'internal market related') law-making—is by way of an agreement between Member States either to amend the existing Treaties or, alternatively, to conclude a Treaty *ad hoc*; and 4) that it is imperative to prepare,

[23] The 'democratic deficit' existing in the Community has many facets: see P Craig and G de Búrca, *EU Law*, 2nd ed, (Oxford University Press, 1998), 155–61.

accompany and follow up European codification, certainly in the second stage, by flanking measures intended to create the proper environment for European codification to succeed.

Before proceeding any further I should point out that, as a working *definition,* I understand hereinafter under (full) codification (ie the first and second stage taken together): legislation which is part, or drafted to be part, of a larger whole and which does not focus on the protection of specific interests, such as consumer, workers or competitors interests, but tries to take a global view of all interests involved. Codification is therefore 'comprehensive' in two respects: first, in that it is conceived and structured as a whole which implies that it normally includes, or is intended to include, more than one chapter of *in casu* private law; and secondly, in that it takes a global view which does not mean that rules focusing on the protection of specific interests cannot, and preferably should not, be incorporated in the larger whole (as the Dutch BW demonstrates). In consequence, the unification only of the general part of contract law and certain specific types of contract, is not codification in the proper sense of the word, whilst the unification of large parts of 'patrimonial' law, as referred to hereafter, may deserve that denomination.

2. EUROPEAN CODIFICATION, POSSIBLE AND DESIRABLE?

2.1. There is no 'Epistemological' Impossibility to Reach Convergence

Let me first point out that I am not one of those who believe that codification at the European level is impossible because of cultural differences, or differences in legal mentalities or internal moralities, existing between the legal systems involved (those of the European Union). That is certainly not the case where codification is limited—as is envisaged by all those engaged in the debate presently—to the core 'patrimonial' parts of private law, such as the (at least general) law of contract, the law of tort (or at least the most important torts), the law of unjust enrichment and what I would call the law of fiduciary relations (rather than the law of property[24])—by which

[24] It would be counterproductive, I think, to try to bridge the deep conceptual cleavage between civil and common law in the area of property. See G Samuel, 'English Private Law in the context of the Codes' in *The Harmonisation of European Private Law* (ed M Van Hoecke and I Ost), (Hart Publishing, Oxford, 2000), 47–61, at 52–58. In contrast, it should be possible, I think, to achieve commonality in regulating fiduciary relations, first, because civil and common law countries share the common a concept of *fiducia* (*fiducie, Treuhand*, trust) and, secondly, because contemporary legal practice has deviced a large variety of banking and investment instruments which fulfill similar needs in the area of both categories of *fiducia*, ie *cum amico* and *cum creditore*. For an attempt to formulate common rules, see DJ Hayton, SCJJ Kortmann and HLE Verhagen, *Principles of European Trust law*, (Kluwer Law International, 1999).

I refer to techniques of *fiducia cum amico* relating to the administration of someone else's assets as well as to techniques of *fiducia cum creditore* relating to collateral for the repayment of money lent.[25] Indeed, the proposition that 'epistemological' difficulties constitute insurmountable obstacles to promote convergence between the legal systems of the common law and those of the civil law, is continuously contradicted by contrary experience of practitioners and down-to-earth academics working in European or international surroundings. That does not mean that those difficulties should not be taken seriously, especially because they are part of an ongoing discussion among European and American experts in legal theory which demonstrates in itself the universality of the law. What must be retained from that discussion is that codification, starting with the use of the instrument itself, should not ignore differences in legal mentalities; however, at the same time, it helps proponents of codification to realise that 'solutions found in different jurisdictions must be cut loose from their conceptual context, stripped of their national doctrinal overtones, and seen (…) in the light of their function, as an attempt to satisfy a particular need'.[26] What we need therefore is an intellectually revolutionary process which is part of an ongoing and all-encompassing process of integration 'among the peoples of the Europe' (Article 1, para 2, TEU).[27]

2.2. Nationalistic Reflexes to be Overcome and Legal Basis Constraints not to be Ignored

To prepare uniform legislation in a truly European perpective is not self-evident. Even for comparative lawyers, trained to look beyond their national borders, it remains difficult not to be guided too much by one's own legal system and to avoid that 'the debate on the need for a European

[25] As the 'Study Group on a European Code', initiated by Professor C von Bar, intends to do by and large. See C von Bar, 'A new Jus Commune Europaeum and the Importance of the Common Law' in *The Coming together of the Common Law and the Civil Law*, *Clifford Chance Millennium Lectures* (ed BS Markesinis), (Hart Publishing, Oxford, 2000), at 67.

[26] Thus H Kötz in 'Comparative Legal Research and its function in the development of harmonised law. The European Perspective' in *De Lege*, *o.c.* in n 6, 21–36, at 35. Kötz' description is casted in somewhat provocative terms as a reply to LM Friedman and G Teubner's equally provocative criticizm according to which, in the words of H Kötz, 'a European common law would amount to the resurrection of the conceptual world of the ninetienth century'.

[27] This view corresponds with the paradigm of the EU as a 'multi-level system of governance' highlighting the erosion of Nation-States (without accepting however their transformation into a new European superstate). See amongst other writings C Joerges: 'The Impact of European Integration on Private Law: Reductionist Perceptions, True Conflicts and a New Constitutional Perspective' in *Private Governance, Democratic Constitutionalism and Supranationalism* (ed O Gerstenberg and C Joerges), European Commission 1998. For further references, see J Wouters, 'Institutional and constitutional challenges for the European Union: some reflections in the light of the Treaty of Nice, *European Law Review*, 2001, 342–56, at 355, fn 75.

Civil code (…) be spoiled by veiled preoccupations with cultural hegemony'.[28] Any attempt, or even appearance, to transplant such feelings of cultural or legal hegemony to the European level or, even worse, simply to create the impression of European codification to be part of some Fortress Europe, must by all means be avoided. Moreover, the raising of expectations of civil codification as an exponent of 'nation-state'-building at the European level, would already be inconsistent with legal reality since, due to the aforementioned principle of attribution of competences, there is no legislature at the European level which is empowered to enact comprehensive legislation covering all areas of private patrimonial law. I will return to that subject below (at 11). It may suffice here to refer to the ECJ's *Tobacco*-judgment of 5 October 2000 where the Court held that 'a mere finding of disparities between national rules and of the abstract risk of obstacles to the exercise of fundamental (economic) freedoms or of distortions of competition liable to result therefrom, [is not] sufficient to justify the choice of Article [95] as a legal basis …'.[29] Although that judgment relates only to Article 95 EC (which allows measures to be adopted by qualified majority in the Council in accordance with the co-decision procedure of Article 251 EC, and thus in cooperation with the European Parliament), it clearly highlights the general principle of specific and therefore *limited* competences which the Community institutions have for the purpose of approximation of national laws. The consequence of this principle is that, eg in the field of contract law, none of the Community institutions has the authority to bring unity into the various sets of rules which regulate, to a varying degree, the different 'categories' of contract: international contracts,[30] EU interstate contracts, commercial contracts between economic operators with equal viz. unequal bargaining power, consumer contracts and 'purely private' contracts.[31]

2.3. Transaction Costs and Legal-Cultural Constraints of Comprehensive v Fragmented Legislation

Apart from the question of the epistemological and legal feasibility of European codification, there is the issue of desirability which can best

[28] Thus U Mattei, 'A transaction costs approach to the European Code' in *European Review of Private Law*, 1997, 537–40, at 539 who proposes, as the title indicates, to examine the desirability of European codification from a transaction-costs perspective.

[29] Case C–376/98, *Germany v Parliament and Council* [2000] ECR I–8419, para 84. See also para 106–7 of the judgment where it is added that the distortions of competition must be significant, and Advocate General Fennely's Opinion, para 82–98 where it is underlined, at para 93, that the *concrete* harmonisation measure proposed by the Community must be compatible with the objective of the internal market or, in the terms of Article 95, must 'have as (its) object the establishment and functioning of the internal market'.

[30] For an impressive list of international instruments relating to substantive contract law issues, see Annex II to the Commission's Communication of 11 July 2001, referred to above in n 1 and 2.

[31] Thus the distinction made by L Sevón in 'Statutory Lawmaking. A Nordic Perspective' in *De Lege*, quoted in n 6, 179–91, at 186–9 who rightly observes that, to make general rules for

be resolved, as suggested in legal literature, by a transaction costs approach, that is by comparing the input of resources to be applied to bring about unity with the output in terms of results.[32] Where, as under the third option of the Commission's Communication,[33] limited legislation is envisaged to improve the quality of existing consumer law directives, it is not at all unlikely that the transaction costs criterion will favour greater harmonisation, or even unification, taking into account the (relatively) limited resources needed therefore and the many advantages of eliminating inconsistencies and promoting coherence. But where it is envisaged to undertake the 'daunting task' (as professor Markesinis calls it), inherent in extensive codification of large parts of private law, of conceiving and elaborating rules as part of a well structured code interconnecting different parts, sections and books, without loosing sight of constitutional, institutional and public law aspects surrounding private laws and reconciling different styles of codification,[34] the cost of academic, political, administrative and judicial efforts to prepare, *c.q.* to adopt, implement and apply legislation may be such, that they do not necessarily outweigh the advantages of unification.

At the end of the day the desirability issue turns on the question of how much fragmentation a legal system is able to support or, in other words, how coherent a legal system must be. That is a question not only of efficiency (ie of limiting transaction costs due to superfluous disparities) but also of fairness and justice (ie of treating similar situations equally and different situations unequally). It is here that cultural differences and differences in legal mentality between common law and Nordic countries on the one hand, which are used to greater fragmentation of laws, and on the other hand the other European countries where a more comprehensive approach is favoured (although also there unification is far from being achieved, even at the European level, because of globalisation on the one hand and compartmentalisation on the other) may come to the fore.[35] I am afraid that there is no rule of thumb to reconcile, or choose between, these two attitudes save for the general principle that efforts must be made to avoid differences for which there is no objective 'particular justification'.[36]

these various categories, there will be a need to resort to standards with an open texture, such as reasonable time, due diligence or, one may add, good faith, which because of their open texture can be adapted to the concrete circumstances of a specific relationship.

[32] See the article of U Mattei quoted above in n 28.
[33] Communication quoted above in n 1, at para 57–60.
[34] BS Markesinis, 'Why a code is not the best way to advance the cause of European legal unity', *European Review of Private Law*, 1997, 519–24, at 520–2.
[35] On the subject of fragmentation, see G Samuel, 'English Private law in the context of the Codes' in *The Harmonisation of European Private Law* (ed M Van Hoecke and F Ost), (Hart Publishing, Oxford, 2000), 47–61.
[36] Thus the ECJ in its *Brasserie* judgment of 5 March 1996 [1996] ECR I–1029, para 42 with respect to homogeneity between extracontractual liability rules for Community institutions as laid down on the basis of Article 288, para 2 EC, and extracontractual liability rules for Member States as adopted by the ECJ in *Francovich* and many subsequent judgments.

All things considered (but leaving apart here the issue of legal basis) the decision as to how much fragmentation a legal system can tolerate, is very much influenced by one's legal background. As an academic trained in a system of codified law, and therefore 'naturally' imbued with the ideas of rationalisation, unification and legal certainty, my gut reaction would be in favour of codification. However, knowing that, as mentioned above, unification remains a relative notion and, moreover, for having practised law in an international context in different occupations, I have some doubts as to what extent disparities (which legal practice is unable to set aside at a reasonable cost) actually, and substantially, hinder interstate commerce. That is particularly doubtful in an area such as contract law where—subject to exceptions to protect consumers or workers—parties may, anyway, modulate their relationship in accordance with their wishes and choose the legal system which they want to apply.[37] And indeed, it may well be that 'in the past … there has been a tendency to overrate the benefits of legislative unification and to underrate its cost'.[38] As it may also be that the assumption that disparaties of rules hinder interstate commerce is often documented in a fairly abstract way (also sometimes in preambles to directives), whilst the ability to cope with differences (an ability which the principle of free movement of services has considerably strengthened, albeit only within the internal market) is underestimated.[39] Economic research should help us to calculate more accurately the cost of divergences as compared with the cost of coping with differences.

3. PRESERVING AND BROADENING THE LEGISLATIVE 'ACQUIS COMMUNAUTAIRE'

3.1. Improving and Consolidating Existing Legislation in the Area of Contract Law and Consolidating and Implementing Case-Law in the Area of Competition Law by Means of Directly Applicable Regulations

If it is correct to assume that the criterion of transaction costs supports the desirability of improving the quality of existing Community directives in

[37] A matter for which Community jurisdiction and legislation now exist: see Articles 61(c) and 65 EC. See further O Remien, 'European Private International Law, the European Community and its emerging Area of Freedom, Security and Justice', *Common Market Law Review*, 2001, 53–86; also J Basedow, 'The Communitarization of the Conflict of Laws under the Treaty of Amsterdam', *Common Market Law Review*, 2000, 687–708.

[38] H Kötz, n 26, at 36 who also quotes in that regard the famous comparatist, professor Kahn-Freund, according to whom the selection of areas where codification may be desirable must 'be dictated by practical requirements and nothing else'. See also Lord Goff in his conclusion on 'Coming together-the Future' to the *Clifford Chance Millenium Lectures* mentioned in n 10, at 241–9, who writes, commenting on the work of the 'Study Group' (above, n 25), that: 'Uniformity as an end in itself is an ideal which is not shared by all', at 241.

[39] W van Gerven, 'A common law for Europe: the Future meeting the Past?' in *European Review of Private Law*, 2001, at (14).

the areas of *consumer*, *labour, public procurement, e-commerce* contracts, etc, then the question arises how to proceed, and more particularly whether it would be appropriate, or not, to also include in that undertaking the national legislation implementing the Community directives. In other words, whether the third option in the Commission's Communication must be understood in a minimalist way, ie as an invitation to streamline existing directive law,[40] or in a more extensive way, ie as an incentive to take a further step by replacing the current directives with regulations. The result of the latter would be, in the areas now covered by directives, not only to achieve greater coherence between *Community* rules laid down in directives but also to unify the *national* rules now implementing those directives. That would raise no particular problems as far as the legal basis is concerned, at least no more than presently, since Article 153 EC (and Article 308 EC) as well as Article 95 EC to which it refers, allows the adoption of 'measures', ie of regulations as well as of directives. Because of the degree of convergence already existing between the implementing national rules of existing directives, such an undertaking aimed at the unification rather than harmonisation of national laws, would be easier (and from a transaction costs perspective be less expensive) than directly codifying national rules which have not yet been subject to harmonisation. Furthermore, psychological obstacles on the part of the Member States may be more easily overcome in areas where harmonisation has already taken place than where that has not. Moreover, to undertake codification in those areas first, ie before codifying in areas where no prior harmonisation has occurred, would help to understand the kind of problems and difficulties of European codification generally and may serve as a learning process for more far-reaching codification efforts.

The consolidation of existing directives and the implementation of national rules in the areas of *contract law* just mentioned would be a first pillar in the construction of European private law in specific areas. However, thanks to case law of the Community courts,[41] there is another specific area where unification of national laws can and should be achieved. That is with regard to contractual and delictual remedies to be made available to private individuals who have sustained damage as a result of breaches of Community *competition* rules (Articles 81 and 82 EC) committed by other individuals. With respect to such breaches, the ECJ stated in a recent judgment of 20 September 2001,[42] that 'the full effectiveness of Article 81 of the Treaty and, in particular, the practical effect of the prohibition laid down in Article 81(1) would be put at risk if it were not

[40] From the contributions made to the colloquium held at ERA on 27/28 September 2001, it would appear that the existing directives can be put fairly well into a general framework.
[41] See in general W van Gerven, 'The ECJ Case-law as a means of Unification of Private Law?' in *Towards a European Civil Code* (ed A Hartkamp *et alii*), Second revised and expanded edition, (Kluwer Law International, 1998) 91–104.
[42] Case C–453/99, *Courage and Crehan*, nyr.

open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition'.[43] That judgment implies that individuals who could, as a matter of Community law, already claim damages in tort against Member States and national public authorities for breaches of Community law (the so-called 'Francovich' liability),[44] may now also claim compensation as a matter of Community law in contract or in tort from other individuals who have caused them damage as a result of breaches of Articles 81 and 82 EC. The conditions for such (contractual or delictual) liability to arise will have to be fleshed out further by the ECJ in later case-law. It would be preferable however for the Community legislature itself to take the initiative by laying down such uniform Community rules in a regulation made on the basis of Article 83 EC. Such regulation should then provide in uniform rules not only for the remedy of compensation but also for the remedy of nullity—which is expressly provided for in Article 81(2), as implemented by case law of the ECJ—as well as for the remedies of restitution, restitutionary (and eventually exemplary) damages, interim relief and, possibly, collective claims to protect diffuse interests. In the not unlikely event that the Commission's 'Modernisation' proposals to replace the existing Regulation 17,[45] are adopted and that private enforcement of Community competition rules will thus be attributed fully to the national cartel authorities *and* to the national courts (including the competence to grant exemptions under Article 81(3)), there will be an urgent need for such a 'remedies regulation' in order to facilitate the task of national courts and to make enforcement of competition rules by those courts more efficient than it is now.[46] Such a regulation would be the second pillar on which European private law can be built, this time in the field of contractual *and* delictual liability,[47] for breaches of

[43] Par. 26 of the judgment. In my Opinion as Advocate General in the Banks case (Case C–128/92, *Banks v British Coal Corporation*, [1994] ECJ I–1209 at para 36) I had encouraged the Court to do so, an advice which it has now followed.

[44] See further W van Gerven, J Lever and P Larouche, *Cases, Materials and Text on National, Supranational and International TORT LAW*, second expanded edition, (Oxford, Hart Publishing, 2000), 889–930, where 'Francovich liability is seen in context with the liability of Community institutions under Article 288, para 2, EC.

[45] First Regulation implementing Articles [81] and [82] of EC treaty, JO 1962, 204.

[46] See further my article on 'Substantive Remedies for the private Enforcement of EC Antitrust Rules before national Courts' to be published in CD Enlermann and IA Atanasiu (eds) *European Competition Law Annual 2001* (Oxford, Hart, 2003). See also the contribution of F Jacobs on procedural aspects in the same *Annual*.

[47] The judgment *Courage and Crehan* mentioned in the text relates to a matter of contractual law but is coached in general terms to include both contract and tort claims for breaches of Article 81 EC. The question submitted to the ECJ by the English Court of Appeal was whether a contracting party to a tied house agreement (in a brewery contract) which is prohibited by Article 81 EC, may rely upon that article to seek relief from the courts from the other contracting party, more specifically whether he is entitled to recover damages alleged to result of his adherence to a price maintenance clause in the agreement. In its judgment the ECJ had therefore to deal with the protection of a weaker contracting party and with issues of unjust

statutory duty by private or public persons. Such a specific Community tort would then come in addition to the liability regulated in the directive on liability for defective products[48] which concerns another type of ('strict') liability in contract or in tort.

3.2. Law Making 'by Exception'

Law making 'by exception' (ie only, or first, in specific 'internal market-related' areas) can be supplemented by existing non-binding General Principles.

If the above proposals were to be acted upon, and a first part of private law therefore constructed through regulations in 'internal market-related' areas of contract and tort law, such as consumer and competition law, the question arises whether such 'codification by exception' (by analogy with 'management by exception') is acceptable. And indeed, the normal way to proceed is first to lay down general rules and only then special rules for specific situations. However, in the present state of Community law, the procedure would be different because of the existence of Community directives and implementing national legislation in specific areas for which there is a legal basis that can also be used, as suggested above, to turn the existing rules into directly applicable Community regulations. Since the existing rules are limited in scope, and part of a well established 'acquis communautaire', the issue of democratic legitimacy raised hereafter in connection with new and more general legislation should not arise here either.[49] That is not so much because in those specific areas 'differences in ethics and legal values (would not be) considerable',[50] for indeed they are, to a certain extent at least, since also in those areas which concern the interests of weaker parties, or diffuse interests, in other words which intend to protect social, consumer and environmental 'citizen' rights,[51] there is no unanimity as to the degree of protection in each Member State. However, because of the existing 'acquis communautaire' in Community, national statutory and case law, there is a sufficiently solid basis to take further steps in those areas.

enrichment and of 'nemo auditur' or 'in pari causa' (prohibiting a contracting party to profit from his own unlawful conduct: para 30 and 31).

[48] Council Directive 85/374/EEC of 25 July 1985, as amended by EP and Council Directive 1999/34/EC of 10 May 1999.

[49] For consumer law there is Article 153 EC in conjunction with Article 95 EC which provides in any kind of measure to be taken in co-decision between the Council and the EP and allows qualified majority in the Council. For competition law, there is Article 83 EC which allows regulations or directives to be taken by qualified majority in the Council but provides only in consultation of the EP.

[50] Thus O Lando, 'Why codify the European Law of contract?' in *European Review of Private Law*, 1997, 525–35, at 530.

[51] On these rights, see N Reich, *Bürgerrechte in der Europäischen Union*, (Nomos Verlagsgesellschaft, Baden-Baden 1999).

As a matter of fact, starting with codification in those fields may have the beneficial effect that, when general codification is prepared—and there is no reason to wait for that even in the absence of a sufficient legal basis[52]—it can be effected in a more 'value-oriented' or 'policy-minded' perspective because of already agreed exceptions to the propositions of more general legislation to come.[53]

From a more practical viewpoint, the objection to 'codification by exception' can also be overcome by giving full support, in line with the second option of the Commission's Communication,[54] to initiatives aimed at drafting non-binding general principles. In the area of general contract law, two sets of principles have already been elaborated: the *Principles of Contract Law* prepared by UNIDROIT ('Institut pour l'Unification du droit privé') and those prepared by the Commission on European Contract law (the 'Lando group').[55] Both initiatives show that, and how much, uniformity can be achieved; moreover they already offer guidance to all those looking for uniform law in whatever capacity,[56] especially because 'they resemble each other, not merely in the editorial form ... but also in substance'.[57] Actually, also the work undertaken by the 'Study Group on a European Civil Code'[58] will probably come up with similar results in the area of contract law, and will in the other areas of private law which it intends to cover (tort, unjust enrichment and collateral to secure debts) adopt the same methodology (including the non-binding character of the rules for the time being). The same methodology was also followed by the group drafting *Principles of European Trust Law*.[59] All of those principles may help, as

[52] That is the position I expressed in the study preliminary to the work of the 'Study group on a European Civil Code' (cfr above n 25; see concluding remarks in para 87–8). That preliminary report has been submitted to the European Parliament (Directorate general of Science, project nr. IV/98/44).

[53] For instance when issues arise concerning the scope of the 'pacta sunt servanda' principle, the exception of 'public policy' or 'mandatory rules', theories relating to abuse of circumstance by a contracting party, to name only a few.

[54] Referred to in n 1, para 52–6.

[55] On these two initiatives, see A Hartkamp, 'Principles of Contract Law' in *Towards a European Civil Code* (ed A Hartkamp et al), second and expanded edition, (Kluwer Law International, 1998), at 105–20; and 'Perspectives for the Development of a European Civil Law' in *Making European Law, Essays on the 'Common Core' project* (ed M Bussani and U Mattei), (Università degli Studi di Trento, 2000), 39–60 where a complete overview is given of the various initiatives and projects of binding law, case law, soft law and scientific/educational projects which are underway (see also below in the text).

[56] See the Introduction, at p xxiii–xxiv, of the *Principles of European Contract Law*, Part I and II, edited by Ole Lando and Hugh Beale, (Kluwer Law International, 2000). The Unidroit principles are commented on by MJ Bonell in 'The need and possibilities of a codified European contract law' in *European Review of Private Law*, 1997, 505–17.

[57] A Hartkamp in the first publication referred to in n 55, at 119.

[58] See above n 25. The name of the group is unfortunate, as pointed out by Lord Goff at 241 of his contribution referred to above in n 10. And see the response of Professor von Bar, at 78 of his contribution referred in n 25.

[59] Referred to above in n 24.

explicitly intended by the authors of the 'Lando' *Principles of Contract Law*, to provide an infrastructure for the as yet dispersed Community law rules governing contracts;[60] an objective which should compensate for the 'piecemeal' approach which existing Community legislation is forced to apply.[61]

In the absence, so far, of a valid legal basis in Community law for general legislation, it will not be possible to turn those *Principles*, or others, into binding law. Accordingly, it must suffice to endorse them informally, in one way or another,[62] eg as 'guidelines' to be taken into account, where possible, in drafting or redrafting future or existing Community law, and possibly also in the implementing of national legislation.[63] The European Commission could also choose to designate the principles as applicable law in contracts concluded by or on behalf of the Community[64] (see Article 288, para 1).[65]

4. THE ISSUE OF DEMOCRATIC LEGITIMACY

4.1. The Principle of (Procedural) Democracy and the (Now Lacking) Legal Basis for European Codification

The principle of democracy is one of the foundations of the European Union (Article 5(1) TEU).[66] Even before the entry into force of the Treaty on European Union the ECJ used it, where it had to choose between two possible legal bases, to give preference to the legal basis with the highest involvement of the European Parliament.[67] The procedure laid down in Article 95 EC complies with that procedural aspect of the principle of

[60] Referred to above in n 43, at xxii.
[61] See also the Commission's Communication, referred to above, n 1, where the advantages of such an approach are enumerated at para 52–6.
[62] For instance as part of an 'assessment of draft legislation programme'. See in that connection *Improving the Quality of legislation in Europe,* TMC Asser Instituut (ed AE Kellermann et al), (Kluwer Law International, 1998).
[63] At the ERA conference in Trier, mentioned in the note accompanying the title of this contribution, many reporters explored ways to achieve consistency between existing legislation and underlying general principles. See also the overview contained in Annex III of the Commission's Communication concerning the 'structure of the acquis'. O Lando in his article mentioned in n 50 also refers to a list of 70 Principles, Rules and Institutions that was prepared by KP Berger, as a common core already applied by legal systems and the business community, in Hans Schulte-Nölke and Reimer Schulze (eds), *European Contract Law in Community Law*, Schriftenreiche der Europäischen Rechtsakademie Trier, 2002.
[64] As I suggested in my contribution mentioned above in n 41, at 99.
[65] See also Article 238 EC pursuant to which the ECJ can be given jurisdiction in respect of such contracts by virtue of an arbitration clause.
[66] On the issue of democratic legitimacy within the Community, see P Craig and G De Bùrca, n 23.
[67] Case C–300/89, *Commission v Council*, ECR I–2867, para 20.

democracy, as it refers, for the adoption of measures of harmonisation (through directives) or of unification (through regulations), to the co-decision procedure of Article 251 EC. Under that procedure, and 'although the Council can in practice make its will prevail if conciliation fails, unless the Parliament is indeed able to muster the necessary majority,' the Council is forced 'to treat the Parliament with the requisite respect'.[68] However, as already mentioned, in the *Tobacco*-judgment[69] the Court interpreted Article 95 EC in a way that does not allow for the codification of core provisions of private law if they do not have 'as their [concrete] object the establishment and functioning of the internal market' (Article 95(1) EC).[70]

Even assuming that Article 95 EC were to offer a sufficient legal basis, it might be inappropriate to use it as a legal basis for general private law codification, ie beyond the scope of 'internal market related' matters (dealt with *supra*). That is because Article 95 allows for measures to be taken by a qualified majority in the Council, in addition to an absolute majority in the Parliament.[71] Since 'qualified majority' at present implies that, where a majority of Council members (ie Member States) *and* a majority of 62 (out of 87) votes are in favour of a proposal from the Commission, that would be sufficient for a measure to be adopted (Article 205 EC). That means that it is possible to impose codification of core provisions of private law on all of the (supposedly) 'non codification minded' Member States.[72] I wonder whether it would be desirable to apply that procedure in an area so 'close to the citizen' as codification of private law (Article 1, para 2 TEU) and regarding an issue which the Member States concerned, at least some of them, may deem to be of 'constitutional' importance (affecting, as it does, the institutional balance between the legislature and the judiciary).[73] That would be different, of course, if the Member States were to decide, on the occasion of the next Intergovernmental Conference (IGC), and therefore unanimously, to amend the EC Treaty in order to bring codification of core provisions of private law within the scope of Community law.[74] Since such an amendment must be ratified by all Member States in accordance with

[68] Thus PJG Kapteyn & P VerLoren van Themaat, *Introduction to the Law of the European Communities*, 3rd ed, edited and further revised by LW Gormley, (Kluwer Law International, 1998), 430–9, at 437, where the procedure is thoroughly analysed.
[69] Above, n 29.
[70] In the same sense S Leible, 'Die Mitteilung der Kommission zum Europäischen Vertragsrecht—Startschuss für in Europäisches Vertragsgesetzbuch?', in *Europäisches Witschafts und Steuerrecht*?, at (17–18).
[71] S Leible, *ibid*.
[72] Of a total of 87 votes, the UK, Ireland, Denmark, Finland and Sweden have 23 votes and could thus be 'out-voted' (if the Nice Treaty is adopted votes will be weighted differently).
[73] On the doctrine of binding precedent and statutory interpretation in English law, see I Mcleod, *Legal Method*, 3rd ed, (Macmillan Law Masters, 1999) at 131 ff resp.227 ff.
[74] As has been decided in the Amsterdam Treaty with regard to 'judicial cooperation in civil matters having cross-border implications … and insofar as necessary for the proper functioning of the internal market': see Article 65 (ex 73m) EC and above n 37.

their constitutional requirements, and therefore with the approval of the national parliaments, the requirement of democratic legitimacy would then be fully preserved.

For completeness' sake it should be pointed out that, apart from Article 95 EC, Article 94 EC could also procure a legal basis for codification. It provides for approximation of national laws which 'directly affect the establishment or functioning of the common market' and may therefore offer a broader basis than Article 95 which is limited to (Community) measures which 'have as their object the establishment and functioning of the internal market'. However, Article 94 is less flexible than Article 95 in that it only allows for the enactment of directives (and therefore only harmonisation but no unification). Furthermore, it does not require co-decision from the European Parliament which must only be consulted (thus providing in less democratic legitimacy at the European level), but requires unanimity in the Council instead (thus providing in more 'indirect' legitimacy at the national level in sofar as national parliaments may have an impact on the vote of their Member State's government representative in the Council). The same procedural rules apply to measures taken on the basis of Article 308 (except that also regulations may be enacted under it).[75] It is not unlikely however, that the restrictive interpretation which the ECJ has attached, in the *Tobacco*-judgment,[76] to the application of Article 95—ie to exclude harmonisation of national laws merely justified by an 'abstract risk'—is also valid for Articles 94 and 308 EC.[77]

4.2. Engaging the European and the National Parliaments as an Expression of the Principle of (Participative) Democracy

Besides a 'procedural' facet, the principle of democracy has also a 'participative' (or 'deliberative') facet, according to which all layers of government likely to be affected by proposed codification, should be allowed to participate as much as possible (even in the absence of an explicit legal competence) in deliberations preceding or accompanying the decision making process. That applies particularly to elected parliaments, whenever decisions are envisaged which imply the making of value judgments and/or the taking of policy decisions, especially when they by their nature touch upon national sensitivities—as the codification of basic principles of private law

[75] See further my contribution on 'Coherence of Community and national laws. Is there a legal basis for a European Civil Code?' in *European Review of Private Law*, 1997, 465–9, at 467–8.
[76] Above, n 29.
[77] Moreover, with regard to Article 308 the ECJ held in its Opinion 2/94 of 28 March 1996 [1996] ECR I–1789, para 35, that it cannot be used to impose on Member States changes which have a constitutional dimension (a dimension which codification may eventually have for the non-codification Member States, as indicated in the text above).

at the European level is likely to do. That the principle of participative democracy plays a role in the European Union was confirmed by Declarations 13 and 14 which the Member States agreed to attach to the Amsterdam Treaty. Declaration 13 tends to strengthen the role of national parliaments in the European Union whilst Declaration 14 invites the European and national parliaments to meet 'as necessary' as a Conference of Parliaments. According to the first declaration, the involvement of national parliaments must be encouraged by stepping up 'the exchange of information between national parliaments and the European Parliament' and ensuring '*inter alia*, that national parliaments receive Commission proposals for legislation in good time for information of possible examination' whilst according to the second declaration a conference of (European and national) parliaments should be convened as necessary in order to consult them 'on the main features of the European Union'. Furthermore, at the recent IGC of Nice, the role of national parliaments was retained as one of the four themes of particular importance for the future of the Union, and will therefore be submitted to the next IGC to be held in 2004.[78]

If the involvement of national parliaments is a political objective to be pursued in matters for which the EU is competent, that must be so *a fortiori* for matters for which Community competences do not exist[79]—as is the case for codification of core provisions of private law as long as that issue is not brought within the scope of EC jurisdiction by amending the EC Treaty. In the absence of such an amendment, the only way to enact core codification is by means of an international agreement in which the Code provisions are incorporated, or to which they are attached. Such an agreement should be prepared in accordance with an 'ad hoc' procedure—modelled eg after the procedure followed for the Dutch Civil Code in order to ensure legitimacy and acceptability[80]—in which both the European and the national parliaments would play a role. Under that procedure codification could be prepared by experts appointed by the Member States who, at an early stage, would take the advice from parliamentary commissions in the European Parliament and the national parliaments on the basis, for example,

[78] See further K Lenaerts and M Desomer, 'Het verdrag van Nice en het 'post-Nice'-debat over de toekomst van de Europese Unie', *Rechtskundig Weekblad*, 2001–2, 73–90, at 89–90. Also in the same issue the remarks of J Meeusen en J Wouters, 107–11, at 109–10.

[79] In areas where no Community jurisdiction international principles may apply, more particularly the principle of international comity to which case law of the Community courts refers in competition cases: see recently the judgment of 25 March 1999 of the CFI in T–102/96, *Gencor v Commission*, [1999] ECR T–II–753. For a comment see Y van Gerven and L Hoet, 'Gencor: Some Notes on Transnational Competition Law Issues' in *Legal Issues of Economic Integration*, 2001, 195–210.

[80] Cf above, at 2. See also W Snijders, 'The organisation of the drafting of a European Civil Code: a walk in imaginary gardens' in *European Review of Private Law*, 1997, 483–7 who stresses the fact, not to be forgotten, that 'legislation, after all, is essentially a political activity', at 484.

of a questionnaire approved by the European Parliament addressing important value judgements to be made or policy decisions to be taken. Once answers were received from those parliamentary commissions, draft bills could be prepared, on any one subject, by committees of experts, and then made public to invite comments from all sectors of society. After such broad consultation and ensuing amendments, the draft bills would be submitted to final deliberation in a 'Convention' (which may take the advice of any group or person it wants to hear) and finally adopted, in view of submission to approval by the Member States, by the Council and the European Parliament. As was the case of the special body set up for the drafting of the European Charter of Fundamental Rights, the 'Convention' would be composed of representatives from the Community institutions and the national parliaments.[81] Obviously, the agreement should provide, in a preliminary ruling procedure before a Community court, for the maintenance of uniformity of interpretation.[82] After it has been approved by all Member States, the agreement would come into force, eg when half of them have ratified it, on those Member States' territory.[83]

Some may argue that the use of an international agreement as an instrument for codification may tend to 'bury' the project for many years or decades. However, as suggested (above the codification of core provisions of private law would in my view be facilitated by the fact that it would occur *after* the consolidation (by means of regulations) of existing legislation in the 'internal market related' sectors of private law (which, as already mentioned, should not preclude general codification from being prepared forthwith, in tandem with the more specific internal market related legislation). Moreover, if, in the course of preparation of general codification, it appears that there was a broad political consensus for establishing a solid legal basis for general codification by an amendment of the EC Treaty, the prior work will not have been in vain, as it can then be used within the framework of the new legal basis. This indeed has happened in the area of conflict of laws where, following the entry into force of the new Articles 61(c) and 65 EC, Treaty provisions contained in external Conventions were

[81] On the ('self titled') Convention, see J Shaw, 'The Treaty of Nice: Legal and Constitutional Implications', *European Public Law*, 2001, 195–215, at 212–3. The Convention comprised 15 representatives of the national governments, 16 representatives of the EP, 1 representative of the Commission and 30 members of the national parliaments (and observers from the ECJ and from the Council of Europe). Obviously the composition, and the numbers of the delegations, should be adapted to the special needs of the codification project and to ensure more specifically a larger representation from the Commission taking into account that that institution would play a crucial role in the consolidation of 'internal market related' legislation.

[82] Because of the overload of the existing Community courts, that may have to be a new court, or an extension of the present ones, which may require, depending on the scope of the envisaged codification, the allocation of important additional resources and therefore a political decision giving high priority to the codification project.

[83] Compare the provisions of Article 34, para 2 (d), *jo*. Article 35 TEU.

transformed into regulations.[84] The advantage of working in two stages, the first of which can be carried out in accordance with the procedure under Article 95 EC, is that it may operate as an incentive to speed up codification of the second stage, and make general codification easier and more acceptable.

5. FLANKING MEASURES NOT TO BE NEGLECTED

5.1. European Codification may not Start from Scratch

Assume for the sake of argument that codification of core provisions has been carried out in large parts of private law and brought to an end; where is a teacher, a judge, a legislator supposed to look when (s)he must explain, apply or elaborate European codified rules? In other words new rules will need to be seen in context, and can and may not be conceived, as one author puts, as principles, how well drafted they are, which are 'scraped off' from internal moralities, underlying value judgments and policy decisions which accompanied them in the national context from which they are drawn.[85] Or, to quote an historian, professor Zimmermann:

> The idea that a codification should be able to cut off the continuity of historical development, has proved to be a rather simplistic illusion. Even in a codified legal system the re-appearance of ideas and solutions from the treasure-house of the ius commune is by no means a rare—although it is usually an unacknowledged—phenomenon.[86]

That is already true in a purely national context as appears from the following statement of W Snijders, the Vice-president of the Netherland Supreme Court who was actively engaged in the (last stages) of the drafting of the new Dutch civil code:

> An effective unification depends not only on general principles [a reference to the Principles of Contract Law of the Lando group], but can often be obtained only through detailed rules, making clear what is meant … (E)ven a clear text cannot solve all implementation problems, linked as they are to the danger of disparity of interpretation ….[87]

Moreover, '(I)t requires the re-education of judges, lawyers and other practitioners, of a kind that must not be underestimated. In the Netherlands in the years before 1992 this was a major undertaking, even though it was

[84] See O Remien, above n 37, at 57.
[85] JM Smits, *The good Samaritan in European Private Law*, (Dordrecht, Kluwer, 2000), passim.
[86] R Zimmermann, 'Roman law and European Legal Unity' in *Towards a European Civil Code* (2nd Ed, Hartkamp et al, Kluwer Law Internctional 1998), 21–39, at 33–4.
[87] W Snijders, above, n 80, at 485.

facilitated by the fact that new *textbooks* and other *literature* were available on a large scale, that practice, in the first place the *courts*, had already largely anticipated the new rules to a large extent and that the *law faculties* had already adapted their teaching to the code before it entered into force' (italics added).[88]

What is true for national codification (admittedly, a very comprehensive one encompassing all subjects of private law and taking more than fourty years to prepare[89]) will be true *a fortiori* for European codification (albeit less extensive) where no comparable support can be found in national legal traditions, mentalities and sources, and where no comparable assistance is to be expected from courts, practitioners and academics.[90] Quite to the contrary, a new kind of lawyer will have to be educated, and throughout the EU considerably revised academic curricula will have to be agreed and applied with a view to creating the legal environment—before, during and after codification—which should allow European codification to function in sustained continuity with the past and to take solid roots in the legal systems of the Member States. In Professor Coing's words,[91] here lies an immense role which academic learning (and teaching) has fulfilled in the past and will have to fulfill again for many years, or rather decades, to come:

> [that role existed] in the formation of our common legal heritage, in the Middle Ages as well as in the Age of Enlightenment. It was academic training based on European ideas that created a class of lawyers animated by the same ideas, and it was the European lawyer who preceded the European law. This is the point, I think, at which our academic responsibility begins … The curricula of our law schools must not be restricted to the study of national law, and not even to national law combined with a certain seasoning of comparative law. What is necessary … is a curriculum where the basic courses present the national law in the context of those legal ideas which are present in the legislation of different nations, that is, against the background of the principles and institutions which the European nations have in common.[92]

Work that is already underway (see below section 5.2) should therefore be continued on an even larger scale with 'the aim of finding a European common core of legal principles and rules' and starting with the modest task of

> mark(ing) out areas of agreement and disagreement, to construct a European legal *lingua franca* that has concepts broad enough to embrace legal institutions

[88] Above n 80.
[89] Above n 80, at 484.
[90] Drawing on his vast experience W Snijders suggests to set up a permanent central institute which would coordinate and prepare the work of working groups and drafting committees: above n 80, at 485. See further below, at 15 of the present text.
[91] Quoted by H Kötz in his article cited in n 26, at 28–9.
[92] Quotation from Coing, 'European Common law: Historical Foundations' in *New perspectives for a Common Law of Europe* (ed Cappelletti) 1978, 31–44, at 44, quoted in full (without the omissions in the excerpt above) by H Kötz, above n 26, at 28–9.

> which are functionally comparable, to develop a truly common law literature and the beginnings of a European law school curriculum, and thus to lay the basis for a free and unrestricted flow of ideas that is perhaps more central to the idea of a common law than that of identity on points of substance.[93]

And above all, to educate lawyers who are ready and capable of leaving behind the 'provincialism and narrowness' of past legal education with its 'emphasis on formal dogma, on legal technique, on subtle doctrinal distinctions'.[94] Lawyers also, whose future it is to study and practice law in the political, economic and cultural context of a growing European integration, and to look for similarities and commonalities in goals, principles and solutions in the national and supranational legal orders which make up the legal heritage which they have in common.

5.2. The 'Bottom-up' Approach of Codification to Accompany and Support the 'Top-down' Approach

As mentioned, many projects are already underway to unearth, understand and rebuild a European common legal heritage.[95] They have in common that they intend, in varying degrees and with differences in methodology, to produce truly European doctrinal writings and materials for use by teachers and students, by judges and other practitioners, by legislators and administrators. Textbooks written from a European perspective are published[96] as well as legal periodicals,[97] and research groups are set up, such as the Trento group on *The Common core of European Private law* (General Editors: M Bussani and U Mattei) and the Vienna/Tilburg group (Ed J Spier *et al*) which engage in extensive comparative research around hypothetical cases discussed under various legal systems. It is in the same vein that I started in 1994, in cooperation with a group of distinguished judges and professors and with the financial assistance of the University of Maastricht

[93] Above n 26, at 36. That this is not an easy matter appears from the literature on Community law which now flourishes abundantly in any one Member State, but unfortunately very often in a closed national, or one language, circuit without reference to literature published in other Member States or other languages.
[94] H Kötz, above n 26, at 29.
[95] Together they form a new field of legal studies: European Private Law. For an overview of the various projects, see A Hartkamp, *Perspectives for the Development of a European Civil Law,* above n 53, where in addition to the already mentioned drafting of 'Principles' projects, the ongoing scientific and educational projects are briefly described at 55–60.
[96] Thus H Kötz, *Europäisches Vertragsrecht*, (JCB Mohr, Tübingen, I, 1996), translated by T Weir and published as *European Contract Law*, (Clarendon Press, 1997) and C von Bar, *Gemeineuropäisches Deliktsrecht*, I and II, Verlag CH Beck, (München, 1998–2000), translated by the authors and published as *The common European Law of Torts*.
[97] European Review of Private Law (from 1993); *Zeitschrift für Europäisches Privatrecht* (from 1993; *Europa e Diritto Privato* (from 1998).

(and during the first years of operation also from the European Commission),[98] with the preparation of a series of *Casebooks for the common law of Europe*. The first book on *Tort Law* was published, first in 1998 in an abbreviated edition and then in 2000 in a complete and largely expanded edition,[99] whilst the books on *Contract Law*[100] and *Unjust Enrichment*[101] were ready for publication in 2001 and 2002 respectively. The books intend to 'uncover' similarities and differences between legal systems whereby the number of legal systems dealt with varies depending on the subjects and on the (large) amount of materials to be treated; but they all include the legal systems representative for the three major law families. The methodology applied is to compare judicial decisions often rendered in similar 'daily life' situations, as well as other sources (statutes and legal writings). The books wish to demonstrate how, notwithstanding existing differences in legal reasoning, very similar solutions are often found, and how Community and ECHR law tend to stimulate convergence, especially in tort and contract law. All of the materials are reproduced in excerpt and preceded or followed by introductory, accompanying and concluding comparative notes and overviews, in which the excerpted documents are situated in the perspective of the legal system concerned, as compared with others.[102]

Obviously, the work done so far is only a start and will have to be followed up by research which, with the help of legal theory, economics and other social sciences, delves even deeper into the phenomenon of

[98] The initiative drew its inspiration from the teachings, in the sixties, of Professor Max Rheinstein at the University of Chicago whose assistant I had the privilege of being in 1959–60 and his successor in 1968. During his courses American post-graduate students were required to solve, and discuss in the class room, concrete hypothetical cases under the US, French and German law of contracts and torts. It has convinced me since that the case method is the best way to learn one's own legal system and that of others. The initiative of the casebooks took concrete form after the conference held in Maastricht in 1991 on *The Common law of Europe and the Future of Legal Education* (ed B De Witte and Caroline Forder), (Kluwer, 1992), where Professor Kötz delivered one of the keynote speeches along the same lines as referred to in the text above.

[99] W van Gerven, J Lever and P Larouche, *Cases, Materials and Text on National, Supranational and International TORT LAW*, (Oxford, Hart Publishing, 2000) and more materials on the internet site http://www.rechten.unimaas.nl/casebook. The first shorter edition, limited to the subject of scope of protection of tort law (now incorporated in the second edition) was published in 1998 by the aforementioned authors in cooperation with G Viney and C von Bar.

[100] Main ed: H Beale, A Hartkamp, H Kötz and D Tallon.

[101] Main ed: E Schrage and J Beatson.

[102] For a presentation of the project, see *European Review of Private Law,* 1996, 67–70 where the names of the members of the steering committee and of the research coordinator (A Alvarez) are mentioned at 70 (also on the back cover of the books). See also P Larouche, '*Ius Commune* Casebooks for a common law of Europe: Presentation, Progress, Rationale' *European Review of Private Law*, 2000, 101–9.The management of the project is presently in the hands of a joint Leuven/Maastricht committee set up in cooperation with the *Ius Commune* research school in which the Universities of Maastricht, Utrecht and Leuven participate.

convergence and divergence with a view of sorting out differences which are artificial, ie maintained for no objective reason, and those which are not. It cannot be stressed sufficiently however, that without flanking measures as described above, European codification would be an enterprise that is carried out in the abstract, ie with no past and probably no future.

6. BY WAY OF CONCLUSION: LEGISLATE EFFICIENTLY AND NOT IN HASTE

It seems appropriate to set up an independent European Law Commission and European Curriculum Commission. Codification is not a 'mission impossible' if it is well prepared. It is not an easy task though, and should not be carried out in haste and without providing in efficient flanking measures, as emphasised above. And indeed, as the American example shows, codification of private law at the European scale cannot be attained by 'mandatory top-down measures' only and, in order to be successful, ie in order not to be perceived as a *Fremdkörper* in the Member States, must be supported by 'voluntary bottom-up measures' deeply rooted in the traditions of both civil and common law countries.[103] Moreover, some institutional measures must be taken to carry out the whole, and lenghty, codification process *and* its flanking measures. To quote, once more, W Snijders, one of the craftsmen of the Dutch Code:

> (The) more or less political activities (of codification) need careful coordination and political insight … This can only be done by a permanent institute, where legal scholarship … and managerial qualities are united … There are … important arguments for such an institute. They are related to a series of intertwined difficulties … In the first place, there is the element of time … (which) will be a matter of decades … Secondly the work must be done in segments … Thirdly, those employed on the code will have to deal with the general problem of the role that pressure groups and lobbyists usually play a role in the legislative process, certainly when it comes to more specific subjects … We meet here in fact three problems: the need for continuity, the need for coordination and the need for continuous well-sifted information.[104]

What Snijders has in mind is the setting up of a permanent institute 'where the work of different working groups or drafting committees can be prepared

[103] Compare MA Eisenberg, 'The Unification of Law' in *Making European Law*, above n 55, 15–26, at 26 who explains, at 19–23, that an American 'national' law transcending that of the Federation and of the States came about in the US in much the same way as a common European law is to emerge: that is under the influence of economics, common history, legal education and scholarship, judicial practice and, last but not least, because of aspirations among lawyers 'to be an American nation with an American culture and an American law'.
[104] Above n 80, at 484–5.

and attended to and where a permanent secretary and his assistants can do what is necessary for continuity …'. Moreover, since general principles, of the Lando Commission type, will gradually lose their attractiveness, as they will need detailed rules, there will be a constant need to accompany problems of implementation and interpretation in the Member States, or at least 'to serve as a kind of rallying point where assistance can be given when this is requested'.[105] And indeed, as was already referred to in an earlier quotation, there will be an urgent need to re-educate judges, lawyers and other practitioners, to revise law school curricula and to provide textbooks and other literature at a large scale.[106] Also to realise this need, the existence of a permanent secretariat will be required.

This well taken advice from someone who has lived with, and during the last stages has directed, a major codification process, as carried out in the context of a modern and democratic society, brings me to my last point. That is to insist on the need to set up an independent law commission where legislative work can be organised and coordinated, and from where follow-up assistance can be supplied, *and* to set up an equally independent law curriculum commission from where not only the revision of university curricula would be guided, but also the setting up of permanent education curricula for judges, advocates and other practitioners would be organised, in close cooperation with law schools, continued education centres and existing 'bottom-up' research projects in the Member States. All this in order to anticipate, accompany and follow-up codification by preparing, as of now, present and future generations of lawyers for a new area of law practice, that is 'against the background of the principles and institutions which the European nations have in common'.[107] Such commissions must consist of members appointed by the Member States in Council, preferably financed directly by the Member States and must be independent from, though working closely together with, the EU Commission and the national administrations.[108]

All this, codification in two stages, as exposed above and flanking measures, will take much time and, in order to succeed, must be done with moderation and without obstination. *Festina lente* should be the device. Just like Rome was not built in one day, it will take time and patience for a common law of Europe to emerge. Time is of the essence, but to put that factor in perspective one must recall, to quote Lord Bingham of Cornhill, the Senior Law Lord in the House of Lords (as he now is) that: 'We are right to continue to worry away at the unnecessary divergences which continue to divide us. But the things which unite us, are greater than the things which

[105] Above n 80, at 485.
[106] Above n 80.
[107] Coing in the excerpt quoted earlier in the text accompanying n 92.
[108] Thus also W Snijders, above, n 80, at 486 who warns against the tendency of bureaucracy.

divide us. The dawning of the new millennium should, no doubt, act as a spur to further endeavour; but it is also an opportunity to reflect on the extraordinary progress already made during what, historically speaking, is like an evening gone'.[109]

[109] 'A New Common law for Europe', at 35, of *The Coming together of the Common law and the Civil law*, above n 10.

9

Deep Level Comparative Law

MARK VAN HOECKE

IN THIS CHAPTER some of the main epistemological and methodological problems of comparative law will be discussed. This will mainly be done on the basis of a concrete example, notably my ongoing research on the interpretation of contracts in Europe, focusing on English, French and German law. From this analysis, conclusions will be drawn as to a methodology of comparative law at a deeper level than the usual one of rules and cases.

1. THE EPISTEMOLOGICAL PROBLEMS

What kind of knowledge do we need for carrying out comparative research? How, and to what extent, may we find it? What kind of new insights may follow from such a research? These are the basic epistemological questions of comparative law.

Worded more directly, we are faced with the question of what we are comparing, and what we should take into account when doing so. The answer to the first part (what are we comparing?) seems obvious: it is different legal systems, or parts of them, that we compare. But, what is a 'legal system'? What determines 'law'? In practice, such questions have hardly been raised in the history of comparative law, let alone answered. More theoretical insights into the phenomenon of law are largely, if not totally, lacking. To such an extent that it created quite a lot of confusion on what comparative law is about: Is it a discipline in its own right or just a methodology? Is it a description of foreign legal systems? Is it the search for the common core of all legal systems (within a certain region, such as the EU, or world-wide), looking for some kind of empirical 'natural law'?

Let us take the most modest of these alternatives: a discipline aiming at describing foreign legal systems. For the time being, we leave open the answer to the question whether this can suffice as such or whether this is only a first step, taken in view of finding interesting examples for improving

one's own legal system, or for finding out what we have in common across two or more legal systems, or for harmonising law, etc.

Describing the Law

Describing law is most familiar to legal scholars. After all, this is also what they mainly pursue outside any context of comparative research. So, we have to start with the question what is 'scholarly legal research' about within one and the same legal system? The short answer is: describing and systematising the law.[1] Describing means identifying valid legal sources and determining the content of the rules they contain. Systematising means the integration of all these sources and rules into one coherent whole, through interpretation and theory building. It is mainly the latter which guarantees the scholarly dimension of legal research. However, as a rule, collaborating to the systematisation of foreign law will be too ambitious for the comparatist, who will already be happy if he succeeds in correctly describing the foreign law. Generally speaking, such a description will not be based on autonomous analysis of all available sources either. It will mainly, if not exclusively, draw on scholarly writing of foreign colleagues who describe their own law. This is a useful work for offering relevant information to legal practitioners and others interested in that foreign law. However, if it would be pure descriptive information, it does not only entail problems as to the scholarly status of such work, but we could also question its practical relevance, in all cases where domestic legal scholars have made this information available in the same language. It does, for instance, not make much sense for a French scholar to publish a book or article, in French, which would purely describe Belgian administrative law, as there are sufficient publications available, written by Belgian lawyers, who, as a rule, are in a much better position to do so. But in most cases, one will rightly reply, (information on) foreign law is, with few exceptions, only available in a foreign language. Does this mean that comparative research would be nothing else but translation work? In practice, comparatists sometimes indeed limit themselves to translating selectively what others have written about their domestic law. This work is useful for those interested in that foreign law, but who do not master that foreign language (sufficiently), but, yet again, this is not scholarly work (however difficult it may be to translate adequately) and it does not create a 'discipline' nor a 'methodology' in its own right.

So, comparative law must be about more than just describing, and mostly translating, foreign law. Of course, the comparatist will reply, we

[1] See on this point more extensively: M Van Hoecke & M Warrington, 'Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law', *International and Comparative Law Quaterly*, 1998, 47 495–536, at 523–28.

'compare law'. This answer now raises another question: what are we *concretely* comparing?

Comparing Rules

Do we compare legal *rules*? A lot of comparative research has indeed focused on rules, but rules cannot be (fully) understood isolated from their legal and non-legal context.[2] Lawyers educated in a legal system have largely acquired this knowledge of the legal context through their legal education and their familiarity with the national, regional and local (non-legal) cultures, through their general education and their socialisation in the relevant communities. Unconsciously, but very effectively, this knowledge and sharing of values and world-views plays a role in the way law is looked at, interpreted and handled. Foreign lawyers largely lack this framework. This is an obvious problem for simply understanding the law of remote legal cultures, but also a more hidden problem for wrongly understanding apparently identical or comparable rules, which have, in practice, because of their context, a completely different scope.

This leads us to the next question: what is the *relevant context* for fully and correctly understanding (foreign) rules? To what extent do we have to consider the environing legal rules, procedural rules and court structures, the constitutional context, legal history, legal culture, the social and economic context, etc? Here, the comparative lawyer is lost. The relevance of each of those contexts is seldom explicitly raised, let alone discussed, in domestic research. According to the topic, different contexts may have diverging relevance. Occasionally some more theoretical legal research, including legal history, legal sociology and the like, may be available, but some overall theoretical framework is lacking.

[2] As has regularly been pointed out by some of the better comparatists. Eg: '… , for, as with all other legal concepts, a particular legal system's use of "contract" can be understood fully only within the wider conceptual, institutional and procedural framework of the system which it inhabits.' (S Whittaker, 'Unfair contract terms, public services and the construction of a European conception of contract', *Law Quarterly Review,* 2000, 116 95–120, at 95). 'Le droit comparé naît du travail de reconstitution des contextes.' (O Pfersmann, 'Le droit comparé comme interprétation et comme théorie du droit', *Revue Internationale de droit comparé* 2001, 275–88, at 285). 'It is also increasingly recognised today that the comparatist must be an observer of social reality and that comparative law has much to gain from an interdisciplinary approach.' (H Kötz, 'Comparative Law in Germany Today', *Revue internationale de droit comparé*, 1999, 753–68, at 756). However, due to a lack of methodology it is easier to make such general statements than to apply them in concrete research, as noted by Luke Nottage, L Nottage, *Convergence, Divergence, and the Middle Way in Unifying or Harmonising Private Law*, (EUI Working Paper LAW 2001/01, European University Institute, Florence) both as regards Kötz ('Unfortunately, Kötz has never adequately met this challenge', at p 20) and as regards Whittaker and Zimmermann's book on Good Faith ('Unfortunately, scant attention appears to have been paid to [that account be taken of any institutional, procedural or even cultural features that might be pertinent to a proper understanding of the approach involved] by the national reporters, none known for their expertise in procedural law—let alone legal sociology', at p 10).

One way out of this problem is to bring together lawyers from different countries and asking them to describe some element the promoters of the comparative research wish to compare. However, this does not always make all those involved in this research aware of hidden differences. Only through an intensive dialogue is it possible to retrieve all contextual differences and commonalities and to determine their relevance for the rules that are compared. When we would dispose of a sufficient number of outcomes of such empirical research, some theory of 'relevant context' could be worked out. Unfortunately, up to now, such empirical research is still almost completely lacking.

Comparing Cases

Another apparent way out, which became very popular in the last decade, is the move from 'rules' to 'cases'. If rules, because of their differing contexts, may mean different things when compared to what their wording may suggest, a way of finding out their exact scope is looking at their application in court decisions.

A first comment is that such a shift tends to offer a rather different picture of a legal system, as it does not describe the general rules of a legal system, but its pathology, namely the conflicts about the (application and interpretation of the) rules, or rather part of these conflicts, those which are not solved outside courts. Moreover, mostly only *published* judicial decisions are sufficiently accessible and can be taken into account. This raises the question to what extent court decisions offer a correct picture of a 'legal system'. The conclusion that legislation does not either is not a sufficient answer. Court practices may seem to be somewhat less 'law in the books' but they do not offer a full picture of the 'law in action': alternative dispute resolution, social or economic practices that never come to a court, will, by definition not appear from court decisions. Moreover, comparative analysis of cases seems to focus relatively more on 'hard cases' for which the solution is not beyond discussion in the legal system itself.[3] Also, comparison is often limited to supreme court or higher court decisions.[4] Here again, one may ask whether focusing on hard cases is an adequate way of showing

[3] This, for instance, is admitted by Simon Whittaker and Reinhard Zimmermann as to their research on *Good Faith in European Contract Law* (Cambridge University Press, 2000). In the concluding chapter to this book 'Coming to terms with good faith' they point to the fact that 'In all twenty of the thirty cases led either to the same result in all the systems or the same result in all the systems bar one or two' and they, rather enthusiastically, add 'This degree of harmony is particularly remarkable in view of the fact that many of the situations included in the study are recognisably "hard cases".' (p 653).

[4] With all its qualities this seems to be a major shortcoming of the comparative research on statutory interpretation conducted by Neil MacCormick and Bob Summers (DN MacCormick, & RS Summers, *Interpreting Statutes. A Comparative Study*, (Aldershot, Dartmouth, 1991)).

commonalities and differences *between legal systems*. They rather point to divergences *within* legal systems. Supreme courts, of course, have a strong authoritative power in their legal system, but they do not always reflect the legal reality of the lower courts. But let us, for the purpose of this paper, leave aside this possible sociological criticism, and accept this 'cases-approach' as having, in principle, a value in its own right, even if it would probably not suffice for fully comparing legal systems and if the actual choice of cases may be criticised to the extent that it would claim to offer a representative picture of the concerned legal field.

Focusing on court decisions unquestionably has the advantage of showing how rules work in practice, how lawyers educated and working in that legal system look at the rules, interpret and handle them.

The 'Objectivity' of Facts

However, another epistemological problem has to be raised here. 'Case-comparatists' seem to approach (judicial) facts as neutral data that can be compared, without any restriction, across all legal systems. They do not seem to realise that 'facts' are socially, and in our context most notably legally, 'constructed'. The facts which create a 'crime', an 'accident', a 'contract' are not just external elements which as a 'natural law' would make it a 'crime', 'accident' or 'contract'. 'Facts' are looked at through legal glasses. Destroying a car may be considered a 'crime' if a thief has stolen this car for a hold-up and afterwards burned it to cover up his tracks, but it is an 'accident' if by a failure of the brakes a truck hits that car. It may even be a 'contract' if the owner brought his old car to a specialised company, which compresses used cars in order to reduce their volume. So these 'facts' appear to be created by property rights, intentions, etc. They are not just 'there'.

Sexual intercourse may be considered a positive fact and even a duty (marriage) or a negative situation and even a crime (rape). What in one country, or period of history, may be considered as the quite normal use of a right that results from marriage, may in another place or time be punished as 'rape' within a marriage. Offering sexual services in exchange of money may be called 'prostitution', but this will mostly not be called so when this is done in the frame of a marriage (even if the 'reality' may be the same).

Let's assume that you want to compare the 'administrative courts' in the countries of the European Union. What counts as 'administrative law' and what is to be considered a 'court', however, cannot be determined independently from the valid law of those legal systems. It involves conceptions of the public/private law divide, of the 'administration' and its task, of what makes a decision-taking body a 'court'. Comparing the same 'reality' will be difficult, as the diverging law of the compared legal systems made these

'realities' different. One could try to work out relevant criteria that are, at least partly, 'system-independent' and act as a common denominator, such as, for identifying 'courts': the independence of the 'court', the status of the 'judges' (professionals or not), the specialisation of the body (full-time court or only a (small) part of a broader task, which is non-judicial), the procedures to be followed, the (possibility of) appeal procedure(s), the integration into a larger court structure, access to the court, the degree of protection of the citizen, etc. Whatever one takes as criteria, it will be a choice that is not a pure description of 'facts' but is strongly determined by a (implicitly or explicitly) chosen theory and influenced by criteria already chosen by one or more of the legal systems one wants to investigate. This is not just so with law, in positive sciences too it is now generally accepted that an informative, scientific description of reality is only possible when embedded in, and guided by, theoretical constructs.[5] In law, 'facts' are, moreover, partly determined by the legal rules themselves and not only by the theoretical framework of legal science. Comparing the 'notary' function will, for that reason, be different when one limits oneself to continental EU countries having a rather similar profession of a 'notary public', in contradistinction with a comparison that also would take into account the Anglo-American law, where no comparable profession exists. Here, it are the rules of the respective legal systems which already have created different 'legal realities', independently (although often influenced by) the conceptual frameworks of legal science.

But, if 'facts' are already partly determined by the rules of the applicable legal system,[6] they cannot be considered to be a neutral basis for comparison.

Anyway, it will be difficult, if at all possible, to find cases from different countries with *identical* facts. To take some of the leading cases of the common law: on the continent there are no reported cases on a snail in a bottle of ginger causing a psychological shock to the consumer discovering it,[7] on

[5] 'The entire history of scientific endeavor appears to show that in our world comprehensive, simple and dependable principles for the explanation and prediction of observable phenomena cannot be obtained by merely summarising and inductively generalising observational findings. (…) Guided by his knowledge of observational data, the scientist has to invent a set of concepts—theoretical constructs, which lack immediate experimental significance, a system of hypotheses couched in terms of them, and an interpretation for the resulting theoretical network' Carl G Hempel, *Fundamentals of Concept Formation in Empirical Science* (Chicago, The University of Chicago Press, 1952), 2.

[6] Sometimes this has even explicitly been stated by legal practitioners, such as Master of the Rolls Jessel, in 1876: 'It is not the less a fact because that fact involves some knowledge or relation of law. There is hardly any fact which does not involve it. If you state that a man is in possession of an estate of £10,000 a year, the notion of possession is a legal notion, and involves knowledge of law; nor can any other fact in connection with property be stated which does not involve such knowledge of law' (*Eaglesfield v Marquis of Londonderry*, 4 Ch D, 1876, 693, at 703).

[7] House of Lords, *Donoghue v Stevenson*, 1932, All ER 1–31.

an advertisement for 'smoke balls' promising a reward to anyone who caught influenza after using the smoke ball inhalant as per directions for two weeks,[8] on somebody buying oats and afterwards complains that he received new ones, alleging that only old ones could be of any use to him,[9] let alone on 'Spice Girls' having signed an agreement to participate in filming a commercial for scooters, but hiding that one of the members had meanwhile decided to leave the group.[10]

Actually, lawyers are only interested in facts that are relevant to the law. So, for instance, the colour of the smoke balls or the day of the week on which the oats were bought is never mentioned, as it is irrelevant to law. Moreover, in order to make the case interesting for legal doctrine, these facts have to challenge the current rules, their scope, interpretation and relationship with other rules, in other words the doctrinal theories. For this reason, most cases related to the requirement of 'consideration' in English contract law, are completely irrelevant for comparing them with Continental legal systems, as none of them uses a concept which would come close to 'consideration'. As a result there cannot be comparable cases on the Continent. This means that, in order to compare cases, one firstly has to select them on the basis of previously conceived types or categories of facts that are relevant to all of the compared legal systems.

The 'practical' argument sometimes used in favour of comparative case studies is the conclusion 'that although the legal concepts and legal rules used in the compared legal systems may be rather different, the practical solutions are often by and large the same'.[11] This conclusion may be true in practice, but questions the scholarly relevance of such an approach even more. It is already interesting to note that comparatists tend to emphasise this 'positive' side of the analysed commonalities and differences. One may also focus on cases where the practical result is completely different, notwithstanding identical legislative rules. If this is so, then it means that legal rules do not, at least not decisively, determine judicial decisions and, hence, 'what the law is'. But, what then makes the law? The personal opinion of the judges? Legal tradition? The prevailing legal culture? The currently prevailing values and world-views in society? Anyway, nothing of all this is ever studied in comparative case research. How can we say that legal systems are different or comparable on the basis of decisions, if just one or three or five (or even somewhat more) judges happen to have delivered the only, or most recent, decision on these 'facts', or happen to have the authoritative power of a supreme court?

[8] Court of Appeal, *Carlill v Carbolic Smoke Ball*, *Law Reports* 1893, QB 256–75.
[9] *Smith v Hughes, 6*, 1871, QB 597.
[10] Court of Appeal, Chancery Division, *Spice Girls Ltd v Aprilia World Service*, (2000).
[11] See eg: K Zweigert, 'Des solutions identiques par des voies différentes. Quelques observations en matière de droit comparé', *Revue internationale de droit comparé* 1966, 5–18, at p 5.

Anyway, all this points to the necessity of having a better sight on what 'makes' the law, on what constitutes a legal system, so that we at least *know* which elements of the law and of its environment we have to study, when carrying out comparative research, and which respective weight should be given to each of them.

Epistemological Optimism and Epistemological Pessimism

Most of comparative research has shown a remarkable *naive epistemological optimism*, pursuing comparisons as if comparing legal systems would not entail specific epistemological problems, or as if the implementation of such studies could be isolated from these more theoretical problems that could be left to legal theorists. On the basis of the history of legal practice, legal science and legal theory there are, moreover, good reasons to believe that the practicioner (and scholar) of (positive) law does not need theory to be successful. What proved possible for domestic law, it is assumed, should be possible in comparative law too. As long as comparatists limit themselves to descriptive translations or summaries of foreign law, this even seems valid, at least if they drop any scholarly ambition to see 'comparative law' being recognised as a scientific discipline in its own right. But, once it comes to a real *comparison* of legal systems huge problems arise, be it for determining the real differences and commonalities, for identifying the 'better solutions' and/or for determining the possibilities and desirabilities for harmonising two or more legal systems.

On the other hand, as a reaction to these problems a *strong epistemological pessimism* has led to a simple denial of any possibility for comparing, let alone harmonising, legal systems. Law is seen as the product of a legal culture or legal '*mentalité*', which, also remarkably, always seems to coincide with the (entire) population living on the territory of a national legal system. Foreigners, in this reasoning never will be able to understand 'really' foreign law, because of cultural differences.[12] This is another easy way to escape the need for working out an adequate methodology for comparative law.

Anyway, with all its shortcomings, comparative research seems to have attained results, which are clearly beyond pure description. All over Europe (but also outside of it) scholars and other lawyers are involved in comparative research projects, in harmonisation initiatives and even in the drafting of 'European codes'. Civil officers from various countries prepare European directives, which should as much as possible fit with the legal concepts and

[12] See most of the publications of Pierre Legrand and most notably: 'European Legal Systems Are Not Converging', *International and Comparative Law Quarterly*, 1996, 45 52; *Fragments on Law-as-Culture*, (Deventer, Kluwer, 1999).

structures of the member States, at least to the extent that it should be practically possible to implement them into domestic law. Judges in European and other international courts (and the advocates, *référendaires*, etc) have to face divergences in legal cultures and need to bridge them in one way or another, on a daily basis. Law students attending programmes abroad, through schemes such as Erasmus/Socrates or otherwise, also have to integrate the new 'foreign' information into their domestic legal knowledge and culture. 'European' textbooks and casebooks are published and used in legal education and legal practice. Reality seems to support the optimistic view.

How to solve this paradox? Whilst one scholar is professing that there never will be a European Civil Code, others agree on a draft of it and receive growing institutional recognition from parliaments and governments.

Maybe they both have a biased view of reality.

Strong epistemological *pessimism* has a perfectionist view on 'understanding'. If you do not fully understand something, you do not understand anything. In practice this means that almost nobody can understand almost anything. A rather frustrating conclusion, especially for those who's professional life is centred around teaching and publishing. As an almost inevitable consequence, knowledge and culture are perceived as static entities, which cannot change under the influence of other persons or cultures. They are closed to the external world. Each culture or 'system' has its own 'code', and converts all external information into its own language. There is no common language. Real communication, in this view, is impossible. This conclusion, however, is clearly refuted by our common sense observation of reality[13] and the knowledge offered by world history.

Naive epistemological *optimism* thinks that comparative law can very well do without any method, or that 'comparing' is just a natural activity: you look and listen, and automatically you 'see' the divergences and commonalities; you compare different legal solutions and automatically you 'see' the 'better solution'.[14] The implicit, unconsciously followed, methodology,

[13] Many comparative analyses show the, sometimes important, influence European law has on domestic law, and how it is, in this way, creating changes in national legal cultures and effectuating a slow, but ever increasing convergence. See, eg, among the abundant literature: J Ziller, 'La dialectique du contentieux européen: le cas de recours contre les actes normatifs', in: *Les droits individuels et le juge en Europe. Mélanges en l'honneur de Michel Fromont*, (Strasbourg, Presses Universitaires de Strasbourg, 2001), 443–64, most notably at 455–59.

[14] Otto Pfersmann has rightly criticised the naive epistemological and ontological assumptions underlying such a view: 'Elle lie implicitement une thèse épistémologique (un cognitivisme juridique: l'expert des règles positives sait ce que sont les règles idéales) à une thèse ontologique (ce savoir produit des règles). Elle constitue une variante du sophisme naturaliste induisant l'habituel fantasme du juriste de se croire producteur de règles idéales dans la mesure où il est expert de règles positives.' (O Pfersmann, 'Le droit comparé comme interprétation et comme théorie du droit', *Revue Internationale de droit comparé* 2001, 275–88, at 279).

the ideological and other assumptions, and their influence on the description and interpretation of the foreign law and on the choice of the 'better solution' thus remain completely out of view. For instance, as rightly noted by Jonathan Hill, 'the approach adopted by "better solution" comparatists fails to consider a more fundamental question, namely whether the function which the rule or institution serves is a worthwile one.'[15] In other words, something comes out of comparative research, but we do not know whether it are the right things, neither at the descriptive level (what is the foreign law and how does it differ or not from our law?) nor at the normative level (which is the best rule or legal solution?).

2. THE METHODOLOGICAL PROBLEMS

The methodological problems of comparative law can best be analysed by using a concrete example. For this purpose, I will focus on a comparison between England, France and Germany as to the interpretation of contracts.

2.1. Terminology

Words do not only generally differ from one language to another, even within the same language words may have diverging denotations according to the country, the region, the professional group, etc. An example in English is the diverging connotation the word 'lawyer' has in the USA when compared to the UK. The Italian saying '*traduttore traditore*' is even more valid in law. How to translate concepts such a 'trust', 'barrister' or 'solicitor' into any continental language? 'Easement' comes close to 'servitude', but is not the same. 'Hypothèque' cannot simply be translated into 'mortgage'.[16] Attorney (USA), barrister, solicitor (England), advocate (Scotland) are all English words, which, in different places, denote comparable, but not identical realities of lawyers defending clients in court. Translating them as '*avocat*' or '*Rechtsanwalt*' suggests a different reality than what is covered by the original word. This means that, for technical concepts, such as 'trust', '*acquis communautaire*', '*Bundesverwaltungsgerichtshof*' translation is undesirable, if not just impossible. It also means that, in order to understand technical words in legal language, one needs an insight into the rules governing the concept and the actual reality it covers, which may be rather broad (as is the case with the three examples given).

[15] J Hill, 'Comparative Law, Law Reform and Legal Theory', *Oxford Journal of Legal Studies*, 1989, 101–15, at 104.

[16] The official translation of the *Code civil du Québec* has solved this problem by creating a new English word: 'hypothec'.

So, the comparatist has first to find out to what extent the words used in the compared legal systems bear the same meaning. Apparently identical words may have a different meaning and apparently different words may have the same meaning.[17] The table hereafter compares the words used in France, England and Germany for 'interpretation', 'contract', and 'methods of interpretation'. Although it is sometimes tried to see a difference between 'interpretation' and 'construction', these two words may be considered to be perfectly synonymous,[18] just as *Auslegung* and *Interpretation* in German, and *contrat* and *convention* in French.

France	England	Deutschland	Comparison
INTERPRÉTATION	INTERPRETATION CONSTRUCTION	*AUSLEGUNG Interpretation*	all words basically refer to the same intellectual activity
CONTRAT CONVENTION	CONTRACT	*VERTRAG*	all words basically refer to the same reality
L'interprétation des conventions	The Construction of Contracts	*Die Auslegung von Verträge*	notwithstanding different terminology, the denoted reality is the same
Méthodes d'interprétation	Canons of construction	*Auslegungs-methoden*	the methods may slightly diverge, but the conception is the same

Summarising, we may conclude that apparently different words in the different languages cover the same reality, so that, here, the comparatist is not confronted with linguistic obstacles. However, it is not because the denoted reality is (roughly) the same in the three languages, that the underlying conceptions, behind these words, as used in the respective countries and legal cultures, are really identical, as we will see further on.

2.2. The Structure of (Law and of) Textbooks

When looking for relevant information in the compared field, one will, as a rule, start with textbooks. Rapidly one may discover that the structure of the law, and of the textbooks describing the law, is not identical in all countries, if not substantially, different. This leads us to the question: to

[17] Some good examples of 'false friends' and 'false enemies' in German, Austrian and French public law are given by Otto Pfersmann (above n 14, at p 283–4).
[18] See also in this sense: K Lewison, *The Interpretation of Contract*, (London, Sweet & Maxwell, 1989), p 1, fn 2, criticising a distinction made by J Isaacs in *Life Insurance Co of Australia v Phillips*, *CLR* 36, 1925 p 60.

what extent is there, in each of the compared countries, books or chapters on 'contract law' and subdivisions on 'interpretation'?

Here, the comparison is more confusing for the comparatist.

In France, most of (general) contract law is to be found in the *Code civil (Cc)*, in which there is a chapter on '*Droit des obligations*', with a subheading '*Les contrats*'. Here, in the subdivision '*Les effets du contrat*' a section V *'De l'interprétation des contrats*' contains 9 articles (Art 1156–64 Cc) on the interpretation of contracts.[19]

In Germany, the *Bürgerliches Gesetzbuch* follows at first sight a similar structure: contract law (*Vertragsrecht*) (with one article on interpretation, §157) as a subdivision of the law of obligations (*Schuldrecht*). However, there happens to be a more general chapter, in the first book of the BGB, the '*Allgemeiner Teil*', with a chapter on 'legal acts' ('*Rechtsgeschäfte*'), in which not only important principles are laid down concerning general contract law, but in which there is also an important article (§133) for the interpretation of contracts, under the heading 'the declaration of will' (*Willenserklärung*).

In England, there are no statutory rules on the interpretation of contracts in general. These principles have been laid down by court decisions in the course of history and are to be looked for in legal textbooks on 'The Law of Obligations', 'Contract Law' and, if one is lucky, 'The Interpretation of Contracts'.[20] In English textbooks the interpretation of contracts is not discussed in a separate chapter. Some textbooks even lack any heading referring to 'interpretation' or 'construction',[21] but mostly it will appear as a smaller subheading in different chapters, the main one being the chapter on 'implied terms'.

We should add that, following a European directive, all EU legal systems have now a specific, and identical, legislative provision on the interpretation of *consumer contracts*. It is obvious that the way in which each of the legal systems will handle this provision and integrate it with more general principles of contract interpretation may both bring to light more hidden divergences and/or show a degree of convergence, also beyond consumer law, under the influence of this common, European, rule.

Until now we seem to be faced only with the practical problem of where to find the relevant data for our comparison, but the mentioned divergences have more important consequences as to the perspective from which the

[19] It is interesting to note that the drafters of the *Code civil* (in 1804) linked the interpretation of contracts not to their coming into being and validity, but to their implementation. However, no important conclusion can probably be drawn from this fact that would be relevant for our comparison.

[20] Only one book of this kind seems to have been published in England: K Lewison, *The Interpretation of Contract*, (London, Sweet & Maxwell, 1989). The author is not an academic but a barrister.

[21] Eg GH Treitel, *The Law of Contract*, 8th ed, (London, Sweet & Maxwell/Stevens & Sons, 1991).

problems are analysed and perceived in each of the legal systems: an autonomous body of contract interpretation in French law; a combination of two bodies, contract and legal act, in German law, and a fragmented set of diverging rules and principles, generally with a more limited scope, in English law. We will see hereafter how these differences in the environing structure of the law also affect the practical results.

2.3. The Problems Perceived as Important Discussion Points in Each Legal System

Difference in rules and structures is not the only divergence, which appears from the reading of textbooks. It is interesting to see to what extent the *problems discussed* may be completely different.

Here, we may notice to what extent the structure of the law, procedural law and elements of legal culture may determine the 'legal problems'. In a way, legal systems create their own problems.

In French textbooks we may find a large chapter on *interprétation des contrats* but it will mainly, if not exclusively, focus on the (limited) part of it controlled by the *Cour de cassation*. As this court has considered the interpretation of contracts to be a matter of 'fact', not of law, lower judges may freely decide, without direct control of the highest courts. Nevertheless there are limits. This French court worked out a theory of '*dénaturation de l'acte*', which assumes that texts may have a 'clear meaning' on their own, so that any 'diverging' interpretation would be incompatible with the 'real meaning' of this text. If judges depart from this 'obvious meaning' the *Cour de cassation* will quash the decision. Textbooks tend to concentrate on this problem rather than on the interpretation methods and reasoning used by lower courts outside the realm of an alleged '*dénaturation de l'acte*'. As no other legal system seems to have a comparable approach, because of a different procedure (no 'cassation' but full reconsidering of the case) or of different theories (no '*dénaturation*' theory in any of the other *Code Napoléon*-countries).[22]

In Germany one will find, as one could expect, (very) large chapters in (extremely) voluminous books, extensively discussing all aspects of the field, but mainly concentrating on the relationship between the seemingly opposed, or at least diverging, interpretation rules of §133 (declaration of will) and of §157 (contract). Other broadly discussed distinctions are those between 'Ob' (if) and 'Wie' (how): Is there a declaration of will? (Ob?) and, if so, which content does it have, how is it to be interpreted (Wie?), and between declarations of will that need a 'receiver' (eg a contract) and those which do not (eg a will) (*empfangsbedürftige Willenserklärung* and

[22] Another typically French problem is the question whether the interpretative rules, laid down in the *Code civil* are compulsory or just guidelines for the judge.

nicht-empfangsbedürftige Willenserklärung). None of these problems ever occurred to the mind of a French or an English lawyer.[23]

In England, interpretation of contracts does not seem to be a subject in its own right. In some publications on contract law it is hardly mentioned, and if so, it is in the context of another topic: implied terms, misrepresentation, fraud, duress, consideration, and so on. Anyway, no attention is paid to some general theory of interpretation of contracts. Problems are, for instance, linked to the question 'was there consideration?'. For the comparative lawyer this is not a very promising road to take, as no continental legal system ever thought of 'consideration' as a condition for the existence or validity of a contract.[24]

To this it should be added that the borderline between 'contracts' and 'torts' is not the same in the three legal systems. What would count as liability in tort in England may well be considered to be a matter of contractual liability in France, if there is any trace of a contractual relationship (eg an accident with public transport). In contradistinction with the continental legal systems, supply of energy (electricity, gas) is, in England, considered to be a statutory duty, not a contract. However, in the light of what has been noticed above these differences seem to be of minor importance, at least in this context.

2.4. Underlying Conceptions

The previous chapter may have made clear that we need to tackle the comparative problems in a different way. So let us have a look at a deeper level, at the underlying conceptions and theories. Do lawyers in France, Germany and England have the same notion in mind when they use concepts such as 'interpretation' or 'contract'? Again, rather diverging views come to light.

A. Interpretation

In France, interpretation is basically focusing on *the will of the contracting parties*, on what they had in mind when concluding a contract. This vision is, very explicitly, supported by Article 1156 of the *Code civil*: '*On doit dans les conventions rechercher quelle a été la commune intention des parties contractantes, plutôt que de s'arrêter au sens littéral des termes*.' This, clearly is a 'subjective approach' to interpretation.

[23] Another typically German discussion is about the *Wegfall der Geschäftsgrundlage*: what should happen when the reasons for concluding the contract are lost, because of a substantial change of circumstances? However, the underlying problem is discussed in other jurisdictions too. In France it is known as (*théorie de*) *l'imprévision*, in England it is partly covered by 'frustration'.

[24] Another typically English approach is the emphasis on the *proof* of terms, and most notably of 'implied terms'.

In England, interpretation primarily focuses on the meaning *'as it appears from the text of the contract'*.[25] What people exactly had in mind when drafting the contract is difficult to find out afterwards, if not impossible. The 'normal meaning' of the text, here, seems to offer, at least apparently, the most reliable basis for judicial interpretation of contracts. This may be called the 'objective approach'.

German lawyers take an intermediate position between the French subjective approach and the English objective approach. They do not focus primarily on the contracting parties thoughts, nor on some 'objective meaning' of the wording of the contract, but on *the meaning a reasonable outsider would assume to be meant*. This is a somewhat 'objectivated' subjective approach: if one has wrongly expressed his thoughts in a way an outsider would have noticed that this could not reasonably be meant, the 'real', psychological, will has to take priority over the expressed will. It is also a 'subjectivated' objective approach in that it does not interpret the text in isolation of its authors and the context in which the contract was concluded.

B. Contract

The conceptions of 'contract' are very similar in France and in Germany, where contract is defined as 'an agreement between two or more parties, that creates legal obligations, or, put more broadly, legal consequences (*Rechtsfolgen*)'. In order to identify the existence of a contract, in both countries the *consent* between the parties suffices.

If some slight difference between the French and the German definitions of 'contract' may be noticed, it is linked to the more abstract German approach, that focuses on 'legal act' and 'legal consequences', whereas the French word it more concretely in terms of 'contract' and 'legal obligations'.

The conception of 'contract' in England, on the other hand, is rather different.

Firstly, rather than emphasising the *agreement*, the 'meeting of the minds' of the contracting parties, as continental lawyers do, English lawyers tend to focus on individual *promises* accepted by the other party.[26] Rather than two persons 'doing something together', there is an, almost accidental, exchange of unilateral promises, accepted by the other party. Here, 'contract' is defined as 'a promise or a set of promises, which the law will enforce'.[27]

[25] Kim Lewinson's book on *The Interpretation of Contracts* starts with the following sentence, under the heading 'The Object of Interpretation': 'The construction of a written contract involves the ascertainment of the words used by the parties and the determination, subject to any rule of law, of the legal effect of those words' (p 1).

[26] House of Lords, *Christopher Hill Ltd v Ashington Piggeries Ltd*, 1972, AC, 441–514, at p 502 (per Lord Diplock).

[27] Pollock, *Principles of Contract*, 13th ed, 1950, 1; AG Guest, (ed), *Chitty on Contracts. General Principles*, 26th ed, 1989, vol 1, §1.

Moreover, an agreement, or rather 'acceptance of a promise', does not suffice, there must be an (economic) advantage for each of the parties, called '*consideration*'. Equivalence of these advantages is not required, but there must be 'something'.[28] 'Gratuitous contracts' are possible in continental legal systems,[29] but not in English law.[30] Because of this economic view on 'contract', family agreements will not easily be accepted to be 'contracts', as 'natural love' is not a sufficient 'consideration'.

For English lawyers it is not the intention to create legal *consequences* that is essential to a contract, but the intention to create *legal relations*, as opposed to social and family relations. Again this tends to narrow the scope of contract law, as there is a presumption that no legal relations were intended when agreements, or promises, are made in such social or family contexts.[31]

France	**England**	**Deutschland**
INTERPRÉTATION	INTERPRETATION	AUSLEGUNG
LA VOLONTÉ des parties contractantes (the will of the contracting parties)	The meaning as it appears from the TEXT of the contract	*Normative Auslegung*: the meaning a reasonable outsider would assume to be meant
Subjective approach	Objective approach	Intermediate position
CONTRAT *Accord entre deux personnes qui crée des obligations* (agreement between two persons, creating obligations)	**CONTRACT** Offer & acceptance Promise	**VERTRAG** *Abkommen zwischen zwei Personen mit beabsichtigten Rechtsfolgen* (agreement between two persons, with aimed legal consequences)
Consent suffices	Requirements: -Consideration: *quid pro quo* -Intention to create legal *relations*	Consent suffices

Summarising, we have to conclude that also at the level of underlying conceptions and theories there are important divergences about such fundamental concepts as 'interpretation' and 'contract'. How then can we find some common basis for comparison, which would transcend the purely 'national' perspective on 'foreign law' and offer a methodology for 'comparative law' as a discipline in its own right?

[28] 'Consideration is usually said to be something which represents either some benefit to the person making a promise (the promisor) or some detriment to the person to whom the promise is made (the promisee), or both.' (C Elliott, & F Quinn, *Contract Law*, 3rd ed, (Harlow, Longman, 2001), 57.

[29] Where a 'gift' is typically seen as a contract, that has to be accepted by the beneficiary in order to be 'valid' (Art 894 *Code civil: 'La donation entre vifs est un acte par lequel le donateur se dépouille actuellement et irrévocablement de la chose donnée, en faveur du donataire qui l'accepte.'*).

[30] With the exception of a promise made under a formal covenant, for which no consideration is required (Law of Property (Miscellaneous Provisions) Act 1989).

[31] AG Guest, (ed), *Chitty on Contracts. General Principles*, 27th ed, 1994, vol 1, p 156, §2–110.

3. DEEP LEVEL COMPARATIVE METHODOLOGY

At the surface, the interpretation of contracts seems to be a very difficult topic for comparing the law of England, France and Germany. There is no common basis available for comparison and almost everything seems to be different: the legal and doctrinal structure in which the topic is located, the problems discussed in legal doctrine, and the underlying conceptions of the two most basic concepts for this field: 'interpretation' and 'contract'.

However, when we look at a deeper level, most notably the history and development of underlying theories and conceptions, we get a rather different picture.

Let us take the opposition between 'subjective' and 'objective' interpretation, in relation to which France is considered to be close to the 'subjective' end of the line, England close to the opposite end, and Germany somewhere in the middle.

3.1. Subjective Interpretation: The Will Theory

Undoubtedly, the 'will theory', that emphasises the will of the contracting parties to determine the content and scope of the contract, has dominated legal thinking in France during most of the nineteenth and twentieth centuries.

When we have a closer look at history, however, we may notice that it is not unfamiliar to German and English legal cultures either.

In Germany the subjective approach to contract interpretation has dominated in the second half of the nineteenth century. Especially von Savigny defended this subjective approach. To him, the (psychological) will was the only relevant element for interpreting a contract, or any other legal act, whereas the text, or any other form of declaration of the will, was only a sign through which the will could be discovered.[32] This resulted in a choice for the will theory in the first draft of the *Bürgerliches Gesetzbuch*, in 1887. Under the influence of von Jhering, who argued in favour of a 'reasonable trust', of what one could reasonably assume to have been meant, rather than the real will of the other party, the second draft of the *BGB*, of 1895, came closer to this more objective theory, which was eventually laid down in the final version of the *BGB* of 1896. However, the code still shows the opposition between both theories. The *Willenstheorie* is clearly to be found in §133:

> When interpreting a declaration of will one has to search for the real will and not to stop at the literal sense of the saying,[33]

[32] FC von Savigny, *System des heutigen römischen Rechts*, vol 3, Berlin 1840, eg at p 257–60 and 307–08. It is interesting to note that most of this volume is discussing the 'declaration of will' (pp 98–307).

[33] 'Bei der Auslegung einer Willenserklärung ist der wirkliche Wille zu erforschen und nicht an dem buchstäblichen Sinne des Ausdrucks zu haften.'

which repeats, almost literally, the wording of Art 1156 of the French *Code civil*. The objective counterbalance (*Erklärungstheorie*) is to be found in §157:

> Contracts have to be interpreted in such a way as is required by good faith and reasonableness in the context of the social practices and normative expectations.[34]

In England the subjective approach obtained a central position in nineteenth century,[35] under the influence of the writings of Pothier. As noted by David Ibbetson, the will theory had a measure of intellectual coherence that the traditional Common Law wholly lacked.[36] In practice, however, the rule that it was the intention of the parties that determined whether or not a term was a condition, was watered down to a rule that it was open to the parties to depart from the ordinary interpretation, provided that their intention to do so was clearly expressed.[37] Nevertheless, at the surface level the will theory prevailed.

3.2. Objective Interpretation: The 'Objective' Meaning of the Text

In England, as a rule, the intention of the contracting parties must be ascertained from the document itself. The task of the courts is to construe the contractual term without any preconception as to what the parties intended.[38] Words are to be understood in their plain and literal meaning, unless it appears from the document itself that another meaning was intended.

Although, in practice, exceptions to this rather strict approach may be found (eg when such meaning would involve an absurdity), it assumes that, in almost all cases, written contracts have a meaning on their own, independently of any context, be it the previous negotiations, the subsequent way of implementation of the agreement, or any other relevant external

[34] 'Verträge sind so auszulegen, wie Treu und Glauben mit Rücksicht auf die Verkehrssitte es erfordern.'

[35] Already in the Middle Ages a kind of will theory was largely applied to 'informal contracts' ('covenants' and 'contracts'): 'Covenant meant "agreement", a "coming-together"; it was based on "the assent of the parties"; "Contract" too … always connoted an agreement rather than a unilateral promise; it could be said to be derived from "the will of each party as proved by their mutual words";' (DJ Ibbetson, *A Historical Introduction to the Law of Obligations*, (Oxford, Oxford University Press, 1999), 73 In 'formal contracts', on the other hand, Common Law courts were not concerned to look behind the document (above, 83–7).

[36] *Ibid,* p 221.

[37] Above n 35 p 224.

[38] J Beatson, *Anson's Law of Contract*, 27th ed, (Oxford, Oxford University Press, 1998), 157; K Lewison, *The Interpretation of Contract*, (London, Sweet & Maxwell, 1989), 7–10 with several relevant quotations from Law Lords.

facts or situations. This approach is well worded by Master of the Rolls Cozens-Hardy, in 1911:

> If there is one principle more clearly established than another in English law it is surely this: It is for the court to construe a written document. It is irrelevant and improper to ask what the parties, prior to the execution of the instrument, intended or understood. What is the meaning of the language that they have used therein? That is the problem, and the only problem[39]

In practice, notwithstanding appearances to the contrary, a similar approach may be found in French law.

An analysis of legal history shows an undisputed attachment to the will theory, at least from the sixteenth century onwards,[40] including by the most authoritative scholars such as Domat and Pothier. It is only by the end of 18th century that a more objective approach, limiting the predominance of intention over text, became more popular among French lawyers.[41] However, the scholars and politicians involved in the drafting of the *Code Napoléon,* and the discussions on it, clearly followed the will theory, as also appears from the wording of the final texts on the interpretation of contracts in the 1804 Code.

After the enactment of the *Code civil* something strange happened. Courts,[42] supported by most of the legal scholars,[43] massively applied the objective approach to interpretation notwithstanding the opposite wording of Article 1156, the long tradition of the will theory and the obvious choice of the drafters of the code to follow the subjective approach. The most plausible explanation for this unexpected change seems to be the fear for judicial arbitrariness,[44] which is closely linked to the period following the French revolution. One of the main aims of this revolution was to replace the aristocratic, law making judges of the *Ancien Régime* by servile bourgeois judges who would strictly follow the statutory law as laid down by the democratically legitimated parliament. Fear of a return to the previous *gouvernement des juges* created an atmosphere in which theories could flourish, which apparently seem to bind judges to the wording of the text, be it statutory or contractual. As a result the French *Cour de cassation* came

[39] Cozens-Hardy MR in: Court of Appeal, *Lovell & Christmas Ltd v Wall* 104 1911 LT, 85.
[40] But with one exception, Cujas, who, in 16th century defended the maxim *interpretatio cessat in claris*, but was not followed by other scholars (Edouard De Callataÿ, *Etudes sur l'interprétation des conventions*, (Brussels/Paris, Bruylant/LGDJ, 1947), 21–3).
[41] E De Callataÿ, see above fn 40, 32.
[42] See above fn 40 E De Callataÿ, 85–6 and 97–103.
[43] E De Callataÿ, see above fn 40, 68–78.
[44] 'On n'a jamais rien à se reprocher en s'attachant au sens propre et naturel des mots; on court toujours le risque de se tromper lorsqu'on s'écarte sur des conjectures. Tout rentre alors dans un arbitraire effrayant.' (Toullier, *Droit civil français*, book III, vol III, n° 305 ff, quoted by E De Callatay, n 40, 70).

to prohibit the interpretation of contracts when the wording is considered to be 'clear'.[45] However, as early as 1808 the Court decided that the interpretation of contracts is a matter of fact finding, which has to be left to the lower courts and cannot be checked as such by the court of cassation.[46] Apparently it would have sufficed for lower judges to present a meaning as 'clear', even if it was based rather on the proven intention of the parties than on the average sense of the words. Hence, in order to be able to check the hidden interpretations by lower courts, that would not be in conformity with the 'normal' meaning of the wording of the contract, the *Cour de cassation* had to introduce an additional, be it rather artificial, theory on the 'denaturation of clear texts', which then would be seen as a matter of not (correctly) applying the code and not as a matter of factual judgement. It is interesting to note that the article which is considered to be violated in such cases is not Art 1156 (on interpretation) but Art 1134, which says that contracts are binding for the contracting parties as if they were a statute.[47]

In other countries, such as Belgium, that were ruled, and even up to now still are, by the same dispositions, neither the theory on, and prohibition of, interpretation of 'clear texts', nor a theory on the 'denaturation' of such texts has been followed. The first theory has been criticised because it is scientifically untenable: there are simply no texts that could be 'clear' on their own, isolated from their context.[48] The 'denaturation' theory has, also rightly, been criticised as an open concept that allows the French *Cour de cassation* to control the factual judgement of a lower court whenever it does not like the result, without any statutory rule being violated by that court.[49] The approach of the French *Cour de cassation* is also highly incoherent and paradoxical, as it is, in its own logic, based on a 'denaturation' of the obvious 'clear meaning' of Art 1156 of the civil code.

[45] Eg: 'Attendu que si, aux termes de l'Article 1156 du Code civil, on doit, dans les conventions, rechercher quelle a été la commune intention des parties contractantes plutôt que de s'arrêter au sens littéral des termes, cette règle n'est faite que pour le cas où le sens des clauses du contrat est douteux et exige une interprétation; mais que permettre au juge de substituer la prétendue intention des parties à un texte qui ne présente ni obscurité, ni ambiguïte, ce serait manifestement l'investir du droit d'altérer ou même de dénaturer la convention.' (Cass.civ., 10 November 1891, *Sirey* 1891, I, 529; *Dalloz Périodique* 1892, I, 406).

[46] Cass.civ. 2 February 1808, *Sirey*, chron., 1808, I, 183.

[47] See eg: Cass.civ 7 March 1922, *Sirey* 1922, I, 366; *Dalloz Périodique* 1925, I, 143.

[48] See on this, more generally: M Van Hoecke, *Norm, Kontext und Entscheidung. Die Interpretationsfreiheit des Richters*, (Leuven Acco, 1987); M Van de Kerchove, 'La doctrine du sens clair des textes et la jurisprudence de la Cour de cassation', in: M Van de Kerchove, (ed) *L'interprétation en droit*, (Brussels, Publications des Facultés Universitaires Saint-Louis, 1978), 13–50.

[49] 'Ce mot *dénaturation* est un mot élastique à la faveur duquel deviennent possibles toutes les extensions du contrôle de la décision que le juge du fond a rendue en fait. On peut craindre que l'institution en perde son caractère et que la cour de cassation devienne un troisième degré de juridiction.' (*procureur-général* at the Belgian court of cassation Paul Leclercq, in an opinion published in *Pasicrisie* 1933, I, 10).

The position of this court has remained unchanged up to the present, but part of the lower courts and of legal doctrine, nowadays, tend to take a more flexible position.

So, surprisingly enough, both the English and French (highest) courts have, during most of the nineteenth and twentieth centuries, applied an objective approach behind a facade of a subjective approach.

3.3. The Intermediate Theory: Legitimate Expectations

The obvious tension between the subjective and objective interpretation in France and England has as a consequence that none of these approaches has ever been applied in its pure form in any of these countries, at least not over the last two centuries.

In Germany, where the tension is to be found in the *Bürgerliches Gesetzbuch* itself, a more realistic theory has developed. A balance has been found between pure subjective elements that are difficult to find out and to prove, on the one hand, and objective elements, on the other. These 'objective' elements, however, are not some untenable theory of 'objective' meaning, but an 'objectivated' approach to the scope of the contract in the light of social standards of good faith and other social norms and practices. When interpreting a contract, German lawyers will not focus on the real intention of the parties, but rather approach it from an external point of view. They will do this both descriptively and normatively. When, descriptively, determining the meaning of the text of the contract, they will ask what an outsider, who would have been present when the contract was made, would reasonably have assumed to have been meant by the parties. Normatively, this meaning will be orientated towards, or corrected by, good faith (*Treu und Glauben*) and social practices and norms (*Verkehrssitten*). Interpretation, thus, is not just a matter of describing what is meant by the wording of the contract, but also a *normative Auslegung*, which is guided by what *legitimately could be expected* by the contracting parties.

Tendencies towards this kind of approach are present in the other countries too, most clearly in England. In fact, the idea that a contract has to be understood in the sense a reasonable man would expect the contract to mean, including some idea of good faith and balance between the parties, is today to a large extent applied everywhere (openly or more hidden).

Today, in England, it is asserted that the court must seek 'the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract'.[50]

[50] (HL), *Investors Compensation Scheme Ltd v West Bromwich Building Society*, 1998, *1* WLR (HL) 896.

This fits perfectly with the descriptive part of the German approach to interpretation. It is interesting to note how the importance of the context is now emphasised, and even more explicitly so by Lord Hoffmann in another decision:

> The meaning of words, as they would appear in a dictionary, and the effect of their syntactical arrangement, as it would appear in a grammar, is part of the material which we use to understand a speaker's utterance. But it is only a part; another part is our knowledge of the background against which the utterance was made.[51]

The normative part of the German approach is now also present in English law, at least in consumer law, by the introduction of the good faith principle and the statutory duty for the judge to interpret consumer contracts in favour of the consumer. Undeniably this will, be it slowly, also affect the way English judges approach the interpretation of contracts in general.

But this normative element is not just some foreign body that would have been imposed on the common law by a European directive.

In his historical overview of the English law of obligations, David Ibbetson points to several developments, that took place in the period between 1970 and 2000, which lead to a more normative approach to interpretation. There is an increased use of standard form contracts, for which it is assumed that parties mostly do not have had any relevant intention at all.[52] In such cases relevant elements have to be found to 'construe' an appropriate meaning. Here, good faith and contractual fairness can play a decisive role. This is supported, of course by the introduction of the good faith principle in consumer law, but also by an increasing legislative regulation in general, by the judicial acceptance of unjust enrichment as a theory in common law, by a greater willingness of judges to lay down rules of law,[53] and by the public law dimension of private law.[54]

The idea of some fair balance[55] between the parties developed during that period, in two stages.

From the 1970s, taking advantage of another party's weakness was not any longer acceptable.[56]

From the 1990s, principles of substantive fairness have been introduced in English contract law,[57] including estoppels that have the same scope as

[51] (HL), *Mannai Investment Co Ltd v Eagle Star Life Assurance Co*, 1997, AC (HL) 749.
[52] D Ibbetson, see above fn 36, 246–7.
[53] See above fn 36, 249.
[54] See above fn 36, 251.
[55] Also Lewison notes, under the heading 'Manipulative interpretation': 'The court will sometimes manipulate the construction of the contract in order to achieve a fair result on the facts of the particular case. This approach is rarely overtly recognised, …' (above n 15, 18).
[56] D Ibbetson, see above fn 36, 251.
[57] See above fn 36, 251 and 258.

continental principles such as the prohibition of abuse of rights. Duties of disclosure of information (misrepresentation) or prohibition of undue influence (duress) likewise aim at putting the contracting parties on equal footing.[58]

The pressure on English law to accept a general principle of good faith is strong. Not only has it already been introduced in the area of consumer contracts, which conceptually is a limited field but practically of very high importance, moreover there is a strong case for considering it to be a general principle of law in several other Commonwealth countries, such as Canada, Australia and New Zealand.[59] The fact that such a principle is also generally accepted on the Continent puts the UK in a position of increasing, be it not very splendid, isolation.

Also in France, it is increasingly recognised that some normative input is needed in contract interpretation, in addition to the intention of the parties:

> Le contrat (…) se caractérise en tant que catgorie juridique par son élément subjectif essentiel: l'accord des volontés, et par ses finalités objectives: l'utile et le juste. De la finalité d'utilité se déduisent les principes subordonnés de sécurité juridique et de coopération. De la finalité de justice se déduit la recherche de l'égalité des prestations par le respect d'une procédure contractuelle effectivement correcte et équitable.[60]

It is recognised that the 'meaning' given to contractual terms is often an imposed meaning rather than the reconstruction of a real common intention held by both parties. Rather than assuming some (non-existent) will, it seems better to construct it on the basis of objective social standards, such as good faith, social practices, the purpose of the contract, general principles of law,[61] or simply 'equity'[62] or 'justice'.[63] They constiture the 'objective' approach, which co-exists, in France too, with the, more traditional, subjective approach. Ghestin notes:

> Certes la Cour de cassation s'obstine souvent à se retrancher derrière la volonté des contractants, encore que l'on constate une évolution de la

[58] See above fn 36, 252–3.

[59] See the evidence given in: AF Mason, 'Contract, Good Faith and Equitable Standards in Fair Dealing', *Law Quarterly Review*, 2000, 116 66–94.

[60] J Ghestin, C Jamin, & M Billiau, *Traité de droit civil. Les effets du contrat*, 3rd ed, (Paris: LGDJ, 2001), 9, with further reference to: J Ghestin, 'La notion de contrat au regard de la diversité de ses éléments variables' *Rapport de synthèse aux Journées Nationales H. Capitant*, (Nantes: LGDJ 2001), 223 ff, esp at 255–6.

[61] Cass. civ. 10 December 1985, *Bull. civ.*, I, n° 339, p 305; *D.S.* 1987, 449.

[62] '… une étude plus attentive permet d'apercevoir que, sous des précautions de style, *l'équité guide souvent le juge* dès qu'il n'est plus tenu par une volonté clairement exprimée. Prenant prétexte de déceler l'intention des parties à travers des clauses ambiguës ou dans le silence du contrat, il prête aux contractants des intentions équitables.' (F Chabas, *Mazeaud Leçons de droit civil*, tome II, vol 1 *Obligations. Théorie générale*, 8th ed, (Paris, Montchrestien, 1991), 321, n° 351).

[63] J Ghestin, above n 60 *(Traité)*, 18.

> jurisprudence vers un abandon partiel de cette référence pour justifier certaines solutions.[64]

This development has directly been influenced by German law, as it was Raymond Saleilles, who later on became very influential in France, who proposed, at the very beginning of the twentieth century, a more objective, socially oriented approach that was directly based on §157 *BGB*.[65]

It has been worked out in the jurisprudence of the French courts in the course of the twentieth century, in the form of theories that aimed at broadening the scope of contractual obligations, independently of the actual intentions of the parties: the distinction between '*obligations de moyen*' and '*obligations de résultat*', assuming stronger duties for some categories of contracting parties (eg a tour operator), that are liable if no result has been obtained, even without proven fault;[66] security *obligations* with public transport,[67] play grounds, medical services, schools, etc; *duties of information* for the professional, such as a banker,[68] vis-à-vis the consumer; a *prohibition of competition*, eg, for an agent, with his principal.[69]

In England, one would call these (generalised) *'implied terms'*, which, paradoxically comes closer to the fiction of applying the will theory, than the French approach in this respect does.

Hence, it is no surprise that Article 2:102 of the *Principles of European Contract Law* reads:

> The intention of a party to be legally bound by contract is to be determined from the party's statements or conduct as they were reasonably understood by the other party.

Obviously, also the scholars involved in the drafting of these principles, could agree on a 'legitimate expectation' view, discarding both the 'subjective' *will theory* and the 'objective' *obvious meaning of the text theory*.

[64] Above n 18, 60.
[65] R Saleilles, *De la déclaration de volonté. Contribution à l'étude de l'acte juridique dans le Code civil allemand*, Pichon 1901, 228, n° 86.
[66] This theory was proposed by René Demogue in 1925 (*Traité des obligations*, vol 5, s 1237, vol 6, s 599) and soon generally accepted by courts and legal doctrine in France and in several other countries (eg Belgium), but it was not taken over in the *Principles of European Private Law*.
[67] Cass. civ. 21 November 1911, *D.P.* 1913, I, 249 was the first case imposing such a security obligation.
[68] Cass. com. 18 May 1993, *Bull. civ* 1993, IV, n 188, p 134.
[69] Cass. civ. 16 March 1993, *Bull. civ*, 1993, IV, n 109, p 75.

These principles also emphasise the role of the context, including social norms of good faith and fair dealing, for interpreting the contract.[70]

3.4. Competing Theories in Each Legal Culture

Summarising this analysis of underlying theories guiding the interpretation of contracts in France, Germany and England, we notice that in fact, the *same competing theories and conceptions* are largely to be found in each of those legal systems. These, more fundamental theories are not typically linked to a country as such, but to a period in history. More precisely, they have, in the course of history, almost constantly been competing, but the predominance of one theory over the other one did not follow the same chronology in the different countries.

Here, we have only been discussing the opposition between the 'subjective' and 'objective' approaches to interpretation. Other questions that are of direct relevance for the interpretation of contracts, where competing theories are to be found in probably every European country, include:

- The role of (contract) law in society: economic (framework for individual liberty and the working of the market) and/or moral (correction of inequalities and injustices);
- The role of the judge in contract law: active or passive?
- A theory of meaning: is a 'meaning' given (in the text) or construed (by the reader)?
- A conception of contract:
  - an agreement for the 'market' or for regulating inter-human relations?
  - (purely) private law or (partly) public law?
  - an individualist gamble or a co-operative endeavour with fair partnership?

In practice, it is the (accidental) majority in the highest courts and/or in legal doctrine that determines 'the' law of the country. They mostly take

[70] 'In interpreting the contract, regard shall be had, in particular, to:

(a) the circumstances in which it was concluded, including the preliminary negotiations;
(b) the conduct of the parties, even subsequent to the conclusion of the contract;
(c) the nature and purpose of the contract;
(d) the interpretation which has already been given to similar clauses by the parties and the practices they have established between themselves;
(e) the meaning commonly given to terms and expressions in the branch of activity concerned and the interpretation similar clauses may already have received;
(f) usages; and
(g) good faith and fair dealing.' (Art 5:102 PECL).

some intermediate position on the scale between two opposite theories in their pure (and extreme) form. Sometimes there is a clash among higher judges (eg: The English Court of Appeal under Lord Denning as opposed to the House of Lords,[71] or currently the *IX. Senat des Bundesgerichtshofes* in Germany, as opposed to the *XI. Senat*, or the 1st *chambre* of the French Cour de cassation, as opposed to the 3rd one), sometimes there are diverging opinions between lower courts (that tend to be more 'practical') and higher courts (that tend to pay more attention to the doctrinal dimension), or between judges and legal scholars, but most often the oppositions run across each of these professional groups, as they are linked to more general ideological divergences in society.

Doctrinal theories play a crucial role for making a desirable result fit with the prevailing law,[72] but they often also block such results. Sometimes the highest courts persevere in applying old theories, which are not any longer followed by lower courts, large parts of legal doctrine and legal practice. Sometimes the facade of the old theory is kept, but in practice the opposite is done.

The Europeanisation of private law will slowly, but thoroughly, influence theory building in the various jurisdictions. In the field analysed in this paper it is the directive on consumer contracts that has introduced, in all EU countries, the rule that 'Consumer contracts are interpreted in favour of the consumer'.[73] Questions that will be raised include, for instance: Is this a compulsory rule or just a guideline for the judge?[74] Does it only apply when the text is unclear or ambiguous or also with 'clear' texts? May it go as far so as to exclude 'consideration'? If the answer to such questions will be difficult to fit in the prevailing general theories on interpretation, these theories will be questioned, and probably adapted.

[71] See eg the criticism by Lord Diplock on Lord Dennings decision in: House of Lords, *Gibson v Manchester City Council*, 1979 ALL ER, 1, 972–81, at 974.

[72] How inventive lawyers may be in this respect, at least if they really want some specific result, transpires from an analysis of case law in Germany and England on cohabitants standing as a surety for bank loans: see M Van Hoecke, & M Warrington, 'Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law', 47 *International Comparitive Law Quarterly*, 1998, 495–536, at 516–519.

[73] Directive of 5 April 1993 (93/13/EEC) *OJ* 1993 L 290, p 9. Art 5: 'In case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain, intelligible language. Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail'.

In France: 'Les clauses des contrats proposés par les professionnels aux consommateurs ou aux non professionnels … s'interprètent en cas de doute dans le sens le plus favorable au consommateur et au non-professionnel.' (Art L 133–2 Code de la consommation, loi du 19 mai 1998).

In the United Kingdom: '… If there is doubt about the meaning of a written term, the interpretation most favourable to the consumer shall prevail.' (Art 6 Unfair Terms in Consumer Contracts Regulations 1994).

[74] According to the French court of cassation, the interpretation rules of Articles 1156 to 1164 of the civil code are not binding for the judge (Cass. civ., 6 March 1979, *Bull. civ.* I, n° 81; Cass. civ., 19 December 1995, *Bull. civ.*, I, n° 466).

4. SOME METHODOLOGICAL CONCLUSIONS

From the analysed topic it transpires that comparative law research may only be carried out meaningfully if it also includes the deeper level of underlying theories and conceptions.

These theories and conceptions have the advantage of not being as such determined by positive law, although the legal system in which the lawyer works will influence the way in which they will be worked out in legal doctrine. This makes this level the most appropriate basis for comparing legal systems, without being biased by one's own legal structures, rules, concepts and language.

Such an approach should be adequate in all fields of comparative law. Family law, for instance, has been largely neglected in comparative (European harmonisation) studies, because it is considered too strongly linked to (national) culture and tradition. However, in Europe, over the last few decades, we have seen strikingly comparable developments and changes as to the sociological reality (from large families and then nuclear families to 'incomplete' families; disconnection from marriage and parenthood; more generalised living together outside of marriage; increasing divorces, etc) and as to the conceptions of marriage and family relationships (including an increasing acceptance of homosexuality as being on an equal footing with heterosexuality, with developments towards same-sex marriages). At this level of integrating new sociological and ideological developments in the law, comparative research may be very fruitful, also within the context of developing a common European private law. State law may be strongly linked to national history and local politics, but it is always comparable at the level of conceptions of democracy, division of power, human rights, centralisation viz. decentralisation, the position of minorities, etc. Social security law may be very technical, but there is always an underlying view on solidarity, insurance, redistribution of wealth and, more generally, a conception of a 'good life' or at least the minimal conditions for it. Of course, in comparative law, these underlying conceptions and theories should not be studied as such but in their relationship and interaction with positive law and the way this law is handled and interpreted by the legal profession.

How to Carry Out Deep Level Comparative Research?

Historical analyses, sociological studies and critical writings, which do not approach the matter from a pure descriptive, positivist point of view, may be a useful starting point for finding relevant material. Depending on the subject this may include other areas, such as political science for constitutional law.

Once the underlying theories and conceptions have been identified that are considered relevant for the matter, the researcher will have to check them on the basis of sufficiently representative material.

This includes legal doctrine and court decisions.

One should be aware of the fact that theories in legal doctrine sometimes live a life of their own and do not reflect any 'legal reality'.

Analysis of court decisions should certainly not be limited to the supreme court or the higher courts, as they may sometimes offer a picture that is not at all representative for the judiciary as a whole. In constitutional law the situation is different. Here, only the constitutional court or, if there is no such court, the highest courts will normally offer useful material.

It is anyway desirable, if not necessary, that some independent research of case law and other legal sources in the compared jurisdiction is carried out in view of its relevance for testing the hypotheses.

If the comparison is about (proposals of) new legislation, which are based on important changes in the predominant world-view in society (eg, euthanasia, same-sex marriage) views expressed in the media and in parliamentary or other debates should be taken into account.

5. WHAT ABOUT HARMONISATION?

Harmonisation may be difficult because of differences as regards:

a) concepts which play an important role in one legal system and are absent in the other (eg: consideration, *cause*);
b) the structure of the field or its environment (eg: a different borderline between contracts and tort);
c) procedural elements (kinds of actions available; lack of uniformity because the *Cour de cassation* leaves interpretation basically to *les juges de fond*);
d) different dominating views and conceptions; and
e) different rules.

(a) Harmonising diverging concepts requires a thorough analysis of the history of the concepts, of the discussions about them and of their practical relevance.

Sometimes scholars have found it necessary to emphasise that 'consideration' has nothing to do with '*causa*'.[75] However, these concepts have several elements in common, be it mainly their superfluous character.

[75] Eg: R David, & D Pugsley, *Les Contrats en Droit Anglais*, 2nd ed, (Paris, LGDJ, 1985), 96, n° 129.

The concept of 'consideration', creating the condition that there must be an advantage for the promiser to engage into a contract, developed in England in the middle of the sixteenth century out of the previously existing *quid pro quo* requirement. Interestingly enough, at those times, it was also called '*causa*'. However, at the opposite of the continental conception of *causa*, it limited the reasons to enter a contract to *pecuniary* reasons, excluding eg 'natural love' in marriage and family relations.

The continental concept of *causa*, inherited from Roman law, also entails a condition for concluding a valid contract, namely a *reason* for entering the contract, an (expected) *advantage* that follows from this contract.

The concept of *causa* is somewhat broader than the concept of *consideration*, but their *function* is identical, as even the House of Lords had the opportunity to confirm in a Scottish case in 1923.[76]

However, historically, this function has probably more to do with the *evidence*[77] of the existence of a contract than with any real requirement for its *validity*. In times when few could read and write, contracts were mostly concluded orally. Proof of the existence of the contract and of its exact terms entailed more problems than where a signed document is available. If there was no advantage whatsoever for one of the parties it could readily be assumed that it was very unlikely that there had been any contract at all. This is underpinned by the fact that, in the common law, as a rule, no 'consideration' is required when the contract is contained in a deed.[78]

The concept of *causa* has, on the Continent, divided legal scholars in *causalistes* and *anti-causalistes*. In fact the concept could be dropped without any inconvenience, as has extensively been underpinned by the anti-causalists. As far as it is relevant, it can easily be covered by the requirement of '*objet*'. Indeed, apart from a reason for entering the contract, civil (Roman) law requires also an 'object'. In practice, this object is also the 'reason' for entering the contract: the reason for buying a house is precisely that one wants this house, the reason for selling it is that one wants the money. The discussion has been complicated because the concept of *causa* has also been linked to conditions of legitimacy of the contract such as morality and public order, but these conditions can easily be worded independently, without linking them to another concept, such as *causa*.

As noted by Ibbetson, throughout the nineteenth and twentieth centuries the concept of 'consideration' was, in England, progressively marginalised

[76] House of Lords, *Cantiere v Clyde Shipbuilding and Engineering Co Ltd*, *Scottish Cases*, 1923, (HL), 105. For an analysis of this case, in which the failure of '*causa*' was equated with failure of 'consideration', see: R Evans-Jones, 'Roman Law in Scotland and England and the Development of One Law for Britain', *115 Law Quarterly Review*, 1999, 605–30, at 607–10.

[77] Consideration has developed within the procedural context of the 'action of assumpsit'. The technicalities of this procedure also partly explain the coming into being of the requirement of 'consideration'.

[78] AG Guest, (ed), *Chitty on Contracts. General Principles*, 27th ed, vol 1, 1994, p 26, §I–034; see also p 166, §3–001.

by courts by ingenious interpretation.[79] The doctrine of consideration was especially creating problems when changes were made to an existing contract without a direct pecuniary advantage for one of the parties, or when the 'consideration' consisted of past events. A reform proposal by the Law Revision Committee in 1937 largely limited the scope of consideration for possibly invalidating a contract.[80] Recent cases seem to go into that direction too.[81] Patrick Atiyah proposed to replace the concept of consideration by one of legitimate expectation: the reasonable reliance on a promise.

All this proves that also the concept of 'consideration' could easily be dropped.

If this is the case, then harmonisation will not be only about choosing the 'better concept' and the 'better rule', but also about rethinking more fundamentally the use and function of every concept and rule. Harmonisation, then, is not some imperialistic conquest of weaker legal systems by stronger ones, but *rethinking and developing together some new European private law*.

This is shown by the *Principles of European Contract Law*, in which indeed both 'consideration' and '*causa*' have been dropped, as the only conditions for a contract to exist are that

(a) 'the parties intend to be legally bound', and
(b) 'they reach a sufficient agreement without any further requirement.' (PECL, Art 2:101(1))

(b) Sometimes the structure of the field concerned will have to be adapted, if one aims at harmonisation. Here, external evidence will have to be given for proposing the 'better solution'. This may be efficacy (economic analysis of law) or one solution better supporting a generally recognised interest (eg consumer protection in contracts, the protection of the victim in torts).

Anyway, when arguing in favour of a 'better solution', in this context or more generally in any form of harmonisation, one has to make explicit the kinds of reasons that would make it a better solution. If such solutions are technical, it is a matter for discussion and decision within legal doctrine, if they imply important political or moral choices, it would rather be a choice to be made at the political level.

[79] DJ Ibbetson, *A Historical Introduction to the Law of Obligations*, (Oxford, Oxford University Press, 1999), 236–41. See also: R David, & D Pugsley, *Les Contrats en Droit Anglais*, 2nd ed, (Paris, LGDJ, 1985), 106–7.
[80] C Elliott, & F Quinn, *Contract Law*, 3rd ed, (Harlow, Longman, 2001), 79–80.
[81] *Williams v Roffey Bros & Nicholls (Contractors) Ltd*, 1990 All ER, 1, 512; QB, 1991, 1, 19. In this decision factual benefit to the promisor is regarded as sufficient in one situation, even in the absence of a legal benefit to him or of a legal detriment to the promisee (AG Guest, (ed), CHITTY *on Contracts. General Principles*, 27th ed, vol 1, 1994, p168, §3–006).

(c) Diverging procedures and court structures cannot be changed but very slowly. Probably the only means for circumventing this obstacle will be the creation of a new, supra-national court which may guarantee uniform interpretation in the field (as is currently done by the two European courts within the ambit of their competence).

(d) Different (nationally) dominating views and conceptions may lead to one view, which is generally accepted in all jurisdictions, as a result of a large discussion within a European legal doctrine.[82]

Some conceptions can be declined and theories eliminated, because they are simply wrong, such as the idea that there would be texts that are 'clear' as such, independently from any context and the '*dénaturation de l'acte clair*' theory in France, which is based on it.

Some theories may be imported into other jurisdictions, because they fit better with current needs and conceptions, such as the German theory of legitimate expectations.

Some views are simply part of diverging opinions in our societies and cannot be 'harmonised': they are part of an ongoing debate, both scholarly and political, in which, for the time being, one view may be more popular than competing ones, but could be a minority view in the future. These theories will go on to compete, but with a much broader (European) basis and audience, which, as a rule, should improve both the quality of the arguments used in the discussions, and the quality of the theories, because of a higher number of participants in the scholarly debate and a broader empirical basis for testing these theories.

(e) Rules are probably the easiest to harmonise. However, it does not help very much to harmonise legal rules if important differences subsist on the other points. There are abundant examples of identical rules in two or more countries, which in practice appear to have a different scope and sometimes lead to opposite results. In the field of the interpretation of contracts, there is a notable difference between the French and the Belgian *Cour de cassation*, as in Belgium there is no '*théorie de l'acte clair*' or concept of '*dénaturation de l'acte*', although both countries still largely, if not fully, share the Code Napoléon structure, concepts and rules as to the law of obligations.

[82] On both the need for, and the advantages of such a European legal doctrine, see: M Van Hoecke & F Ost, 'Legal Doctrine in Crisis: Towards a European Legal Science' *Legal Studies* 1998, 18 197–215.

10

NICE Dreams and Realities of European Private Law[1]

NIKOLAS ROOS

1. INTRODUCTION

EUROPEAN PRIVATE LAW scholars have been debating and promoting a (private) *Novum Ius Commune Europaeum* (NICE) for about two decades now. I would like to present a critical and sceptical view of the NICE-movement and I will also argue why NICE-scholars should shift their ambitions more from shorter term practical to longer-term theoretical concerns. With few exceptions, lawyers can be more or less sceptical about the pace of the process and discuss the (best) ways to let the process take place, but they can hardly imagine a European future without NICE. NICE's background assumption is very simple: national European societies are unifying, therefore law, including private law, is in need of harmonisation and unification. Believers tend to think of NICE as something that gives value and substance to European integration. NICE is supposedly based on a commonality of European legal values and of understanding law. Moreover, NICE-adepts tend to think that, notwithstanding the many appearances to the contrary, this commonality is already there in principle, like a treasure that is just waiting to be discovered by those who are clever enough to spot it. The need for NICE is also felt because European law tends to undermine the coherence of national law. As this is seen as something that is more or less inevitable, NICE is expected to accomplish something for Europe that national codes did historically for nation-states. I will argue that this expectation is an anachronism (section 1). Epistemological

[1] I would not have been able to write this article without a lot of support and advice so generously given to me by my colleague Jan Smits, professor of European Private Law at Maastricht University. Although he is, in my view, the most realistic and balanced observer of European Private Law, I will put forward that even he is still too idealistic about its potentialities. All views put forward here, are mine and not (also) his, unless I explicitly state the contrary. I am also indebted to Ralf Michaels for commenting on what I had written in my chapter on what I now call 'conceptualist' approaches (section 4) to NICE.

assumptions in an important part of the NICE-debates also seem more or less outdated. Law is believed to reflect a particular essential cultural spirit (section 2) or it is, on the contrary, believed to be reducible to solving identical social problems (section 3). Others follow a more traditional conceptual approach (section 4), simply assuming that differences in European private law are not substantial or are at least surmountable. Only a few authors seem to follow an empirical or sociological approach. A review of their work supports scepticism about NICE (section 5). In my conclusion, I will suggest an approach to NICE that is, on the one hand much more thoroughly empirical and sociological, and, on the other hand, much more theoretically and academically orientated. It should be much more empirical as far as the needs for NICE are concerned, it should be more sociological as far as the actual development of European private law is concerned, and it should be much more theoretical-academic as regards the conceptual foundations of private law.

2. NATIONAL VERSUS EUROPEAN LEGAL INTEGRATION

It is a hardly disputed fact of the theory of the development of the modern state that its primary drive was a political-military one. Until the nineteenth century about 80–90 per cent of the state budget was spent on defence. The rising central authorities therefore had a great fiscal interest in expanding control over local power holders who resisted centralisation and tried to keep up local law and jurisdiction. Creating uniformity of private law was more or less a by-product of a political struggle through which nation-states were formed. Because of this, nationalisation of private law also played a symbolic role in making the population think and feel like members of a political unity with an exclusive and far-reaching claim on its citizens. Mobilisation of the population had become of increasing importance since the French revolution, when massive conscript armies replaced the mercenary ones of the previous centuries. Later the rise of industry also required a better educated as well as a more healthy and disciplined population. Moreover, national codification of law had become an article of Enlightenment progressiveness in the eighteenth century. This was even the case in a country like England that had already established a centralised legal system in medieval times. However, it had also produced a very powerful bar with a major financial interest in resisting the codification proposals of reformers like *Bentham*. On the continent, in contrast, even a conservative like *Savigny*, the founder of the Historical School of Law, would not radically reject the codification-ideal that his opponent *Thibaut* advocated as a means to overcome Germany's backwardness as a nation. *Savigny* just argued that both social-economic development and German legal science were not sufficiently developed yet to produce a truly national codification

for Germany. In fact, when the BGB came into force in 1900, it was seen as the culmination of German legal science and of national integration,[2] just like the Code Napoléon had been in France almost a century before.

The original motive for post-war European integration was primarily political and not economic. Its aim was to definitely end the kind of violent competition that, from an historical perspective, had been inherent in the European nation state from its beginning.

However, after a very ambitious attempt to directly establish a European Political Union (the so-called *Pléven-* plan) had proven to be premature in 1954, economic integration came to be seen as the best means to reach the goal of securing peace in Western Europe. For market integration, legal adaptation was only necessary in so far as laws seriously distorted fair economic competition.[3] With the exception of a few areas, like consumer, liability and competition law, private law was of no great relevance in this respect. Nevertheless, much of the European legislation in the sphere of private law is suspect of having been superfluous or even counterproductive from an economic point of view.[4] The need for a European Civil Code (ECC) would therefore not seem to be a practical one. Moreover, according to almost all legal commentators,[5] the EU lacks competence to impose ECC. However, this may change as a part of the ongoing process of constitutionalisation of the EU. The European Parliament has already advocated ECC twice (in 1989 and in 1994). The European Council demonstrated an obliquely favourable attitude to this proposal at its meeting in Tampere in October 1999. It declared that 'as regards substantive law, an overall study is requested on the need to approximate Member States' legislation in civil matters in order to eliminate obstacles to the good functioning of civil proceedings'. At that time it still seemed as if the Commission had greater priorities than ECC.[6] However, meanwhile the Commission has demonstrated

[2] According to R Zimmermann, 'Savigny's Legacy', *Law Quarterly Review* (1996) 112, p. 601 the BGB 'was caught up in a surge of nationalist sentiment'.

[3] As *Fischer*, the German minister of foreign affairs, stated in his plea for a European Federative State on 12 May 2000 (Vom Staatenverbund zur Föderation—Gedanken über Finalität der europäischen Integration, *Bulletin der Bundesregierung*, nr. 29, 24 May 2000): *For how, in the long term, can it be justified that countries inextricably linked by monetary union and by economic and political realities do no also face up together to external threats and together maintain their security?*

[4] See R van den Bergh, 'Subsidiarity as an Economic Demarcation Principle and the Emergence of European Private Law', *Maastricht Journal of European and Comparative Law*, (1998) 5, pp. 129–152. A Ogus, 'Competition between National Legal Systems: A Contribution of Economic Analysis to Comparative Law', *International Comparative Law Quarterly* (1999), pp. 405–421. It is telling of the strong pro-NICE attitude among European private lawyers that critical articles like these are largely ignored.

[5] J Basedow, 'Un droit commun pour le marché commun', *Revue Internationale de Droit Comparé*, 1998, pp. 7–28, represents the only (and very unconvincing) exception that I know of.

[6] CW Timmermans, 'Zur Entwicklung des europäischen Zivilrechts', *ZEuP* 1 (1999), pp 1–5.

a more activist attitude, calling on 'stakeholders'[7] to report on private law that creates concrete obstacles for the functioning of the internal market, the result of which will be discussed later. Moreover, if integration becomes more flexible, generally speaking, thanks to the new flexibility provisions in the Treaty of Nice, it may stimulate integration of private law on an intergovernmental basis. It may do so especially if governments can be made to believe that there is a certain strategic advantage in being a pioneer in the integration of private law. Countries successful in integrating their private law may act as a model for countries that have not done so yet. This is a well-known effect of newness, as illustrated—at present—by the Dutch Civil Code of 1992. However, the experiences with codification also demonstrate that it is a lengthy and often abortive process even if it is restricted to just one country.

Projects like these tend to be staged for symbolic reasons and not for any urgent practical reason.[8] It is therefore plausible that the European Parliament's advocacy of ECC is mainly inspired by the assumption that ECC will be a lever for a European identity and not by the idea that it would be of direct functional importance for the development of the inner market as such. In thinking that ECC is important from the point of view of political identity, the EP shares a fundamental premise with many NICE-scholars. It is not only shared by those who are in favour of ECC, but also by some of those who are against it, but think that at least a common legal culture is of great importance for EU-political identity. I think this assumption is an anachronism.

The typically academic dream of ECC and also, to some extent, of NICE, is inspired by a nostalgic desire for the ideals of transparency of law in the nation state. Nationalised law and especially codified national law allowed lawyers a comfortable feeling of being in control of law. Such desire for lost simplicity is readily understandable. However, the ideal of the universal lawyer is irretrievably a matter of the past even within national law and is unfeasible now that internationalisation has led to a proliferation of sources of law.[9] Moreover, national private law still profits from its cultural symbolic value inherited from the past. Therefore ECC

[7] COM (2001) 398 final, published in *Official Journal of European communities* C 255/1 of 13 September 2001.

[8] The support for ECC by the EP stands in a marked contrast with the great lack of interest that the Dutch parliament took in the process of re-codification of Dutch civil law (between 1948 and 1992), at least after its first ten years. The main reason why Parliament had agreed with the project was that it fitted into the more general atmosphere of making a new beginning after the war. See EHOP Florijn, *Ontstaan en ontwikkeling van het nieuwe Burgerlijk Wetboek*, (Maastricht, Maastricht University Press) 1994.

[9] J Smits, 'The Future of European Contract Law: On Diversity and the Temptation of Elegance', in: M Faure, J Smits & H Schneider (eds.) *Towards a European Ius Commune in Legal Education and Research*, (Antwerp, (Intersentia) 2002), pp 239–56, has argued this point in more detail.

may arouse anti-European sentiments rather than pro-European ones, even if the British, who, with only a few exceptions, never shared the ideals of codification, were to be excluded from such a project. That the British are highly unlikely to join ECC is not just because of the hotly debated differential nature of English law from whose perspective a code symbolises continental cultural imperialism. Much more important is that Britain was and still is to the Anglo-Saxon (legal) world what Rome was to the continental (legal) world before the times of national codes. These legal links, moreover, are part of a more general Anglo-Saxon culture that includes many more people than the European population. Moreover, the Anglo-Saxons have also experienced that the mixing of civil and common law traditions in countries like Quebec, Scotland and South Africa went along with struggles for which tradition would prevail over the other.[10] Even if ECC were realised for most of the continental Member States, it would still be a risky achievement from the point of view of furthering integration. The unity of ECC will be undermined very quickly unless there is a European Court that guarantees unity of interpretation. Even then, however, one can easily imagine cases that will be seen as the outcome of national legal cultural struggles within the bosom of the Court, just as they have taken place already in both the Luxembourg and the Strassbourg Courts. Thus even a purely continental ECC may arouse national resentments rather than further integration. In view of these objections it might be argued that ECC is not anachronistic in the sense of an outdated idea, but that its time is still to come once European integration has made further progress. In this speculation, however, anachronism in the first sense is not absent. It is assumed that Europeans may eventually identify with Europe through common legal institutions like national peoples did with nations. This is highly unlikely, however, because the political and social-economic conditions of our times are very different from those of the great national codes. ECC can never be a symbol comparable to the Code Napoleon or the BGB. For the French of two hundred years ago, it symbolised overcoming a legal diversity associated with pre-liberal times. It was a national act of modernisation, consolidating the coming into power of the third estate in a truly unified national French state. A somewhat similar account might be given for the BGB that came into force almost one hundred years later than the Code Napoléon,[11] even though, in contrast to the latter, political discontinuity made the former lose most of its symbolic force to the present German constitution. Such strength of symbolic meaning is implausible in the case of ECC. With the possible

[10] R Evans-Jones, 'Receptions of Law, Mixed Legal systems and the Myth of the Genius of Scots Private Law', *Law Quraterly Review* (1998) 114, pp 228–49.

[11] A post-war recodification project was stopped because it was found unacceptable to replace the *Code Napoléon*. Meanwhile, however, more than half of it has been adapted in a piecemeal fashion, leaving the code as such formally untouched.

exception of consumer law and family law, public law is perceived as much more important for the modern common man than was civil law at a time when market societies became established. If perhaps in some far away future a common European civil law becomes established, the creation of ECC would not be of great significance, neither in a social-economic nor in a political-symbolic sense. Politicians therefore have little or no incentive to burden themselves with such a project. However, even if ECC were not to materialise, what is the likelihood of a development towards a common European culture of private law, which is seen as a precondition for it? The relation between private law, culture and society has often been debated in European private law during the last ten years.

3. THE CULTURALIST APPROACH

In view of the anachronistic ideas about the meaning of NICE as a means for European identity, it is not surprising to find ideas about the relationship between (private) law and society dating from times when it was not yet studied in a more thorough empirical way. One of them is the culturalist model, which is popular among legal historians like *Zimmermann*, but also with a comparatist like *Legrand*, who tries to protect the common law from what he sees as continental legal cultural imperialism. According to the culturalist model, law is deeply embedded in society and its culture, even though not necessarily in national cultures. There are two important differences in how the two authors use the model. Whereas *Zimmermann* accepts that legal culture is a culture of specialists that may have a transnational character, even though there are important cultural differences between nations in other respects, *Legrand* emphasises an *epistemological* link between legal culture and culture in general. Since the latter is often a national one, countries can only have legal cultures in common provided that they also share a common culture in an epistemological sense. However, since according to him, the crucial epistemological factor is a deductive vs. an inductive -, precedent and case-based style, the link to national culture is much stronger in the case of inductively operating (legal) cultures, as the particular history of legal cases will matter a lot. Though English legal culture is transnational in so far as it is the mother of all Anglo-Saxon legal systems, national legal history is bound to weigh much more in case-based legal systems. The other major difference between how the two authors use the culturalist model concerns the nature of the dependence of law on culture and the level of this dependence. Both authors assume that it is not the content of the legal rules that is decisive, but rather the conceptualisation of the law, the way that legal problems are categorised and analysed. However, whereas *Zimmermann* focuses on material legal concepts, *Legrand* concentrates on how concepts are used in the legal reasoning

process in concrete cases. He readily admits that English law borrowed a lot of concepts from the Ius Commune tradition.[12] However, it is the way they are applied and developed that, according to him, is decisive for a legal system's view of the legal process and of the value of legal doctrine. This explains why he discusses common law versus civil law all the time, neglecting major cultural differences between civil legal systems, the French and the German, for instance, and between common law legal systems, the English and the American, for instance. This is not a minor objection to his impossibility theorem, also because such a comparison will show that the distinction between a deductive and an inductive style, is much too simple a dichotomy.

Let us first take a closer look at *Zimmermann's* position. He is quite explicit about the legal cultural tradition that is his source of inspiration. This is what he calls '*Savigny's legacy*'.[13] *Savigny* was very critical of *Thibaut's* proposal for a German Civil Code, modelled after the Code Civil, as a means to come to national unity. *Savigny* argued that such a Code would be a break with national legal traditions that could only eventually result in a code after the development of 'an organically progressive legal science which may be common to the whole nation'.[14] 'Organic development' is the important concept for understanding both *Savigny* and *Zimmermann*. The reference to biology had four important functions in *Savigny's* argumentation. It referred, first of all, to the romantic criticism of the French revolution as a rejection of continuity in the development of society. By attempting a radical rupture with the past reforming society according to a blue print, the French revolution had destroyed the forces of 'organic' social growth. In its desperate frenzy to realise its rationalist ambitions, it was bound to end in a bloody tragedy that conservatives saw as a punishment for humanist self-idolatry and atheist rejection of God's guiding hand in history. What *Savigny* detested most of all in the three civil codes valid in parts of Germany at the time in which he wrote (1814), the Austrian *Allgemeines Bürgerliches Gesetzbuch*, the Prussian *Allgemeines Landrecht* and the French *Code Civil,* was the influence of natural law ideas. These ideas belonged to the same stock

[12] Regretfully, *Legrand* did not discuss Gordley's thesis that the distinction between common and civil law is simply outdated; see J Gordley, 'Common Law and civil law: eine überholte Unterscheidung', *Zeitschrift für europäisches Privatrecht* 1993, pp 498–518. Although Gordley's claim is mainly about American private law, the historical influences responsible for congruence that he refers to have also affected English law. It explains why it has been found that common lawyers, without knowing it, use search engines with conceptual trees 'that strongly resemble the general parts of continental codifications'. See B Schäfer and Z Bankowski, 'Mistaken Identities: The Integrative Force of Private Law', in: M Van Hoecke & F Ost (eds.), *The Harmonisation of European Private Law*', (Oxford, Hart Publishing 2000), p 25. Cautiousness as regards taking the USA as a model for Europe was advocated by M Reimann, 'American Private Law and European Legal Unification, Can the United Sates be a Model?', *Maastricht Journal of European and Comparative Law* 1996, pp 217–33.

[13] R Zimmermann, *above* n 1, pp 576–605.

[14] Savigny as cited by Zimmermann on p 579.

that had inspired the French revolution. In law they had been developed also by way of criticism of Roman law and the value of legal history and traditions. By doing so, natural law cut off the possibility of an 'organic' evolution and this is something that, according to *Zimmermann*, must also be avoided today:

> *We are today the heir of … an infinitely rich tradition that has significantly contributed to the level of sophistication of modern Europe. But it is important for us always intellectually to reacquire that heritage, if we wish to preserve it and to contribute to its organic evolution, because … … as in every other epoch within the history of European law our law develops 'in unauflöslicher Gemeinschaft mit der ganzen Vergangenheit'.*[15]

The very emphasis on the importance of history raises a somewhat perplexing question, of course. Given the fact that we have a period of at least two hundred years of relatively isolated development of nationalised law behind us in Europe, would it not be quite 'inorganic' to do away with that part of history? Is national law not national precisely because it is based on national values? However, law's being 'organic' has a second meaning that is used by *Zimmermann* to make critical judgements about the value of historical development of law.

In the quotation just given one can see a connection between the first and this second meaning of law as being 'organic'. The reference is to law not being a 'mechanical' assembly of parts that can be exchanged for other parts without affecting the well functioning of law as a whole. *Zimmermann* provides the following example: *even a supposedly new subject such as insurance law requires the existence of a general law of contract and has started to develop within the doctrinal parameters thus established.*[16] The claim here being made is that law as something that has reached a high degree of complexity in historical development, can not be criticised piecemeal. Something that may seem to be odd or arbitrary at first sight may appear to be quite rational if considered in a wider context. In fact, this was also a more general claim of conservative criticism of Enlightenment rationalism. The claim that law must operate historically is connected to the idea that so many historically determined ties within law as a whole will be overlooked, that it will disintegrate unless an historical approach is followed in which legal adaptation always finds place within a given historical tradition. There is a political implication against EU-bureaucratic rationalism involved in this view on law:

> *Community enactments often reflect a certain policy bias … … Company law and contract law are more than mere appendage of the free movement of*

[15] Above n 2, p 585. His citation from Savigny can be translated as 'in insoluble coherence with the whole past'.
[16] Above n 15.

> *goods, persons, services and capital. Thus, there is the obvious danger that neither the systematic wholeness of our legal systems nor the other fundamental values informing them are borne in mind sufficiently.*[17]

Disconnecting parts of the law from the historical law as whole, *Zimmermann* goes on arguing,

> *may well lead to a pervasive cynicism about law …, and if we proceed from the assumption that every epoch produces its own existence, and with its own legal rules, law will appear to be an entirely arbitrary artefact. The faith in law as an autonomous discipline will be shaken.*[18]

This is what has happened, in his opinion, at many of the elite institutions in the United States, where law reviews are full of articles *on law and storytelling, …or on property law as a phallic metaphor*.[19] I fear that disdain for American legal culture is not a very convincing way to make the divided European legal cultures feel like having much in common. If anything represents a remarkable difference between European and American law journals it is not this fancy kind of articles plenty of which are also produced in Europe, but just not published as much in prominent journals. The reason is quite simple, namely that American law journals are edited by students who often have a college background in other fields than the law. An important difference of academic relevance that cannot be overlooked by means of ridicule, is the much greater social scientific orientation of American law journals and notably the rise of the economic analysis of law. It does affect the autonomy of law indeed, as Posner has also argued,[20] but it also integrates law with the help of social scientific concepts. I understand, however why *Zimmermann* prefers to ignore this, because social scientific analysis of law demonstrates the feasibility of a non-historical approach to law. It is telling, in this connection, that the scarce but very critical contributions of economists of law on the subject of European private law, are simply being ignored by NICE-adepts, as already stated.[21]

The reference to biology that *Savigny* used following romantic historians also served two sociological purposes. One was the idea that socio-cultural development in general and legal development that should go hand in hand. In fact, this was *Savigny*'s very argument against *Thibaut's* proposal. The second was the idea, that social evolution is a process of functional differentiation through which organisms can reach greater stages of complexity. This

[17] Above n 15.
[18] Above n 15.
[19] Above n 15.
[20] RA Posner, 'The Decline of Law as an Autonomous Discipline: 1962–1987', *Harvard Law Review* Vol 100: 100 *Harvard Law Review* (1988) pp 761–800.
[21] Above n 4.

was not an idea that had to wait for Darwin to be discovered. It represented a common sense social evolution theory already included in Aristotle's political philosophy. It had been echoed over and over again and been given an economic account by Adam Smith. The notion of differentiation through division of labour was important to explain the fact that whereas law would have its origins in the organic life of a nation, it is delegated to a class of specialists in the course of society's growth to greater complexity.[22] This was of special importance in the German situation in which the preponderance of Roman law might be considered as an 'inorganic' feature of German legal development, as the Germanist wing of the Historical School of Law was indeed to argue. One of the defences used by Romanists against this important objection was that Roman law represented no more than a treasure house of proto-scientific thinking about law that had been further developed by the medieval scholars. As such it had been just an instrument to bring German law into a higher stage of development, a process that, according to *Savigny*, was still not advanced enough to allow a German code. In fact, the precise relationship between law as science and law as a particular historical expression of a nation remained an unresolved issue within the Historical School of Law.[23]

The backgrounds just sketched are important for the understanding of *Zimmermann's* scholarly campaign to demonstrate a common background of civil and common law in the Ius Commune heritage. In fact, just like *Savigny,* he emphasises the conceptual commonality and not a commonality of substantive norms, just as was the case in historical Ius Commune, which figured as a framework for conceptualising material law that was largely of non-Roman origins. The trick of *Zimmermann's* argumentation is to implicitly reclaim Roman law as the historical source of all that is scientific in law. On that basis he can also claim the necessity of a revitalisation of Roman law by creating bridges in the diversity of national private legal systems, just as it did in the period before and during the process of national integration of local law. After that period, lawyers quasi lost their memory of its origins in the historical Ius Commune. This explains why there is no inconsistency, according to *Zimmermann,* in emphasising the essential demand of organic development of law and to work one's way back into the times before law became nationalised. According to *Zimmermann,* the Ius Commune tradition must be revitalised to be able to perform its legal integrating task once more, be it at a higher stage of complexity and in the

[22] See J Schröder, Savigny's Spezialistendogma und die, 'Soziologische' Jurisprudenz, *Rechtstheorie 1976, Heft 2,* pp 23–52.

[23] It lingered on in German debates on the role of the law and of the judge in the twentieth century (the *Freirechtschule)* and on the methodology of sociological study of the law (*Ehrlich v Weber);* See Schröder, above n 22. In fact, the controversy between the Romanists and the Germanists is clearly echoed in some of the criticisms of Zimmermann's views by other legal historians (see next page).

light of the present needs of European legal integration.[24] The role of historical analysis is to show how legal diversity within the framework of Ius Commune conceptualisations can be explained by 'the institutional, ideological, social and economic context within which they were expressed; and this context may be completely different today'.[25] However, unless there is also an 'organic' relationship between that context and historical development, it is difficult to understand why legal development would follow an 'organic' pattern. In fact, the context *Zimmermann* refers to as precisely that which made *Jhering* reject his allegiance to the Historical School of Law's vision of the development of law as the development of an 'inner substance', as *Zimmermann* calls it.[26] If law were largely determined by social-economic and political factors, a social scientific analysis of law would seem to be more adequate. It would not imply that the history of law is unimportant. It would just be no more than historical material for a social scientific understanding of law, but nothing like a conceptual model one can only operate with from an internal point of view. The background sketched here also explains why *Zimmermann* is against ECC for the present moment. He is so for exactly the same reasons that *Savigny* was against codification in Germany almost two hundred years ago. According to *Zimmermann,* we will first have to re-establish a common legal scientific community *and* integrate European national societies sufficiently before it may ever be time for ECC.

Zimmermann's 'neo-pandectist' approach to European private law can and has been criticised for his view on legal history, his theory of the value of legal history for the development of European private law and for the relation between law, legal culture and society that he assumes. A 'neo-Germanistic' reaction to *Zimmermann*'s attempt to appear as reincarnation of Savigny, was to be expected. As *Zimmerman* admitted already in the programmatic article 'Savigny's Legacy',[27] the study of the history of European law was focused on academic legal writing, rather than on its actual influence on legal practice. According to *Caroni,*[28] the role of Roman Law was,

[24] Zimmermann's interest in 'mixed' legal systems is quite in line with his general thesis concerning the integrative potential of Ius Commune. However, it is rather striking that in his writings on mixed legal systems he has nowhere given any example in which recourse to the Ius Commune background allowed bridging gaps between common and civil law in mixed legal systems. However, he might argue, of course, that one has not been sufficiently aware of this common heritiage even in mixed legal systems.

[25] Above n 15, p 597.

[26] Above n 15, p 598.

[27] See footnote 15. He refers to Coing's *Europäisches Privatrecht* Vol I (1985) and Vol II (1989) as 'the first sustained attempt to sketch the development of priate law legal doctrine', above n 15, p 599. He also refers to Brauneder's 'trenchant criticism' of Coing's books (in *Zeitschrift für Neuere Rechtsgeschichte* 15 (1993), pp 225–35, without, however, spending any further attention on it.

[28] P Caroni, 'Der Schiffbruch der Geschichtlichkeit: Anmerkungen zum Neopandektismus', *Zeitschrift für neuere Rechtsgeschichte* 16 (1994) pp 85–100.

in fact, a rather restricted one. Germany has been exceptional in the way it accepted Roman law. The '*Reichskammergericht*' in its instruction of 1498 was empowered to apply the 'Imperial and Common Law' of the German-Roman Empire. The consequence of this was that Roman Law was not only applied as a supplement to local law, but actually replaced it where the local law could not be shown to be based in a common law of non-Roman origin. However, everywhere else in Europe, Roman law was only applied, if at all, as supplementary law, that is if no local law could be shown to be applicable.[29] Law was therefore characterised by great local variation creating an understandable desire for codification as a means of establishing legal unity. It would be most unhistorical to treat the nationalisation of law as just a regretful historical intermezzo that we can skip over now, reconnecting ourselves to the historical Ius Commune tradition. If anything, this would be a very 'inorganic' move, precisely because much of national private law is not of Roman origin and because it is national law that created an integration of law that was unprecedented. *Brauneder* and *Stein*[30] have observed that the impact of both local law and natural law in the eighteenth century codes has been very much neglected, whereas both were developed in opposition to traditional scholarship. Common European private law never existed, whereas, on the other hand, the codes of the period of Enlightenment were not nationally orientated as, in fact, *Zimmermann* himself admits[31], but had universalist pretensions and were actually transplanted successfully for that reason. 'Neo-pandectism' therefore comes down to a caricature of legal history in two respects. It projects a degree of unifying effect on Roman law that it never had, whereas it ignores the fact that codes precisely aimed at establishing such unity. *Caroni* accuses 'neo-pandectism' of not only abstracting from—and discrediting non-Roman historical elements in modern law—but also of treating 19th and 20th century legal history in so far as it is not based on Roman law, as 'inorganic'.

According to *Giddens*,[32] eighteenth century society was closer to the Romans than modern society is to eighteenth society. Therefore, neo-pandectism's treatment of law and industrial society would seem to based on an ultra-romantic dream that post-industrial society will no longer be plagued by the dynamism of industrial society that made organic models of law and society, that may have had some plausibility for agrarian societies,

[29] The term 'Ius Commune' has had variable historical meanings and its historical extension is very much contested. See PL Nève, Ius Commune oftewel 'Gemeen Recht': taduttore traditore?, in: *Tertium datur, Drie opstellen aangeboden aan Prof.mr. JA Ankum*, (Tilburg, Tilburg University Press 1995), pp 33–58.

[30] W Brauneder, Europäisches Privatrecht: historische Wirklichkeit oder zeitbedingter Wunsch an die Geschichte?, Saggi, conferenze e seminari; 23, Roma 1977 (Centro di studie Richerche di Diritto comparato e straniero) (February 1997); PG Stein, *Römisches recht und Europa. Die Geschichte einer Rechtskultur*, (*Frankfurt am Main* 1996 Fischer).

[31] Above n 22, p 601.

[32] A Giddens, *Sociology, A Brief but Critical Introduction*, (London, MacMillan 1982).

hopelessly outdated. This appeared already in the strain caused by *Savigny's* view of the relationship between law as an expression of 'folk spirit' and lawyers as a class of specialists. Just continuing the latter, in principle, sound observation concerning legal development, one would expect sub-specialisations to develop among those specialists. Such sub-specialisation, that we have actually seen taking place and which is still continuing, goes hand in hand with increasingly greater differentiation within the law, including private law. As a part of that process, the very demarcation of private and public law has become more and more problematic, as we know.

In contrast to the considerable veneration that someone like *Zimmermann* meets in the NICE-community, *Legrand* is used as a doormat in the NICE-community because of his provoking thesis that 'European legal systems are not converging'.[33] In discussions about Legrand's thesis it has been noted[34] that there is a strong resemblance between his view and the Historical School of Law, according to which law represents the Folk Spirit. Surprisingly, it has not been noted that this implies that the opposing views of *Zimmermann* and *Legrand* are based on very similar background assumptions. The reason why *Zimmermann* has nevertheless been treated much more respectfully, is, I suspect, that he has exchanged national folks for a European folk and thus qualifies as a NICE-guy, whereas *Legrand* radically maintains the 'peculiarity of the English' and therefore figures as NICE's bugbear. At the same time he is also met with a kind of fearful respect for his postmodernist philosophical jargon that the members of the NICE-community are rarely familiar with. However, it can not be maintained that his thesis as such is obscure. In fact, his description of the common law style of legal reasoning is probably the best ever produced from an internal point of view. However, internal points of view tend to have an ideological character. Claiming that common law reasoning is 'essentially' different like *Legrand* does, already suggests rhetorical strategy, but that observation does not allow the disregarding of his arguments. *Legrand* has mainly been criticised because his description of how the common law operates does not take into account the huge amount of statute law applied nowadays, as well as the changes in how statute law is dealt with, making it more similar to continental methods. Conversely, it has also been pointed out that case law plays an enormous role in many continental legal systems nowadays. However, that argument does not carry very far. Even if it were true that the English law is inclined to construct the scope of statute law less narrowly nowadays, it does not imply that statute law would replace case

[33] P Legrand, 'European Legal Systems are not Converging', *International comparative Law Quarterly* 45, pp 52–81.
[34] A Watson, *European Transplants and European Private Law*, (Ius Commune Research School, Maastricht 2000), p 1.

law as the methodological focus. Conversely, the great increase of case law in continental legal systems does not imply that common law case *methods* are becoming more important in continental law. In fact, continental lawyers can be seen complaining about too much *Einzelfallgerechtigkeit* from which legal science cannot develop *rationes decidendi* into systems of rules and principles.[35] At best one can conclude that both continental and English law have become more complex and chaotic, but that does not necessarily imply convergence in a methodological sense. In other words, *Legrand* has hardly been met on his own epistemological ground, something that I propose to do here.

Legrand always contrasts common and civil law. Although he puts forward the thesis that European legal systems are not converging, he never entered in a comparative analysis of continental legal differentiality. He does not think that national private legal systems on the continent may not converge. In his view the 'mentalités', as he calls them, of civil law legal systems are not fundamentally different, whereas those of civil law legal systems and common law legal systems are. 'It is between these legal traditions that the **primordial** cleavage-the **summa differentia**-lies'.[36] It is therefore untrue that *Legrand* accepts Folk Spirit theory if 'folk' is understood as 'national folk', even though he does argue that the common law agrees with the empirical and pragmatic spirit of English culture in general. According to *Legrand*, 'the legal can never be perceived on its own terms; to penetrate the "legal" one must appreciate the "social" that underpins it'. Legrand defines 'mentalité' as 'the frame of perception and understanding of a legal community, in short, its epistemological substratum'.[37] Obviously, his epistemological cast of 'folk spirit' suggests an enormous coherence in cultures if it were true that common law and civil law are divided by a primordial cleavage. In what does this primordial cleavage consist then according to *Legrand?* First of all, the common law has not moved on from the inductive stage of methodological development. Induction implies that concepts are closely connected with empirical observations and that classification of cases takes place on the basis of some salient facts rather than of abstract legal schemes. In accordance with this the law is not seen as a system of rules and principles, but rather as an associative network of cases. The English judge solves a case by looking at its salient features in connection with cases that are similar in many respects, but differ in some others, without apprehending a 'complex categorical design of hierarchical norms purportedly comprehending all eventualities'.[38] The inductive style is preferred because of a pragmatic attitude that distrusts abstract logical reasoning.

[35] See eg JM Barendrecht, *Recht als model van rechtvaardigheid*, (Deventer, Kluwer, 1992).
[36] Above n 33, p 63.
[37] Above n 33, p 60.
[38] Above n 33, p 66.

In fact, the common law does not operate with rules or rules are no more than hypotheses concerning *ratio decidendi* in a number of cases. Legal knowledge is supposed to emerge from facts and not from rules. Lacking rules in the continental sense, English law also does not know rights as derived from rules, but just legitimate expectations that, in the light of the precedents of the common law, appear as having been wronged. The task of the common law judge is to connect past, present and future as if they are continuous. The common law allows social development to influence the law by the technique of making distinctions as if these distinctions had always been there in the common law, which is supposed to date from 'time immemorial'. This is quite different from continental law that has a fixed point in time coming into force, according to *Legrand*, as the result of a formal political act. These differences amount to differences of legal ontology, making it impossible to understand the law of the one in terms of the other, even if concepts are nominally the same. In *Legrand's* view it is a typically continental feature to think of legal scholarship as a science comparable to other sciences. This, according to him, is typically not the view of the common lawyer. It is this difference in the epistemological model of the law that *Legrand* assumes to constitute the unbridgeable divide between civil and common law.

It is important to note that *Legrand* denies neither that there has been a long-standing and important influence of the civil law tradition on English law, nor that there has been an important increase of common rules as an effect of present-day European integration. However, that does not make any difference, according to him, to the way that people think and feel about the law and how lawyers operate with it. Both depend on differential *mentalités*. The change of manners and customs take time, he argues, referring to *Hofstede's* well-known studies on comparative national cultures: 'Societies … . have ways of conserving and passing on mental programs from generation to generation with an obstinacy which many people tend to underestimate'.[39] 'Only later', *Legrand* says, 'can the laws and institutions of a nation, through experience, learning and reason, be accommodated to the new manners and customs'.[40]

I would like to start my criticism with *Legrand's* reference to *Hofstede*. The latter has shown that there is still a major cultural division between Germanic, Latin and Byzantine mentalities in Europe.[41] However, it is important to note that these differences have everything to do with the history of regional and national religious, political and legal institutions. Since the first factor, religion, is of quickly decreasing importance, the effect of change in political and legal institutions might become all the greater, as

[39] G Hofstede, *Cultures Consequences*, (Beverly Hills, Sage, 1984), p 16.
[40] Legrand, above n 33, p 62.
[41] G Hofstede, *Images of Europe. Valedictory Address*, (Maastricht 1993).

data concerning the cultural effects of regime-change in Spain and Portugal confirm.[42] It is plausible moreover, that the dynamics of cultural change increase with increasing internationalisation. Education is an important factor in this connection, as the history of nationalism reveals so clearly. Common mentalities in present day European nations were largely created because nation-states gained considerable control over education and culture. At present, the increase in international educational mobility in Europe goes along with increasingly Europe-orientated curricula in European law departments. Moreover, culture, including legal culture, is not just a matter of educational institutions. Whereas *Legrand* accuses NICE-believers of being continental legal imperialists, one hears lots of complaints about the domination of Anglo-Saxon law firms on the continent. Apparently there is a great flexibility of both continental and common law minds to shift between legal epistemological paradigms all the time when co-operating with each other. In fact, this is nothing new, since its feasibility was already known from the experience of mixed legal systems. Without idealising mixed legal systems as foreshadowing NICE, it may nevertheless be asked how they have been able to operate at all if the epistemological cleavage were really as primordial as *Legrand* suggests.

Since *Legrand* makes so much of epistemological styles, it seems relevant to remark that empirical studies of science do not support the claim that inductive and deductive styles of thinking are mutually exclusive. There is just a lesser or greater emphasis and explicitness on theoretical assumptions depending on whether science is in a phase of paradigmatic competition or not. *Samuel,* to whom *Legrand* often approvingly refers, distinguishes common and continental law as being in different phases of rationality. According to him, English law is in a pre-axiomatic stage, continental law in a post-axiomatic one.[43] Practically speaking this difference means that whereas continental law is more concerned about consistency and coherence in law, the common law operates with more or less implicit theories ordering case law. *Samuel* discusses common law cases in which a lack of theoretical reflection led the common law judge astray. Conversely, English law can be very flexible in a way that continental law is not. This is not because distinctions between cases made by the English judge cannot be integrated in a theoretical doctrinal framework. Samuel distinguishes between 'rule defined and rule described knowledge'.[44] English law can be described as a system of rules, but it is not, therefore, also a rule guided system, as *Legrand* has rightly argued according to *Samuel*. However, it cannot

[42] Above n 41; comparing his own data with those collected in another study 10 years later, Hofstede found a marked difference, for instance, in Spain and Portugal, due to the shift from authoritarian to democratic political regimes in both countries.
[43] G Samuel, *The Foundations of Legal Reasoning*, (Antwerp, Maklu, 1994).
[44] G Samuel, 'European Private Law in the context of the Codes', in M Van Hoecke & F Ost (eds.), *The Harmonisation of European Private Law*, (Oxford, Hart Publishing 2000), p 58.

be a coincidence that English law can at least be described as a system of rules. Sub- or semi-consciously the inductive method is obviously at least rule-orientated. *Samuel* suggests that a lack of flexibility he finds in civil law is due to a lack of theoretical sophistication. According to *Samuel*, continental law suffers from a substantial load of quasi-metaphysical concepts, that he ascribes to the Gaian-tradition of dividing private rights in rights *in personam* and rights *in rem*. Elsewhere[45] I have tried to show how much doctrinal confusion goes along with that distinction. In other words, it is mistaken to judge the nature and effect of systematisation as to openness for facts simply on the basis of traditional forms of systematisation that still operate with metaphysically loaded concepts. Furthering post-axiomatic thinking in continental law is still also a matter of de- and reconstructing a defective legal-cultural inheritance. Distinguishing between civil and common law in such an *essentialist* way as *Legrand* does, implies a neglect of the creative potential of confronting both major private legal systems. I fully agree with *Samuel* that, although *Legrand* is right to see ECC as a form of continental legal imperialism, there is no reason to reject all other attempts to connect civil and common law.[46] When reflecting on legal history, one should be especially critical of self-representations of legal systems as being epistemologically unique. Such would-be uniqueness is little more than an expression of the socio-political history of legal systems. For instance, the indeed lesser degree of systematisation of the common law is very much the consequence of a conscious attempt of the bar to keep its lucrative monopoly on access to the law, both against political reformers and against legal scholars. The self-representation of the common law so aptly made by *Legrand,* reflects not only pragmatism and empiricism as a general characteristic of English culture, but also an ideology to justify the role of the English judges as oracles of the law.

3. LEGAL FUNCTIONALISM

The culturalist view has its origins in pre-sociological times in which society was conceived in terms of particular cultural ideas rather then as an assembly of relations between groups each having their own particular interests in competition with other groups. In fact, it was this sociological insight that brought *Jhering* to his famous shift from *Begriffsjurisprudenz* to

[45] N Roos, 'On Property without Properties', in: GE van Maanen and AJ van der Walt, *Property Law on the Threshold of the 21st Century*, (Antwerp: Maklu 1996), pp 161–212.
[46] G Samuel, 'The Impact of European Integration on Private Law', *Legal Studies* (1988) Vol 18 no 2 wrote (p 175): 'This post-axiomatic stage offers a genuine opportunity to move the convergence debate forward, since it is a territory where the imperialistic und universalising tendency of the civilian axiomatic thinkers can be by-passed in favour of models which, not being reductionist, embrace complexity'.

Interessenjurisprudenz. History no longer appeared to him as a quasi-logical unfolding of culture, but as the result of political and social-economic conflict of interests. One and the same set of legal ideas may have different social functions, depending on the social context it figures in. Legal rules and principles can therefore not be compared as such, but only in relation to that context. Because of this legal comparison only makes sense from a practical point of view if societies and its social subsystems are structurally and functionally rather similar. Given such similarity, functionalists compare variable legal solutions to what they assume to be the same functional social problems (*presumptio similitudinis*). The critical perspective of legal functionalism is that the same set of legal ideas can have different social functions in different social contexts and vice versa. That this is the case can of course be easily demonstrated.[47] However, functionalists also try to use legal comparison for making statements about the relative qualities of legal rules and principles in relation to social functions that they presume to be similar, and that is a much more debatable enterprise, as will be illustrated below.

The legal functionalist view on law is naive from a sociological point of view. The reason is that law often has social functions which are different from or even contrary to what a lawyer, taking law at face value or ignoring alternatives to law, is inclined to think it has. A good illustration of lawyers' naive or professionally deformed view of the micro-social function of law can be found in *Macauley's* well known study *Non-contractual relations in business*,[48] already published in 1963. He showed that the typical perspective of legal enforcement that is common among lawyers is usually far from a businessman's mind. Half of the contracts he studied were not even valid in a legal sense. Businessmen primarily trust long-term relationships and forms of formal and informal insurance against unusual circumstances that may frustrate a 'partner's' fulfilling his contractual obligations. Meanwhile, *Macauley's* findings have been by and large confirmed over and over again.[49] If one reads legal authors in the field of Ius Commune studies, however, one has the impression that businessmen operate with an eye on the law all the time. They are supposed to refrain from developing new foreign business relations out of ignorance of or uncertainty as to the foreign law, which, apparently, they are supposed to know quite well in their native country. At the same time, there is an almost complete lack of reference to empirical studies that show how the lack of uniform *private* law in Europe would hinder international trade. How come, one wonders, that such a major obstacle was not made part of the 1992-programme? In fact, parts of private law that were believed to directly affect competition,

[47] As was demonstrated already by Karl Renner, *Die Rechtsinstitute des Privatrechts und ihre Soziale Funktion: ein Beitrag zur Kritik des bürgerlichen Rechts*, (Tübingen, Mohr 1929).
[48] *American Sociological Review* 28, pp 55–67.
[49] See A Jettinghof, *Het komt zelden voor*, (Maastricht, Metajuridica Publications 2001).

have indeed been harmonised, as in the case of consumer law, product liability and competition law. They were directly relevant for fair competition, even if it is doubtful if much that has been accomplished in this field was not superfluous or even counterproductive from the point of view of efficiency (see footnote 4). It is interesting to see how studies like *Macauley's* are not being taken seriously by protagonists of NICE, even if they are familiar with them. *Kötz* starts the preface of his *European Contract Law* as follows:

> If Europe is to be economically unified in a Single Market, there is no doubt that its private law will also have to be unified, at least to some extent.[50]

Although the latter clause is pretty vague, it must be assumed that the matter of *Kötz's* book, formation, validity and content of contracts, as well as contract and third parties, is something that has to be unified according to him. After having given a reasonably fair description of *Macauley's* article, however, he continues as follows:

> Not only are they (contracts, N.R.) necessary where the parties have been unable to reach an acceptable solution despite the initiatives mentioned, but they also provide the framework within which the parties can conduct their negotiations. This is an important function, and the clearer and more precise the rules are, the better they will fulfil it.[51]

Obviously *Macauley's* finding that parties avoid using contracts as a framework for negotiations in case of problems, because they are afraid of spoiling good relationships if they do so, is something that *Kötz* simply refuses to accept. According to *Macauley*, businessmen will end relationships rather than go to court, nor do they calculate legal consequences very much during negotiations, unless they conclude contracts with great risks for the survival of their firms they cannot insure in any other way. In any case, even if *Kötz* were right, it would not follow at all that *uniformity* of law would be a necessary requirement for a single market. If businessmen care about the law at all, they tend to consult lawyers. This may cause some extra costs if a foreign lawyer has to get involved, but these extra costs will rarely be so substantial as to be decisive for business transactions taking place or not.

Because of their instrumentalist view of law, legal functionalists tend to ignore differential cultural values 'behind' the law (or its absence), even if they have deep anchors in social structure. For instance, according to *Kötz,* it really does not matter much if problems of pre-contractual liability are

[50] H Kötz, *European Contract Law I*, (Oxford, Clarendon Press 1997), p iv.
[51] Above n 50, p 14.

treated in terms of contractual or tort liability. However, this is only true if one takes a shallow look at such an issue. Of course, both forms of liability aim at regulating negotiation and at compensating damage in the case of liability. However, the conditions and amount of liability may vary considerably depending on the way that it is classified. Obviously, the manner of classification is related to the socio-legal values concerned with contractual behaviour. It is not just a technical legal accident that standards of care tend to be lower if pre-contractual liability is classified as tortious instead of contractual. However, it certainly causes a logical strain to do so if the very reason for that fixation is a pre-contractual relationship. The English judge explicitly rejected good faith as a principle in pre-contractual relationships in *Walford v Miles*,[52] not because the legislator had told him to do so, but because it does not fit into his perception of the pre-contractual relationship. When discussing *Walford v Miles, Kötz* criticises the strongly worded rejection of good faith by the English judge for being over-dogmatic and simply speculating that the German judge and the French judge might have come to a similar results by other means. However, *Kötz* also criticises the *Cour de Cassation*, which also follows a tort-approach to pre-contractual relations, for having taken a decision that is inconsistent with an earlier one.[53] This inconsistency, however, was not caused by a functional vision of the court on the pre-contractual relationship, but by the typically French positivistic attitude that requires a legal basis for classifying pre-contractual relationships as contractual ones. Interestingly, the Dutch judge also found no such basis in the old Dutch Civil Code. However, lacking a positivistic attitude, he expanded the good faith requirement to pre-contractual relationships. One may praise the Dutch judge for being so pragmatic as legal functionalism requires, but that would be an ideological sort of praise, because it ignores the macro-social functions of French legalistic culture. It is part and parcel of a particular French way of looking at law and legislation. One can think that such a vision is outdated, but one should realise that changing this view implies a major revision for the French political-legal system as a whole. Such changes are not impossible, as the case of the Netherlands illustrates, but they should not be seen as a matter of legal technicality, because they typically touch upon the national 'spirit' of law.[54]

Kötz's criticism illustrates how the *presumptio similitudinis* that does not imply, in itself, that different solutions found to similar problems are equivalent, can easily regress into an *axioma similitudinis*. It results in criticisms according to which judges misunderstand their own law and

[52] (1992) 2 AC 128.
[53] H Kötz, above n 50, p 41.
[54] The impact of such changes can be studied at the moment in the case of former communist countries, where private law has been adapted to the new socio-political realities without changing much in the black letters of the law.

treat legal problems as a matter of value instead of as a matter of legal technicality that is optimal from a functional perspective. The only way that functionalists can account for value-differences is in terms of differential protection of *interests* involved. In a functionalist view, divorce, for instance, is a solution for functional problems of marriage. Depending on how interests of man, wife, children and society will be seen as deserving more or less protection, which will be value dependent, divorce (or its restriction) will take different legal forms and be variously 'best' regulated. However, the problem with legal functionalism is that the determination of legally relevant interests takes place on the basis of the very same legal values and concepts that functionalists want to compare. The idea that interests are somehow 'there' only to be regulated as efficiently as possible is typical of an instrumentalist view of law that has been discredited in modern sociology of law. Law is not just an instrument through which people defend their interests, but is also a medium for people to identify and express their interests. Law *constitutes* society as much as it serves various interests in the society constituted by it. The defects of culturalism can therefore not simply be overcome by thinking in terms of functions that the law ascribes to itself.

4. CONCEPTUALISM

Whereas a functionalist will compare e.g. different solutions to problems of property relations in apartment-buildings and their (dis)advantages from the point of view of the different stakeholders involved, conceptualists assume that such divergence is a matter of an insufficiently adequate legal understanding of the social relations involved. In the conceptualist view legal comparison's function is not fundamentally different from problem solving within a single legal system. For conceptualists, legal differentiation is either artificial and purely nominal (and can and ought to be abolished for efficiency reasons) or it indicates a lack of legal understanding that can be overcome by developing more adequate concepts. Legal comparison is a means of improving legal thinking by taking out those elements in the comparison that are sound and using them to develop new concepts and doctrines. The critical function of conceptualist comparison is by definition absent if legal concepts are identical, however defective they may be from a logical point of view. Conceptualists appreciate those concepts more or less like the Romans did in the case of the *ius gentium*, as a natural law of an empirical kind that is not in need of any correction, because it would not have been common if it were not good. Difference, however, is perceived as an indication that there must be something wrong conceptually. There is supposedly an optimal solution in the law, which is a matter of conceptual analysis.

An illustration of this approach is to be found in the so-called *Principles of European Contract Law* (PECL) or *Lando*-principles.[55] Take, for instance, article 2:101 sub 1 on 'Conditions for the Conclusion of a Contract':

> A contract is concluded if:
>
> (a) the parties intend to be legally bound, and
> (b) they reach a sufficient agreement without any further requirement

In the notes it is explained to the reader that common law countries have a doctrine of consideration, whereas some continental countries have the requirement of a cause of contract. The reader will look in vain for any explanation as to why such requirements were thought superfluous by the *Lando*-commission. Obviously, terms like 'intention to be legally bound' or 'sufficient agreement', are vague and flexible enough to allow the maintenance of much of what is behind the two different doctrines in question. However, the question can then be raised as to what extent such principles are more than just lip-service to uniformity, unless, of course, uniformity and the problem of how to justify it, is a matter that was tacitly supposed to be delegated to a European Court of Civil Justice. However, how is that Court to decide in the face of actual differences? The *Lando*-principles vacillate between description and prescription of European principles.[56] Hiding its prescriptive intentions implied hiding critical perspectives in the hope that its descriptive appearance might stimulate acceptance. *Smits* objection' that it is not 'the *best possible rule* that prevails, but the rule on which consensus can be reached, indeed leaving out the flesh and blood of national legal systems'[57], may therefore not be totally justified. We do not know what the consensus was based upon, but one can speculate about it. The conditions for concluding a contract, for instance, would fit a criticism of, on the one hand, the doctrine of consideration, and, on the other hand, the continental doctrine of cause of contract. The former confuses fundamental agreement on the goal of the contract with mutuality of the interests involved. The latter confuses agreement about the goal of the contract with agreement about the fundamental elements of the contract. *Lando*-condition a) would meet the first criticism, condition b) the second one. Note that agreement on fundamental elements represents an adjustment of the interests involved, something that is inadequately expressed in the consideration doctrine that equates the concept of an interest with a quid-pro-quo interest. Thus, although the requirement of cause

[55] O Lando & H Beale (eds.), *Principles of European Contract Law,* Part I and II, (The Hague, Kluwer Law International 2000).
[56] R Michaels, 'Privatautonomie und Privatkodifikation: Zur Anwendbarkeit und Geltung allgemeiner Vertragsprinzipien', *RabelsZ* 62 (1998) pp 580–626.
[57] J Smits, *The Good Samaritan in European Private Law,* Inaugural Lecture Maasticht University, (Deventer, Kluwer 2000). It is justified in substance, however (see also footnote 9).

avoids this confusion, the consideration-doctrine also represents an insight that is relevant as a criticism of the requirement of cause.

Although the speculative analysis just given might also be read as a justification of the conceptualist approach, it justifies it no more than by the extent to which legal comparison may indeed be useful for detecting conceptual defects. However, there is no reason whatsoever to assume that conceptual differences are often or usually the effect of such defects. Differential understandings of value laden concepts, like 'good faith' for instance, will rarely be the result of analytical defects, but rather of differing views on law and society.

The Study Group on a European Civil Code,[58] that presents itself as a continuation of the work of the *Lando-group*, does not suffer from such ambivalence between description and prescription. If divergence is found, it will either be assessed as functionally irrelevant or a reasoned choice for a best solution will be made. Since the Study Group operates on a much more detailed level than PECL, it is bound to be confronted with problems of incommensurability as illustrated by our criticism of Kötz's attempt to overcome differing views on pre-contractual relations. A reasoned choice for a best solution, however, would seem to involve fundamental differences in views on private law. The methodological basis of this indeed enormous enterprise, in which scores of private legal scholars are co-operating all over Europe, is hardly scientific: idealistic optimism in combination with a naive assumption that the work is of practical importance.

The futility of looking for commonality is best illustrated by a third project of a conceptualist kind, the *Common Core*-project.[59] This project is much less naive about the existence of a common core, its name notwithstanding. It does not assume, for instance, that national law is something static, or that the opinion of courts is necessarily identical with the judgement of the scholars. At the same time, however, it is not so clear what the project is really about. It aspires to be a mere description of differences and similarities, although it is believed that the project can also support practical concerns connected with European integration and stimulate the rise of a common legal culture. Unlike the other two projects, however, commonality is tested rather than presumed. The test is also more rigorous, in so far as hard cases are used for comparison, even though they are not real cases, something that may make an important difference, as *Michaels* argues.[60] On the other hand the significance of the fact that cases are decided in a

[58] C von Bar, 'Le Groupe d'Etudes sur un Code Civil Européen', *Revue Internationale de Droit comparé* 2001, pp 127–139.

[59] M Bussani & H Mattei (eds.), *Making European law, Essays on the 'Common Core project'*, (Trento, Università degli Studi di Trento 2000).

[60] See R Michaels, *Common Core?, Paper for the Conference on Epistemology and Methodology of Comparative law in the Light of European Integration*, Brussels October 24–26 2002 (to be published), for a thorough criticism of the methodology of the Common Core project.

common way as far as outcome is concerned is very unclear. Both volumes published so far conclude, in fact, that there is a surprising commonality in outcome, but that this goes along with a lot of differences in how these outcomes are reached,[61] something that will hardly be surprising from a functionalist point of view. It is quite unclear, however, what one should infer from commonality, especially since only a limited number of cases were selected without there being any clear connection between them. The irony of the Common Core project is that, precisely due to its greater methodological concerns, it shows the *theoretical* meaninglessness of describing commonality and differences of law. And for all their theoretical and methodological defects, the other two projects are at least clear as to their practical purpose. They simply presume that commonality is good and that difference should be avoided if possible because they believe that private law has an important role to play in furthering European integration. Moreover, within this practical purpose, critical theoretical ambitions are not altogether absent, even if hidden, as we have seen.

As a general conclusion, however, it can be stated that an inductive search of commonality remains a haphazard sort of enterprise from a theoretical point of view. It would seem to require a critical comparative conceptual analysis that highlights difference rather than commonality. Whether such difference is to be overcome or not is a totally different question, in which theoretical and practical points of view should not be confused. Even if one looks at these matters from a purely practical point of view, the great emphasis on background commonality is paradoxical. If private law in Europe is so similar from the point of view of outcomes, why bother so much about unifying it? After all, in case of great similarity one would not expect there to be an urgent practical need for unification. In fact, legal difference can even be good, if it suits differential practical needs. *Increasing* difference, it is worth noting, is an almost non-discussed alternative, even though some authors clearly see the usefulness of competition between legal systems. One would expect a practical need for harmonisation or unification only in case of great divergences that cause practical problems. What about them?

5. EMPIRICAL AND SOCIOLOGICAL APPROACHES

Private law scholars have done surprisingly little research into this question. They just assumed that there is a great need for legal integration and that transaction costs of legal diversity are high or even prohibitive. In its communication to the Council and the EU-Parliament of 13 September 2001,[62]

[61] R Zimmermann and S Whittaker, *Good faith in European Contract Law* (eds), (Cambridge, CUP 2000), J Gordley (ed), *The Enforceability of Promises in European Contract Law*, (Cambridge, CUP 2001).
[62] See n 7.

the Commission expressed its desire to receive concrete information from all 'stakeholders, including businesses, legal practitioners, academics and consumer groups' as to whether 'the proper functioning of the internal market may be hindered by problems in relation to the conclusion, interpretation and application of cross-border contracts'. 'Stakeholders' is, I think, a both curious and telling qualification in the case of academics. Leaving academics aside, however, one wonders why stakeholders would not already informed the Commission spontaneously about such problems. In fact, positive response to the request by the Commission from other groups than academics has been limited.[63] The most relevant group, the business world, does not seem very concerned with private law as an impediment to European integration. A few problems mentioned are about a lack of uniformity in consumer law, insurance law and securities. Complaints concerning consumer law, however, come mainly from consumer organisations that simply assume that legal divergence causes problems for consumers. Any kind of empirical research proving this seems to be lacking or is not referred to at least. Most complaints, however, were concerned with the lack of coherence between EU-directives. In other words, the greatest problems have been created by a lack of competence or coordination in the EU-bureaucracy itself! This raises the question once more of the extent to which EU-intervention was necessary or desirable at all (see footnote 3). In their critical evaluation of the response, *Smits* and *Hardy*[64] therefore demand that supposed transaction costs of legal diversity first be estimated more reliably and then be discounted against the costs of harmonisation and unification. This disregard for the dearth of economic-analytical literature on European private law is likely to continue as before, as the European bureaucracy is no longer neutral in these matters at all, behaving more like an important stakeholder in the NICE-movement itself. It is not superfluous to note, moreover, that the empirical basis of the reactions to the Commission is doubtful. It would be a worthwhile project to investigate the empirical basis on which the answers to the request of the Commission have been given.

Sceptical academics like *Smits* are rare, in fact. He has been very critical of the *presumptio similitudinis* of functionalism. He has been even more critical of the *Lando*-group's pretension of being empirical in what it 'finds' as common. In fact he had elsewhere already called the whole idea of general principles of private law into question, even within national law. Most principles have so many exceptions that it is difficult to choose

[63] See http://europa.eu.int/comm/consumers/policy/developments/contract_law/comments/indexen.html. There were only 33 reactions from the business world, whereas 70 out of 160 reactions in total came from academics.

[64] JM Smits and RRR Hardy, 'De toekomst van het Europees contractenrecht', *Weekblad voor Privaatrecht, Notariaat en Registratie* (2002) 6513, pp 827–33.

between what should be seen as the principle and what as an exception to a principle.[65] The reason for this is, according to him, that so many fields of private law have become linked up with public policy considerations, as in the cases of eg consumer law, tenant law, etc. One might add that decreasing generality is not just a matter of legal principles, but also of definition of concepts. In fact, EU-directives have contributed to this tendency. As an example one can think of the effects of European protection against the stealing of goods of national cultural value,[66] or the diverging definitions of 'consumer' in European consumer law directives. *Smits* also argues that there are features of national private law that seem to pervade large parts of it which cannot be represented in terms of principles, but which are connected to them as a kind of general background against which they figure. In this context he refers to images of social relations and ideas about the relationship between law and morality, as well as a certain jurisprudential style, as explained by *Legrand*. *Smits*' proposal is to allow the national courts to adapt the law depending on whether a particular legal question is more or less strongly linked to national mentalities or whether it concerns morally more or less neutral matters that can be decided on the basis of considerations of efficiency alone. *Smits* therefore suggests the splitting of the law into a pragmatic-functional and a principled part, leaving it to the courts to find out when the latter is the case or not. It is questionable whether this is feasible. *Smits*' distinction between morality dependent and independent law is too simple. Market morality is not simply a matter of efficiency and efficiency can be a matter of a whole set of rules that cannot be judged one by one. *Collins*, for instance, argues that one of the major problems of private legal integration is precisely the differential way in which commercial law is perceived from a European and from a national point of view.[67] Whereas for the EU with its ambitions towards market-integration, consumer law is seen from the point of view of rationalising markets, member states often have consumer law that takes an extremely protective attitude towards consumers as a weaker party. Questions can be raised, moreover, concerning the constitutionality of allowing courts to act as quasi-legislators. And why would courts be interested at all in improving law in terms of efficiency? If a particular country were especially good at making its law more efficient, it might just imply a greater workload that courts are rarely happy about.

[65] J Smits, 'Eenheid en verscheidenheid in het contractenrecht; over het gedetermineerd verleden en de postmoderne toekomst van het privaatrecht, preadvies Nederlandse Vereniging voor Wijsbegeerte van het Recht', in *Handelingen Nederlands Tijdscrift voor Rechtsfilosofie en Rechtstheorie* 1998 nr. 1, pp 10–38. See also footnote 9.

[66] C Bollen & GR de Groot, 'Verknoeit het Europese recht ons Burgerlijk Wetboek?', *Nederlands Tijdschrift voor Burgerlijk Recht* 1995, pp 1–9.

[67] H Collins, 'European Private Law and the Cultural Identity of States', *European Review of Private Law* 1995, pp 353–365.

As a model for a judicial process of integrating law, *Smits* refers to 'mixed legal systems', which have found different equilibria between common law and civil law institutions. I see two problems as regards *Smits'* optimism connected to 'mixed' legal systems. One is that the account he gives of South African private law as an especially instructive model for a future European mixed legal system, is not exactly convincing. The best *Smits* can say when looking at general contract law, tort, property and trust is that South-African Law has sometimes used English case law to specify general principles of civil law. Mostly, however, South-African law does not appear better to him, but somewhat undecided, fuzzy or even confused.[68] That conceptual problems in mixed legal systems can be great and problematic has also been argued by *Evans-Jones* in the case of Scots Private Law.[69] The second problem is that 'mixed' legal systems do not provide a convincing case for judges' fine sense in distinguishing technical issues from those rooted in national mentality. The reason is that 'mixed' legal systems will have to cope with differing mentalities almost by definition.

Not sharing *Smits'* great expectations of the role of the judge in the development of European private law, I do not disagree, however, with *Van Gerven*[70] that judges are also important as gatekeepers in the development of NICE. However, their influence will be a longer term and rather haphazard affair. *Van Gerven* used to be critical of ECC as a means to reach NICE. When presenting his project for *Casebooks for the Common Law of Europe*, he wrote that the aim was 'to strengthen the common legal heritage of Europe, not to strangle its diversity'.[71] However, I have the impression that *Van Gerven*[72] has recently come to the conclusion that NICE cannot be accomplished in the foreseeable future unless it is backed up by a legislative programme aiming at an ECC by a number of intermediate steps. It may be that *Van Gerven*'s 'turn' is due to the recent initiative of the Commission that was discussed earlier. It is not because it demonstrated the need for an ECC, but rather because the response to the initiative may be interpreted as a fatal blow to the whole enterprise that *Van Gerven* would regret as a setback to the interest in European private law in general. Let us assume now that an ECC were indeed developed, that it had sufficient political backing and that it were a thorough piece of work in which each major legal system can recognise some of itself. However, precisely because of this, it will also be largely 'foreign' to any national legal system. Could it become a success?

[68] J M Smits, *The Making of European Private Law: towards a Ius Comme Europeanum as a Mixed Legal* System, (Antwerp, Intersentia 2002), ch 6, 7 and 8.
[69] R Evans-Jones, above n 10.
[70] W van Gerven, 'ECJ Case-law as a Means of Unification of Private Law?', in: AS Hartkamp & others, *Towards a European Civil Code*, 2nd edn, (Nijmegen, Ars Aequi 1998), pp 91–104.
[71] 'Casebooks for the Common Law of Europe, Presentation of a Project', *European Review of Private Law* (1996), p 68.
[72] *Codifying European Private Law*, chapter 8 in this volume.

Watson, who studied many historical examples of legal transplants, has flatly contradicted culturalist and functionalist scepticism about ECC because of the great amount of evidence for the success of many 'legal transplants'.[73] According to him, this is due to the differentiation between legal and general culture.[74] Lawyers can be trained in what is—originally—a foreign legal 'mentalité' and largely impose it upon their society in so far as the law is concerned, provided that they are backed up by sufficient political power in doing so. Another reason why transplants are so often successful is, according to *Watson*, that many rules have little social impact or that it does not matter what the rule is, as long as there is a rule. However, he admits that major transplants always went along, with major religious, political or economic changes. Obviously such major changes will also have a great impact on culture in general. Reception is possible and still easy when the receiving society is much less advanced materially and culturally, according to *Watson,* something that clearly does not apply in the relationship between civil and common law societies. However, to *Watson's* understandable amazement, *Legrand* has argued that legal transplants are simply 'impossible'[75], because the peculiar features of English law are a reflection of the difference of English mentality in general. According to *Watson, Legrand* simply misrepresented him, because he had always stressed 'that a rule once transplanted is different in its new home'.[76] Law is very pliable, according to *Watson,* and can therefore be adapted to local needs. However, this would seem like an answer to a functionalist concern, not to Legrand's thesis of non-convergence. But as far as 'mentalité' is concerned, *Watson* sees no problem because he regards legal culture as very much independent of general culture. The introduction of an ECC would be problematic, of course, in so far as lawyers would have to be retrained. But this can be done if necessary. Indeed, experience with foreign legal students, including English ones, shows how quickly they can adapt their minds to a foreign legal system.

Watson' optimism concerning an ECC is not shared by *Teubner,* although the latter agrees that *Legrand*'s impossibility theorem is largely refuted by *Watson*'s empirical findings concerning legal transplants.[77] According to *Teubner,* however, *Watson* exaggerates the degree of independence of the law from its societal context. Indeed, the least one can say is that *Watson* was not very interested in the process of transformation that transplants go through once they have taken place. The critical point *Teubner* wishes to

[73] A Watson, *Legal Transplants: an approach to comparative law,* (2nd ed), London 1993 (University of Georgia Press).
[74] See above n 73, ch 11, for Watson's explanations for success of legal transplants.
[75] P Legrand, 'The Impossibility of "Legal Transplants" ', *Maastricht Journal of European and Comparative Law*, 1977, pp 111–24.
[76] A Watson, above p 1, n 34.
[77] G Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergencies', *Modern Law Review* 61 (1988), pp 11–32.

make, however, is that studies on the effects of globalisation show how it is quite possible that attempts to harmonise law will result in greater divergence. His argument, although couched in the somewhat obscure terminology of systems-theory, is in fact no more than an application of the sociological insight that the real meaning of law will always depend on the institutional context. The institutional context in the case of the harmonisation of law is always a double one. New principles and rules will have to be incorporated in an existing body of law *and* be adapted to the more or less given social structures they are applied to. The example that *Teubner* provides by way of illustration of his thesis of the possibility of greater divergence resulting from harmonisation is the use of the principle of *good faith* in labour contracts, and this is sufficiently plausible. Given the respective nature of British and continental labour relations[78], the meaning and applicability of such a vague term like *good faith* is bound to be different. However, the example proves not that *Watson*'s thesis about legal transplants was wrong, but that differential meaning of transplanted law was excluded from his definition of the success or lack of success of legal transplants. It proves at best that harmonisation cannot be guaranteed by having the same rules on a verbal level. But that is what both *Legrand* and functionalists have always been emphasising. Moreover, *Legrand* might remark that *Teubner* not only admits that questions of fit with general traits of national law are problematic in case of transplants, but also that the specific, much more individualist nature of British labour relations is deeply embedded in both British legal and general culture. However, this does no more than prove that the effects of harmonisation can contradict its intentions. It does not prove at all that major changes in law may not also have an effect of congruence on a societal and broader cultural level over the long run, if lawyers participate in a common legal culture. The reason is that lawyers who share a common legal operational framework will continue to communicate and thus also become more familiar with social institutions in the countries concerned. Even though legal culture may be fairly independent of general culture, as *Watson* argues, communication between lawyers in connection with transplants usually includes case law, which presupposes a certain familiarity also with the social institutions of a foreign society. However, at this point we hit on a very vulnerable spot of multinational legal integration. Transplantation of law, including maintenance of a truly common legal culture, is to no small extent a matter of a common language.[79] Since Latin has not been the *lingua franca*

[78] See H Slomp, *Between Bargaining and Politics, an Introduction to European Labour relationships*, (Westpoint, Praeger 1996). In fact, continental labour relations in Germanic and in Latin countries are also very different from each other.

[79] See T Weir, 'Die Sprachen des europäischen Rechts. Eine Skeptische Betrachtung', *ZeuP* 1995, pp 368–374; and also O Remien, 'Über den Stil des europäischen Privatrechts', *RabelsZ* 1996, pp 1–39.

among lawyers in Europe for more than two hundred years,[80] language is a very problematic issue for legal integration in Europe. On the other hand, even in the Latin part of Europe more and more lawyers are able to read English nowadays. However, continental law and legal cases that are not published on in English will largely remain inaccessible to foreign lawyers. For obvious reasons, legal cultural 'imperialism' by the Anglo-Saxon world is to be feared rather than the reverse as suggested by *Legrand*.

6. CONCLUSION

The overview of the indeed scarce empirically and sociologically orientated literature shows that it cannot offer a clear and promising perspective on the European integration of private law. However, I have not dealt with any historical perspective other than that of *Zimmermann*, which I find much too culturalist. The connection between culture and social and political factors has been made clear by *Van Caenegem* in his work on the history of European private law.[81] According to him the divergent development of English, French and German law can be understood from the differential socio-political position of, respectively, judges, legislators and professors in those countries. Following his lead, I myself presented a structural analysis of the three legal systems as they were about ten years ago. I also included the USA as a fourth legal system into the comparison. In contrast with *Watson,* I found a marked coherence between legal culture and general culture. Its title was 'The European Dinosaur Complex' and its political point was a criticism of ECC as a typically continental idea.[82] Since it was published four years before *Legrand* started his anti-NICE campaign, one would think that he would have found it very much to his liking. However, although I know that he is aware of the article since I discussed it with him, he has never mentioned or criticised it. I used to flatter myself by speculating that he did not do so because my analysis of English law was very close to his, and that it might have made his look less original. Another reason that occurred to me was that I made it clear that there are also very important cultural differences between French and German law, something he tends to ignore by simply dichotomising between civil and common law. Although this may have been the case to some extent, I now think that another reason

[80] It is to be noted that the supremacy of Roman law over indigenous law was to no small degree not caused by Roman law's inherently greater logical qualities, but because it was the common language of the legal scholars.
[81] R C van Caenegem *An Historical Introduction to European Private Law*, (Cambridge, CUP 1992).
[82] NHM Roos, 'The European Dinosaur Complex', in B de Witte & C Forder (eds), *The Common Law of Europe and the Future of Legal Education*, (Deventer, Kluwer 1992), pp 639–60.

may have been more important. For all the important differences that I analysed, I did not draw the conclusion that European legal cultures might not converge in the course of European integration. I just pointed out that it would be a longer-term process, and that difference in existing law should not be underestimated. The growth of a common European legal culture, I also argued, would be primarily a matter of reforming law schools in Europe.[83] In fact, I then failed to notice a very important point at that time. American private law is much closer to continental law than English law and this can easily be explained by the relatively more important role of law professors in American law.[84] Not only does this lend additional support to Van Caenegem's theory, but it also explains much of the ongoing changes in English law as influenced by an increasing role of law schools and law professors in England. Having a shared European legal culture, however, is not the same as having a unified law. It is primarily a matter of mutual understanding and of allowing one's own legal system to be *critically* challenged by foreign ones. In that process the shared culture might become something different, richer and more complex than any of the legal systems it is inspired by. Just like *Legrand*, I therefore find difference much more interesting than commonality, but differently from him I see it as inspiration for critical creativity rather than for conservatism. For all my sceptical views concerning the NICE-movement, I think it can nevertheless already be credited with fostering a greater mutual legal understanding in Europe. However the value of the nascent common legal culture would increase if its academic focus shifted. At the moment it is mainly an inductive search, almost rule by rule, for more or less commonality from a supposedly practical need for harmonisation or even uniformity. Instead the focus should shift more to a critical comparative review of the institutions and the foundations of national private laws in order to take out much of its historical and metaphysical slack. Renewal of national private law through critical comparative analysis, including the practical use of law, is, in my opinion, an indirect, but more natural and fruitful way to NICE. Thus a more contemporary form of legal science may develop in which elements of different legal cultures can come together in a theoretically constructive way, as advocated by *Samuel*.[85]

In this paper I have tried to understand private law in the context of legal systems as a whole, and this context is to a large extent a political one. This is also true of the present European context. However, I do think that the development of European private law has other main carriers than the main national legal cultures did in the past. Neither judges (England), nor legislators

[83] And I stressed the need for (at least passive) polylinguistic training.
[84] The reason was that Gordley's article (see note 12) had not been published yet at that time.
[85] As an example of an effort in that direction I am so immodest to refer to my article 'Property without properties', in: GE van Maanen and AJ van der Walt, *Property Law on the Threshold of the 21st Century*, (Antwerp, Maklu 1996), pp 161–212.

(France) nor professors (Germany) are likely to be the primary carriers of European private law, but rather Euro-bureaucrats and their counterparts in private organisations on the one hand, and legal counsels of international law firms on the other. The operations of both are very much sector-based, something that corresponds with the disintegration of private law into specialised fields in which non-private law is often as relevant as private law, or is even more relevant. The impression that scholars and judges are of primary importance at present is created by the fact that scholars are responsible for most publications and that they will often write about legal decisions by judges, some of them, in fact, belonging to both groups. However, mine is no more than an impressionistic hypothesis and some scholars seem to be very well connected with Commission bureaucrats at the moment. The extent and importance of the communication between the four groups is something that, as stated, deserves more empirical study. An interesting case study, it seems to me, would be the interaction between NICE-academics and the EU-bureaucrats and politicians that they have succeeded in mobilising even in the absence of clear needs of legal practitioners or of other interest groups. The development of European private law should therefore become much more a matter of empirical study of the behaviour of legal professionals in practice than dreaming about NICE and its supposed beneficial effects on European integration. The course of development of European private law will also be dependent on political factors, as was that of national legal systems in the past. Much will depend on the further development of the EU-constitution[86] and, more specifically, on the role of the nation-states in it. Predictably they will demonstrate a forceful resistance against dumping on the scrap heap of history, unless major political and legal ideological changes can capture the imagination of the Europeans to enable them to overcome the rigidities of nation states. Only then will NICE have a chance to really take off and inspire legal development in Europe. It is however uncertain, if not unlikely, whether something like that will ever happen at all. Moreover, it is a subject that goes much beyond the limits of this paper.[87] However, NICE, as a longer term cultural process, can further a de-nationalisation of legal thinking and thus support the fundamental aim of European integration. For the moment, however, NICE should be primarily used as an academic playground, the practical importance of which can and should be compared to that of fundamental research in relation to applied research in science. It should thus be regarded as being necessary, and possibly fruitful, but very uncertain as to what its eventual practical effects might be.

[86] See my paper 'The European Charter of Fundamental Rights and Law as a Way to Survive' for the Conference on Epistemology and Methodology of Comparative Law, Brussels 24–26 October 2002.

[87] To avoid appearing like an oracle I may refer to BS Frey, *Ein neuer Föderalismus für Europa. Die Idee der FOCJ*, (Tübingen, Mohr, 1997).

11

The Europeanisation of National Legal Systems: Some Consequences for Legal Thinking in Civil Law Countries

JAN M SMITS

1. INTRODUCTION

THIS CHAPTER FOCUSES on the consequences of the Europeanisation of law for national legal thinking. As the growing influence of European treaties, directives and case law on the *substance* of domestic legal systems is being assessed more and more,[1] the influence on the process of national legal reasoning as such is lagging behind. This does not come as a surprise: European institutions or courts seldom give concrete guidelines as to the way that the substantive rules have to be dealt with. But there can be no doubt that the increasing body of law of European origin has important consequences, not only for the way that domestic lawyers reason with these types of legal rules, but also for the way that the more 'classic' parts of national legal systems are addressed.

This chapter is restricted to a discussion of the consequences of Europeanisation of private law in civil law countries. Thus, both the common law and other areas of law than private law are omitted. As far as the common law is concerned, there is a growing body of literature on the influence of European Union law and human rights law on the way the common law judge reasons.[2] Naturally, in describing the characteristics of

[1] See on the debate on the emergence of European private law, among others, Jan Smits, *The Making of European Private Law*, (Antwerp-Oxford-New York, Intersentia 2002); Arthur Hartkamp et al (eds), *Towards a European Civil Code*, 2nd ed, (Nijmegen, Ars Aequi 1998).
[2] Cf Pierre Legrand, for example 'European Legal Systems are Not Converging', *International and Comparative Law Quarterly* 1996 45, 52 ff; 'Against a European Civil Code', *Modern Law Review* 1997 60, 44. See EH Hondius, *Nieuwe methoden van privaatrechtelijke rechtsvinding en rechtsvorming in een Verenigd Europa*, Mededelingen Koninklijke

the civil law tradition, one cannot go completely beyond the features of the common law for the simple reason that these characteristics have to be contrasted with those of that other great law tradition. But one should also bear in mind that it is impossible to isolate the 'European' influence on legal reasoning from other influences that have been present over the last decades as well: in this respect, Europeanisation of law is only one of the factors, together with globalisation and a trend towards more substantive reasoning.

It is useful to make clear at the outset that we are far from establishing a 'methodological *ius commune europaeum*': the mere fact that there is law of European origin that influences national legal reasoning does not in any way imply that this influence leads to convergence of national legal systems. On the contrary: it is likely that Europeanisation of substantive law rather reinforces differences in legal reasoning instead of eliminating them. This point is taken up again in Paragraph 8. First, some characteristics of legal thinking in the civil law will be described (Paragraph 2) and assessed from a viewpoint of increasing internationalisation (Paragraphs 3–7).

2. LEGAL THINKING: THE TRADITIONAL FEATURES OF THE CIVIL LAW TRADITION

In order to be able to assess the influence of Europeanisation on the modes of reasoning in national legal systems, it is useful to first make a list of the decisive factors that determine the legal reasoning in the different private law systems. Consensus on what such a list should look like, is however hard to reach. In their classic textbook on comparative law, Zweigert and Kötz identify five different factors that are crucial for the 'style' of a legal system.[3] Two of these (the mode of thought in legal matters and the kind of legal sources a legal system acknowledges) explicitly deal with modes of reasoning. But there are other aspects of equal importance, as we shall see below. In addition, it should be noted that various types of reasoning also exist *within* one national legal system, dependent on who is engaging in it (judge, legislator, practising lawyer or legal scholar) and what type of case

Nederlandse Akademie van Wetenschappen, Afdeling Letterkunde, Nieuwe Reeks, part 64–4, Amsterdam (2001); Mark Van Hoecke, 'The Harmonisation of Private Law in Europe: some Misunderstandings', in: Mark Van Hoecke & François Ost (eds), *The Harmonisation of European Private Law*, (Hart Publishing Oxford, 2000), 1 ff. On the differences between the two legal traditions, see Smits, above n 1, with further references, and in particular Geoffrey Samuel, 'System und Systemdenken—Zu den Unterschieden zwischen kontinentaleuropäischem Recht und Common Law', *Zeitschrift für Europäisches Privatrecht* 1995 3, 375 ff.

[3] K Zweigert & H Kötz, *An Introduction to Comparative Law*, translated by Tony Weir, 3rd ed, (Clarendon Press, Oxford, 1998), 68 ff; cf Smits, above n 1, 73 ff; Wolfgang Fikentscher, *Methoden des rechts in vergleichender Darstellung*, (Tübingen, Mohr 1975–1977).

is involved (hard cases as opposed to relatively easy cases). In this Paragraph, five closely related aspects of reasoning that are in my view constituent for the civil law tradition (without stating that there no other aspects), are identified. In the subsequent Paragraphs, these characteristics are elaborated in view of the effect that Europeanisation of law may have on them.

The first aspect of the civil law way of reasoning is concerned with the sources of law. It is well-known that traditionally, in civil law countries, rules are issued by a national legislator for a specific time, as opposed to the common law, where the law dates from time immemorial.[4] Although this characteristic has lost much of its importance distinguishing the civil law from the common law way of reasoning because of the present-day importance of case law in civil law countries and of statutes under English law, it definitely still plays a role.[5] In particular the aspect that it is the *national* legislator (or highest court) that decides what the law is still important.

Closely related to this, is the fact that private law is laid down in a national Civil Code in most civil law countries with, at least traditionally, a pretension of coherence and completeness,[6] while under English law the importance of precedent is emphasised. Zweigert and Kötz seem to regard the problem of sources solely as a matter of the opposition between statute-based and case-law systems,[7] but there is more to it. As far as the civil law judge is concerned, the specific relationship between the sources of law implies that his natural *habitat* is to find a solution *within* the existing legislation and case law and not to go beyond the national system. For the legal scholar, it implies an emphasis on the national debate: his main activity is to systematise *national* legislation and case law. Although there are signs that this has now changed somewhat,[8] it still is true for *most* legal scholars in *most* civil law countries,

A second civil law characteristic consists of two different aspects.[9] The first aspect is of a more historical nature: civil law is systematised in accordance with the taxonomy of rights that is provided by Roman law. By using the system of Justinian's *Institutiones*, rights are located in a greater scheme of things. Through this, different areas of private law are separated from each other so that a law of contract, property and delict could develop. Were this aspect the only one of this feature of systematisation, it could readily give way to a less systematised law. There is however another,

[4] Legrand, 'European Legal Systems Are Not Converging', above n 2, 71; Van Hoecke, above n 2, 11.
[5] See Smits, above n 1, 86 ff.
[6] See for example Reinhard Zimmermann, 'Codification: History and Present Significance of an Idea', *European Review of Private Law* 1995, 3 95 ff.
[7] Zweigert & Kötz, above n 3, 71.
[8] See para 5.
[9] Cf Smits, above n 1, 79 ff.

highly important, aspect of systematisation: it has, at least up till now, always been an essential part of the civil law tradition that there is something *programmatic* to systematisation as well: new case law and legislation are immediately categorised in accordance with the existing taxonomy of rights.

It would be incorrect to state that this systematisation is the task of legal scholars alone. In the civil law, it is essential that this system also be used to adjudicate cases. Any civil law judge feels himself at least to some extent bound by the system that his predecessors helped to create. This is important because it implies that policy arguments always have to go through the filter of that system. Ever since the rediscovery of Roman law, jurists have tried to create a 'scientific' legal science, ensuring that choices among competing rights had to be constrained by clear and unambiguous principles, 'so that judicial judgement could be separated from the uncertainties of political rhetoric and metaphysical theory', as Van der Walt put it.[10] In other words: legal certainty was ensured through academic activity (where in English law this was done by a highest court and the doctrine of precedent[11]). Legrand relates this guaranteeing of certainty through method with the stereotype of a Civil Code as

> a self-contained and self-referential system, (that) illustrates the deep conviction held by civilian jurists that experience lived ought to be no longer privileged (…) that experience lived can be reduced to proportional knowledge in the form of a panoptic and autarkic body of rules of law, and that it is useful to organise experience lived (and the law) in this way.[12]

In my view, this reduction of knowledge to a body of rules has not so much to do with the existence of a civil code as such, but more with the received civil law tradition, this characteristic already being present before any civil code was introduced in Europe (to be precise: ever since the reception of Roman law).

A third feature of the civil law tradition is specifically related to the way courts reason. Traditionally, this reasoning is deductive, made possible by the existence of rather abstract legal norms.[13] This does not imply that reasoning through a syllogism is always explicit in the case itself—in fact this is only the case in some countries—but it definitely often underlies the court decision: one tries as much as possible to let the correct results flow

[10] AJ van der Walt, 'Marginal notes on powerful(l) legends: Critical perspectives on property theory', *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 1995, 396.
[11] Consistent with this is that in a time when precedent has become less important, systematisation is of growing importance. A powerful plea for systematisation of English law is R Goff, 'The Search for Principle', 1983, reprinted in: William Swadling & Gareth Jones (eds), *The Search for Principle*, (Oxford, OUP, 1999), 313.
[12] Legrand, 'Against a European Civil Code', above n 2, 45–6.
[13] Zweigert & Kötz, above n 3, 69.

directly from the dogmatic or statutory system. In French law, this becomes rather clear if one looks at the case law of the Cour de Cassation: results seem to be achieved in a logical way by putting the legislative rule first, then presenting the facts of the case and finally allowing the coherent result to follow from there. Any further rationalisation of the result is generally not considered necessary. In other words: reasoning is not substantive but formal: the justification for the judgement lies in the application of the authoritative rule.[14]

A fourth characteristic of the civil law deals with the way that statutes are interpreted. Traditionally, the opposition between civil law and common law countries as to interpretation of statutes is that in the civil law, the literal meaning of the words is not decisive. Instead, many factors play a role in the interpretation of the legislative text: the intent of the legislator (as apparent from the legislative history), the systematic context and the purpose of the rule are at least as important as the words of the statute itself.[15] Of course, this is only true subject to a recognition of the differences among the various civil law countries (in particular France and Germany). Under English law, interpretation of statutes used to be very different: because of the supremacy of the common law, statutes—looked at as intrusions into the sacred common law—had to be interpreted as restrictively as possible. In practice, this 'exclusionary rule' came down to deciding what the 'plain meaning' of the statute was. Over the last decade, this approach has changed as a result of the case of *Pepper v Hart*, in which the House of Lords in principle allowed the taking into account of the legislative history of a statute.[16]

As a fifth feature of legal reasoning, one can look at the 'mentality' of the legal system. This is something of a 'mixed bag', with various elements regarding the legal technique used in a national legal system. Among these are the importance attached to open-ended norms and to comparisons with other parts of the national legal system or with other legal systems, the extent to which courts are prepared to anticipate future legislative texts, the possibility of giving judicial opinions retroactive effect,[17] etc.[18] I regard

[14] For more details Smits, above n 1, 83 ff.

[15] See on interpretation in a comparative perspective the important study by Stefan Vogenauer, *Die Auslegung von Gesetzen in England und auf dem Kontinent: eine vergleichende Untersuchung der Rechtsprechung und ihrer historischen Grundlagen*, (Tübingen, Mohr 2001); Reinhard Zimmermann, '*Statuta sunt stricte interpretanda?* Statutes and the Common Law: a Continental Perspective', *Cambridge Law Journal* 1997, 56 315 ff, *Roman Law, Contemporary Law, European Law*, (Oxford, OUP 2001), 182 ff D Neil MacCormick & Robert S Summers (eds), *Interpreting Statutes: A Comparative Study*, (Aldershot, Dartmouth 1991).

[16] [1993] 1 All ER 42. Cf Peter Birks, 'Adjudication and interpretation in the common law: a century of change', *Legal Studies* 1994, 14 166.

[17] On which recently the comparative study by OA Haazen, *Algemeen deel van het rechterlijk overgangsrecht*, (Deventer, Kluwer, 2001).

[18] Cf JBM Vranken, 'Argumenteren in het recht', *Weekblad voor Privaatrecht, Notariaat en Registratie* (2001) 6428, 14 ff.

the legislative, judicial and scholarly styles of a legal system as the most important aspects of this mentality. As to judicial style,[19] there is a well-known difference between French and German law, the *Cour de Cassation* preferring a brief motivation of its decision, based on the equally brief statutory provisions of the Code Civil and avoiding any reference to case law[20] or legal doctrine, and the *Bundesgerichtshof* providing the parties (but foremost the academic community) with a judgement, which looks like a scholarly treatise devoting ample attention to cases and doctrine. The other civil law systems are somewhere in between these two extremes. Likewise, one can distinguish between various styles of legislation and legal scholarship. Generally speaking, the civil law countries try to be as exhaustive as possible in drafting their statutes (with exceptions, of course). Likewise, their scholarship is regarded as an indispensable tool for legal practice to continuously systematise the law (next to an autonomous function for legal scholarship).

These features of the civil law tradition will now be confronted with the increasing Europeanisation of law. This is not an easy task: often, the representatives of a national legal system are not even aware of their own ways of legal reasoning when compared with other countries, let alone knowing what influence is exercised on their modes of reasoning by EC law or by international instruments for the protection of human rights. Nevertheless, an assessment of this influence shall be attempted here.

3. THE EUROPEANISATION OF THE SOURCES OF LAW

The traditional idea of a *national* legislator that drafts acts that are in principle *complete* and *within* which the civil law judge has to find the solution to the case at hand, has been under pressure for more than a century now.[21] Here, we restrict ourselves to the specific pressure of European origin, which is much more recent.

The most important factor in this context is that as a result of the increasing Europeanisation, the *amount* of sources has increased. This has led to a much more complex relationship between the sources of law than there was in the time that the legislator and the courts were the only two important players in the (then national) field. Nowadays, the law is also

[19] Cf BS Markesinis, 'A Matter of Style', in: idem, Foreign Law and Comparative Methodology, (Oxford, Hart Publishing 1997), 126; also see idem, 'Judicial Style and Judicial Reasoning in England and Germany', *Cambridge Law Journal* 2000, 294 ff.

H Kötz, 'Über den Stil von Höchstrichterlichen Entscheidungen', *RabelsZeitschrift* 1973, 37 245.

[20] In Cass. Civ. 3e 27 March 1991, *Bull. Civ.* V, no 101, it was determined that a reference to another case can under no circumstance serve as a motivation for the decision in the case before the court.

[21] On this development Smits, above n 1, 96.

derived from the institutions of the EC and the Council of Europe. Because of the direct effect of EC legislation, national courts need to take this EC law directly into consideration. The multiplication of legal sources that is relevant to the legislative process and to the adjudication of cases is however not restricted to law that originates from the European institutions. There is also an increasing need to take into account what other national legislators and courts have done with this law of European origin. To decide how an EC directive should be implemented, for example, it is useful to take into account how that same directive is implemented in other countries. Likewise, for the court that has to interpret national law in conformity with a directive, it might be useful to consider foreign case law. Unfortunately, comparative studies in which the implementation and application of implemented directives are assessed have hitherto largely been absent.

This increasing plurality of sources gives rise to specific problems, both for the legislator and for the courts. This becomes particularly clear in the case of directives—the most important source of EC private law. It has often been remarked that the provisions of these directives expressed in unclear language and do not make use of the traditional legal terminology. But apart from that, the legislator's freedom to implement these directives is rather limited (despite Art 249 s 3 EC Treaty), especially in the area of consumer protection (which is where most of the private law directives are concentrated). It is settled case-law of the European Court of Justice that the implementation should make the legal position under national law sufficiently precise and clear and that individuals be made fully aware of their rights.[22] In a recent case, the European Court of Justice ruled that interpretation of national law in conformity with the directive cannot achieve the clarity and precision needed to meet the requirement of legal certainty, in particular not in the field of consumer protection.[23] This leaves little room for the national legislator: to be certain of an effective implementation, he will probably have to take over the provisions as literally as possible.

In addition, the national courts that need to apply the directives, irrespective of whether or not they want to give them direct effect, interpret national law in accordance with the directive, or, since they want to establish State liability for non-implementation, find it difficult to consider the legislative history of the directive. If there are any documents at all relating to how to interpret the directive, they are often difficult to access. This point is taken up again in paragraph 6.

The multiplication of legal sources through the process of Europeanisation is also present in legal scholarship.[24] There, it is in particular the idea that a

[22] C–365/93, ECR [1995] I–499 (Commission/Greece).
[23] C–144/99, ECR [2001] I–3541 (Commission/Kingdom of the Netherlands).
[24] See in particular Martijn W Hesselink, *The New European Legal Culture*, (Deventer, Kluwer, 2001).

uniform European private law should be created, that has led to an increasing interest in foreign law. In some European countries, among them Germany, Italy, the Netherlands and the United Kingdom, a cross-fertilisation of the law is the result.[25] The famous words of Rudolf von Jhering, coined in 1852, that legal science had deteriorated into a provincial study[26] are now rapidly loosing importance.

As to the increasing number of sources, it is of some interest to draw a parallel with the times of the ius commune. Before the rationalisation of law by the Pandectists and their systematising predecessors, a great number of legal sources existed as well. It was only the systematisation by legal scholars that allowed the rulers of that time to draft codes as the ultimate source of law to remove the existing legal uncertainty and inefficiency.[27] It is well-known that these codes were often provided with a prohibition against interpretation and the further development of their provisions. We are currently witnessing a similar process: in order to create legal certainty in the areas that are covered by EC law, the European Commission and ECJ put themselves at the centre of application of EC law, allowing only very restricted freedom of implementation and interpretation to the national institutions.[28] It is therefore no coincidence that the preliminary rulings procedure of art. 234 EC Treaty reminds us of the famous *référé legislative*, that also kept the power to interpret statute law with the legislator itself.[29]

4. SYSTEMATISATION AND EUROPEANISATION OF LAW

The Europeanisation of law also affects the idea of a legal system as it has existed for several centuries. This is the case in at least three different ways. In the first place, as regards the ingredients of the system, it should be noted that the growing internationalisation of law leads to a decline of the use of Roman law concepts: the terminology used in European directives and other European instruments (like the European Convention on Human Rights) is largely autonomous and not based on the *lingua franca* of Roman law. In the case of EC directives, it is even the European Commisson's policy to abstain from using terms that are already part of a national legal terminology. According to the Commission, this avoids the idea that a concept

[25] See for an example from the *UK White v Jones [1995]* 2 WLR 187. For an argument for the use of comparative law: TR Bingham, '"There is a World Elsewhere": The Changing Perspective of English Law', *International and Comparative Law Quarterly* 1992, 41 513.
[26] Rudolf Von Jhering, Geist des Römischen Rechts, Bd. I, 8. Aufl., Leipzig 1924, 15: 'Die Rechtswissenschaft ist zur Landesjurisprudenz degradiert'.
[27] Zimmermann, 'Roman Law', above n 15, 181–82.
[28] Cf para 5.
[29] On which recently Matthias Miersch, *Der sogenannte référé legislative: eine Untersuchung zum Verhältnis Gesetzgeber, Gesetz und Richteramt seit dem 18. Jahrhundert*, (Baden-Baden, Nomos, 2000).

from one legal system is being used. There are many examples of this autonomous terminology. Thus, EC directives make mention of a right to 'reduction of the price' and of a right of 'withdrawal'.[30] It can of course be questioned whether this is a sound policy: these 'neutral' terms are immediately translated into the national legal terminology,[31] but they can never become completely part of it because of their autonomous European origin.

This brings me to a second way in which the idea of a legal system is disturbed. Because of the different character of European law that is parachuted into the national legal systems, it starts to work as a 'legal irritant', as Teubner has called it.[32] In this respect, Teubner specifically referred to the requirement of good faith that was introduced in English law as a result of the implementation of the EC Directive on Unfair terms in consumer contracts. But also in civil law countries, directives may disturb the coherence of the national legal system. This is for example caused by the fact that directives do not follow the traditional dividing lines between the various areas of law. They adopt, in accordance with the competencies of the Directorates-General in Brussels, a more functional approach, providing rules where that is needed to solve a problem (most of the time abolishing barriers for the common market or implementing consumer protection). This explains why one can often find, in one directive, aspects of both property law and contract and tort law. A specific aspect of the irritation by directives is caused by the fact that their provisions are mainly applicable to consumer contracts and thus create a dichotomy in contract law: there are now for example differing rules for remedies in the case of sale of goods, depending on whether it is a consumer sale or a business transaction.[33]

The third—and perhaps most important—aspect is that Europeanisation also challenges the notion of guaranteeing certainty through method. The programmatic desire to fit new cases and legislation into the national system, because that would enhance legal certainty, has lost much of its importance.

[30] Art 3 Directive 1999/44 on Sale of consumer goods and associated guarantees (*Official Journal of European Communities* 1999 L 171/12) and Art 6 of Directive 97/7 on the Protection of consumers in respect of distance contracts (*Official Journal of European Communities* 1997 L 144/19) respectively.

[31] The 'right of withdrawal' of Art 6 of Directive 97/7 is a 'herroepingsrecht' in the official Dutch translation, while in the Dutch implementation (Art 7:46d BW), it is modelled as 'ontbinding'. In German law, it has become a 'Wiederrufsrecht' (Par. 312 d BGB) and in the English one, it is a 'right to cancel' (Regulation 10 of the Consumer Protection (Distance Selling) Regulations 2000).

[32] G Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences', *Modern Law Review* 1998, 61 11.

[33] EC directives have created many more specific rules for specific types of transactions. See Jan Smits, 'The Future of European Contract Law: on Diversity and the Temptation of Elegance', in: M Faure, J Smits & H Schneider (eds), *Towards a European Ius Commune in Legal Education and Research*, (Antwerp, Intersentia 2002) 239 ff; Mauro Bussani, 'Integrative' Comparative Law Enterprises and the Inner Stratification of Legal Systems, *European Review of Private Law* 2000, 8 85.

One of the reasons for this is indeed the increasing Europeanisation of law: institutions other than the national legislator or highest national court now decide what the law should be in the areas covered by the EC or Council of Europe. This implies that there are other ways of attaining legal certainty than through academic activity. The weighing of policy arguments is taken over by the supranational institutions which have their own ways of ensuring legal certainty. From a viewpoint of legal reasoning on the national level, this is a step back, from substantive to formal reasoning: there is no longer any need to weigh the policy arguments underpinning the rule of European origin. Furthermore, the European institutions would penalise such a weighing at the national level as a violation of European law. What used to be the rationalised system in the civil law or the doctrine of precedent in the common law, now has become the rule of European origin for both: a guarantee for legal certainty, about which discussion is no longer needed.

Here too, there is an interesting parallel with the former ius commune. Before any systematisation of the law took place, the analysis of the legal texts was rather textual: the question raised was what the drafters of a legal text actually meant by it, not how the text could be understood as part of a larger whole. It might be so that in the areas, covered by law of European origin, the movement is one of withdrawing from a law *more geometrico* and returning to what the text of the directives and other instruments actually say. This might change as soon as a 'European' system of private law has come into being. But despite efforts to create such a system, we are still far from it.[34]

5. DEDUCTIVE REASONING AND EUROPEANISATION OF LAW

The question to be discussed under this heading is how to progress from the sources of law to the decision in a concrete case. I have already indicated that the reasoning in civil law countries is traditionally of a formal nature: because of the fact that the legislator has made a policy decision about how to weigh the different interests in specific types of cases, the court only has to apply the 'formal' rule. It is crystal clear that this line of reasoning can no longer be accepted if the interests have to be weighed again or if there are new types of cases that are not covered by the formal rule. The reaction of the various European legal systems regarding this type of cases differs significantly. In Germany, for example, the court is often willing to explicitly discuss the various arguments in favour and against a certain outcome of the case.[35] Here, German law approaches English law,

[34] The drafting of 'principles' (see footnote 44) can be looked at as such an effort.
[35] Cf Markesinis, 'Judicial Style and Judicial Reasoning in England and Germany', above n 19.

where courts are usually prepared to openly discuss and balance the policy considerations that underlie a particular rule. Lord Goff has said that 'it is better to have a feast of contrasting sources, festering with ideas, than a single hygienic package, wrapped in polythene (…)'.[36] In France, this discussion is usually still hidden behind the rules of a legal-technical nature. This does not come as a surprise where a particular French judge once said that he and his colleagues 'do not write our judgments for the parties, their legal advisors or, still less for the general public. We write them for ourselves'.[37] Other countries are somewhere in between these two extremes.[38]

Does the Europeanisation of law have any effect on these ways of reasoning by the courts? If I am not mistaken, Europeanisation gives rise to two conflicting developments. On the one hand, it reinforces deductive reasoning in the areas covered by EC directives, on the other hand it gives rise to more explicit policy reasoning where the courts draw inspiration from comparative law.

In the first place, a rather restrictive interpretation is needed where national law concerns implemented EC directives. In the view of the European Commission and of the ECJ, the implementation by the legislator and the application by the courts have to be very precise and do not leave much space for an autonomous interpretation of the law. National variations are eliminated in favour of one single European, and rather literal, interpretation. The case of Commission/Kingdom of the Netherlands (cited above) seems to suggest that the margins within which Member States implement directives in the field of consumer protection are now rather narrow. There are several cases in which this has become apparent. Thus, concerning Directive 93/13 on Unfair terms in consumer contracts,[39] the ECJ has made clear that the court has to be able to determine of its own motion whether a term of a contract is unfair, regardless of what the national law of the Member States provides.[40] In the case of Directive 1999/44 on the Sale of consumer goods and associated guarantees,[41] the Commission requires the Member States to meticulously implement the provisions, even if there are national rules with which similar results could be reached, but where this is left to the courts. That is thought not to be sufficiently 'effective'. The Dutch, for example, were forced to implement the right to price reduction laid down in article 3 of this directive, even though the courts could reach similar results by making use of the

[36] Goff, 'The Search for Principle', above n 11.
[37] Cf Mackenzie-Stuart, in: DL Carey Miller & R Zimmermann (eds), *The Civilian Tradition and Scots Law*, (Berlin, Duncker & Humblot, 1997), 360.
[38] Cf on Dutch law Vranken, above n 18, 19–20, where the case of HR 8 September 2000, *Nederlandse Jurisprudentie* 2000, 734 (Baby Joost) is contrasted with HR 8 April 1983, *Nederlandse Jurisprudentie* 1984, 717 (Van der Heijden/Holland).
[39] *Official Journal of European Communities* 1993 L 95/29.
[40] C–240–244/98, ECR [2000] I–4941 (Océano Grupo); cf. C–372/99 (Commission/Italy).
[41] *Official Journal of European Communities* 1999 L 171/12.

provision on partial termination of the contract.[42] Thus, implemented directives lead to isolated parts of national private law where a very specific mode of legal reasoning is required. National courts should therefore always be aware of the European origin of a rule.

In the second place, there is a tendency away from deductive reasoning on the basis of national rules. This is caused by the growing internationalisation of the legal debate. Courts are increasingly more willing to draw inspiration from foreign law. Again, the extent to which this takes place, differs from one country to another. In France, a court hardly ever refers to foreign materials, whilst in Germany this happens much more often.[43] But *if* it happens, it is because a court is willing to look at the argumentation used in other countries. The existence of 'principles' of European private law[44] also drives national courts away from deductive reasoning. Judges are then invited to interpret their national law in accordance with those principles. It is still too early to draw any conclusions about the use of these principles. It is however likely that they will receive a more favourable reception by the courts in countries like Germany, the United Kingdom and The Netherlands (where the drawing of comparative inspiration is not new) than in Spain, Greece or Portugal.

6. INTERPRETATION AND EUROPEANISATION OF LAW

The 'multi-factor' approach to interpretation—in interpreting legislative texts, the wording, legislative history, system and purpose of the statute are taken into account—is at present the leading approach in civil law countries. The process of Europeanisation of law influences this approach in at least three different ways.

First of all, where EC law itself is concerned, there is a movement away from the traditional methods of interpretation. In the case of areas of law covered by European directives,[45] for example, the interpretation needs to

[42] See on this JM Smits, 'De voorgenomen implementatie van de richtlijn consumentenkoop: een gebrekkig wetsvoorstel', *Weekblad voor Privaatrecht, Notariaat en Registratie* (2001) 6470, 1047.

[43] Cf Smits, above n 1, 84 and U Drobnig & S van Erp (eds), *The Use of Comparative Law by the Courts* (Reports XIVth Congress of Comparative Law), (The Hague, Kluwer, 1998).

[44] Like Ole Lando & Hugh Beale (eds), *Principles of European Contract Law*, (The Hague, Kluwer, 2000); G Gandolfi (ed), *Code européen des contrats; avant-projet, livre premier*, (Milano, Giuffre 2001); DJ Hayton et al (eds), *Principles of European Trust Law*, (Deventer, Kluwer, 1999).

[45] See for other areas of EC law, where there is influence of general principles of law (cf art 288 EC Treaty) Reiner Schulze, Pluralismus der Rechte und Konvergenz des Rechtsdenkens—Zur geschichtlichen Rolle allgemeiner Rechtsgrundsätze, in: H-D Assmann, G Brüggemeier & R Sethe (Hrsg.), *Different Legal Cultures—Convergence of Legal Reasoning*, (Baden-Baden, Nomos, 2001), 9 ff.

take place as much as possible in conformity with that directive.[46] This often leaves less space for the legislative history and the system of the text than exists under national law. The rather liberal approach towards the wording of the statute, as exists in many civil law countries, then has to be relinquished in order to fulfil the requirements of the ECJ with regard to the implementation of directives. It is no surprise that the legislative history of a statute cannot play a big role in this respect: often, the documents needed to ascertain what the intent of the legislator has been, are difficult to find (if existent at all). The wording and purpose of the directive then become much more important.[47]

In this respect, one can draw an interesting parallel with English law. One of the main arguments for the exclusionary rule, stating that the parliamentary history of a statute could not be consulted, was that legal certainty demanded 'that the rules by which the citizen is to be bound, should be ascertainable by him (…) by reference to identifiable sources that are publicly accessible'.[48] This can be related to the reasoning of the ECJ in the Commission/The Netherlands case,[49] where the literal implementation of directives in the field of consumer protection was emphasised because of the necessary clarity and legal certainty.

This duty of interpretation in conformity with the directive leads to different ways of interpretation of national law and implemented EC law. It is therefore important that the law of European origin can always be recognised as such. If directives are implemented in previously existing national codes (as usually happens in Germany, France and the Netherlands), it is however often not clear which part is 'European' and which part is national. This calls into question whether the different mode of reasoning requires the drafting of a separate national code of European origin. I would say that there is no need for this, so long as the European parts of the law remain recognisable as such.

Secondly, the interpretation of statutes is increasingly governed by human rights. In particular in countries where a constitutional review of national legislation is allowed (like in Germany, Italy and Belgium), private law is interpreted in the light of the applicable human rights. This constitutionalisation[50]

[46] C–14/83, ECR 1984, 1891 (Von Colson and Kaman/Nordrhein-Westfalen): 'in the light of the wording and the purpose of the directive'. On '*Europafreundliche Auslegung*', see Winfried Brechmann, *Die richtlinienkonforme Auslegung*, (München, Beck 1994) Stefan Grundmann, 'Richtlinienkonforme Auslegung im Bereich des Privatrechts', *Zeitschrift für Europäisches Privatrecht* (1996) 4, 399 ff; R Schulze, in: idem (Hrsg.), *Auslegung europäischen Privatrechts und angeglichenen Rechts* (Baden-Baden Nomos 1999); MH Wissink, *Richtlijnconforme interpretatie van burgerlijk recht*, (Deventer, Kluwer) 2001.

[47] As to the system of the directive, this often does not give a clue either.

[48] *Fothergill v Monarch Airlines Ltd., [1981]* AC 251, 279, per Diplock, LJ.

[49] C–144/99, ECR [2001] I–3541 (Commission/Kingdom of the Netherlands).

[50] On which C-W Canaris, *Grundrechte und Privatrecht*, (Berlin, Walter de Gruyter 1999); C Joerges, 'European Challenges to Private Law: On False Dichotomies, True Conflicts and

of private law (including contract and tort law) is especially important in German and Belgian law. The European Convention on Human Rights has also had a profound influence on specific parts of private law. Apart from family law and procedural law, a broad definition of property is part of the protection guaranteed by the ECHR.[51]

It is seldom that a national rule is explicitly struck down because of its incompatibility with human rights. The national rule is more often interpreted in the light of the constitution or the ECHR. For instance, in a famous German case, the *Bundesverfassungsgericht* stated that a court must, on the basis of Art 2 of the German Constitution, take into account the extent to which a contract disproportionately affects one of the contracting parties. The fundamental rights contained in the Constitution become part of private law, for example through open-ended norms like those on good faith.[52] In that case, concerning surety in a family relationship, this meant that Par. 138 and 242 BGB had to be interpreted in accordance with Art 2 of the Constitution, protecting the right of everyone to 'free development of his personality'.

A third tendency is related to the drawing of 'comparative inspiration' by national courts. In the specific area of EC directives, it is often useful to consider foreign implementations to better understand what is meant with the provisions of a directive. Thus, what is meant with 'threshold' in art. 9 of the directive on product liability[53] can be better understood if one takes into account both the German and the French implementation. And apart from directives, there are signs that national law will be interpreted more and more in accordance with sets of European 'principles'. One of the ambitions of the drafters of these principles is at least that national courts use the principles where national law does not provide a solution to the issue raised.[54]

7. THE EUROPEANISATION OF 'MENTALITY': THE STYLE OF LEGAL SCHOLARSHIP

I have already hinted above at what Europeanisation of law means for national judicial styles. Here, I will focus on the consequences of

the Need for a Constitutional Perspective', *Legal Studies* (1998), 18 146 ff; Johannes Hager, 'Grundrechte im Privatrecht', *JuristenZeitung* 1994, 373 ff.

[51] Art 8 and 6 ECHR and Art 1 of the First Protocol to the ECHR respectively.
[52] Bundesverfassungsgericht 19 October 1993, *Entscheidungen* (1994) 89, no 18, 214.
[53] Directive 85/374 concerning Liability for defective products, *Official Journal of European Communities* 1985 L 210/29; see Hondius, above n 2, 7.
[54] Cf Art 1:101 s. 4 PECL. About the way that the Unidroit Principles of International and Commercial Contracts (1994) are used by the courts: MJ Bonell, 'The Unidroit Principles in Practice: The Experience of the First Two Years', *Uniform Law Review* 1997, 34.

Europeanisation for the style of legal scholarship. As indicated before, this scholarship has been national in nature for over 200 years now. In each European country, private law is still predominantly studied and taught from national textbooks. But the call by Zimmermann that 'the essential prerequisite for a truly European private law would appear to be the emergence of an "organically progressive" legal science, which would have to transcend the national boundaries and to revitalise a common tradition',[55] is being acted upon more and more. There are already a fair number of textbooks on European private law that focus on the extent to which common solutions can be found in the various European Member States.[56] Together with other methods, like the drafting of principles, the competition of legal systems and the teaching of students on the basis of comparative law, they constitute the foundation of a truly European legal science.

An important aspect of this newly created legal science is that it cannot solely consist of a *legal* debate. In order to find out what the best rules for a future Europe should be, one has to go beyond the traditional boundaries of the law.[57] I have previously argued that in order to build up a new European private law one cannot just draft common solutions in the form of principles by looking at the positivistic rules of the European legal systems. These rules are just formalistic shadows of the policy considerations that underlie them and that have to be brought to the surface before they can play a role at the European level. It is with these policy considerations, together with an economic analysis of law and insights of legal history, legal theory and empirical evidence that a new European private law has to be built up. This interdisciplinary approach is indispensable for the discipline of European private law itself, but it will also have important consequences for scholarship in national legal systems. These will be looked at more and more from a European perspective, using the acid-test of 'Europe-resistance'. The contest of national and European private law will definitely lead to a demystification of national private law. One could quote Cardozo that 'few rules in our time are so well established that they may not be called upon any day to justify their existence as means adapted to an end'.[58] Europeanisation will lead to jurists, no longer looking backward to the mass of national legal materials, but looking forward to what we wish the legal system to be. Perhaps, this is even the most important aspect of the Europeanisation of law.

[55] Carey Miller & Zimmermann (eds), above n 37, 293.
[56] For an overview: Smits, above n 42.
[57] Jan M Smits, *The Good Samaritan in European Private Law*, (Deventer, Kluwer, 2000), in particular 46 ff. See for a similar view now also Hesselink, above n 2, 72 ff.
[58] Benjamin Cardozo, cited by Richard Posner, *Overcoming Law*, (Cambridge Mass, Harvard University Press, 1995), 391.

8. EUROPEANISATION OF NATIONAL LEGAL ORDERS?

A final point to be raised, is whether the developments described above lead to a 'methodological European private law.' To put it differently: is there convergence of legal thinking in Europe?[59] Legrand has denied this categorically: civil law jurists think in terms of 'rights', whereas common law lawyers take 'actions' as their starting point. In his view, these are two epistemologically different conceptions of the law.[60] Such a statement is however too general to be tested against the background of the actual developments. If one takes these as one's starting point, the conclusion may be different. One should then differentiate between those areas which are covered by EC directives and those where Europeanisation of law is of a more 'voluntary' character.

In areas of national private law where directives have to be implemented, there is a high pressure on the national legislator and courts to give up national methodology. Even though directives formally leave the Member State the freedom to choose the method of implementation (cf Art 249 s 3 EC Treaty), in practice most directives are enacted in the field of consumer protection with a correspondingly very limited margin for the Member States. For, as we have seen, the European Commission and the European Court of Justice want the Member States to adopt a rather literal approach towards such directives.[61] This means for example that their provisions have to be laid down in a statute and that a national practice of leaving the implementation to the courts by way of interpretation of national law in accordance with the directive (like the Dutch government had adopted in some cases) has to be abandoned.[62]

This implies that for the specific areas of law that are covered by directives, uniformity in legal thinking among the European Member States is actively promoted. However, another type of divergence is the inevitable result of that: for reasoning in areas *not* covered by directives remains the same, with the consequence that the type of reasoning one has to adopt depends on the origin of the rule. Europeanisation thus gives rise to a fragmentation of national law.[63] It may very well be a rhetorical question whether the advantage of a uniform methodology in Europe for one specific part of private law outweighs the disadvantage of a fragmented methodology *within* the national legal systems.

[59] See on this question Ernst A Kramer, 'Konvergenz und Internationalisierung der juristischen Methode', in: HD Assman, G Brüggemeier R Sethe (Hrsg.), *Different Legal Cultures—Convergence of Legal Reasoning, Baden-Baden (Nomos) 2001,* 31 ff.
[60] Legrand, 'European Legal Systems Are Not Converging', above n 2, 52.
[61] See above, para 5.
[62] There is a similar argument in case of enforcement of human rights.
[63] This 'fragmentation' of national private law is discussed in Smits, 'The Future of European Contract Law', above n 33.

In other areas of national private law, foreign law is drawn on for inspiration only on a voluntary basis. Any development towards the Europeanisation of method will there be slow and incremental, possibly even slower than the adoption of substantive law. Legal history shows that where foreign rules or institutions are transplanted from one system to another, the newly introduced transplant rapidly becomes part of the importing system. The way of reasoning of the latter will govern the imported rule.[64] The transplanting of a whole way of reasoning from one system to another is much more rare.

[64] Cf Jan Smits, 'On Successful Legal Transplants in a Future Ius Commune Europaeum', in: Andrew Harding & Esin Örücü (eds), *Comparative Law in the 21st Century*, (London, Kluwer Academic Publisher, 2002), 137.

12

Comparative Law and the Internationalisation of Law in Europe

MIREILLE DELMAS-MARTY

THIS TITLE IS based on an inversion: instead of studying the 'Epistemology and methodology of comparative law', I will speak about the contribution of comparative law to the epistemology and methodology of the process of internationalisation of law in Europe.

The internationalisation of law has not waited for comparative lawyers. Of course, they have long dreamt of ambitious internationalisation, leading to legal integration or even unification. Eugène Lerminier, who held a Chair in the general and philosophical history of comparative legislation (created at the *Collège de France* in 1832), expressed resolutely universalist convictions: 'we may say that there will be a world State, and say it, not simply as a chimera, or utopia, but as a real and powerful fact'.[1] He was undoubtedly a little quick off the mark, yet the equally ambitious theme of a 'common law of civilised humanity' was taken up by Raymond Saleilles during a conference in Paris in August 1900. Soon after, in 1910, the Chinese jurist, Shen Jiaben, proposed the 'fusion' of Chinese law and Western law.[2] Even after the Second World War, the unification of law occupied several chapters of the comparative law treatise by HC Gutteridge and was conceptualised in very concrete terms. The argument would be subsequently addressed by R David and D Tallon. However, there has also been a strong current of resistance to this process, which some see as at best useless and at worst harmful.

[1] Lesson of 19 April 1836.

[2] See *Variations autour d'un droit commun* [variations on a common law], UMR de droit comparé de Paris, vol I, Travaux préparatoires, Société de législation comparée 2000; vol II, Actes des rencontres, 2002.

The problem is that the law that has developed in Europe over the last half-century has little in common with the dreams of comparative lawyers. After the Second World War, the law's aims were more economic (to reconstruct countries destroyed by two wars) and political (to avoid renewed conflict) than legal (to elaborate an integrated and coherent 'order'). Moreover, internationalisation was achieved without any theorisation, through a mixture of diplomatic and bureaucratic tinkering, as reviewed and corrected *a posteriori* by European judges. Above all, it was pragmatic: although human rights were proclaimed and consolidated as early as 1950 through the Council of Europe's formidable instrument of legal harmonisation the European Court of Human Rights (ECHR), they were dissociated from the economic aspect of European construction, which was founded on certain communities created by treaty (the European Coal and Steel Community, Euratom and the EEC) as well as through the body of EC legislation. The European Union, created by the Maastricht treaty, superimposed various forms of cooperation over this structure. It was not until the Charter adopted in Nice in December 2000 that a series of principles capable of creating a legal coherence specific to the European communities was systematised. Significantly however, this Charter has retained the status of a simple non-binding Declaration.

In other words, my starting point is not the title of this conference, but rather its sub-title, widened beyond the term 'integration' to embrace the broader concept of internationalisation. This allows me to take into account the whole complexity of a process that does not only imply integration of domestic law into European law as such, but also includes cooperation and multiple forms of interaction, including a return to domestic law (the concept of explicit or implicit 'State margins', leading to the 're-nationalisation' of European law). It is only after having evaluated these processes of internationalisation of law in Europe that I will comment on the potential contribution of comparative law through new functions.

1. EVALUATION OF INTERNATIONALISATION

In the absence of a clear political vision, the objectives of internationalisation remain confused and its methods uncertain.

1.1 The Objectives

The objectives of internationalisation are determined above all by political choice. The main difficulty thus results from the lack of clear choices. A comparison of the White Paper on European Governance with a number of

recent declarations is sufficient to show this. The White Paper, adopted by the European Commission on 25 July 2001, begins with a list of five principles of 'good governance' (openness, participation, accountability, effectiveness and coherence), which are claimed to reinforce the principles of proportionality and subsidiarity. It explains that in future, 'the linear model of dispensing policies from above must be replaced by a virtuous circle, based on feedback, networks and involvement from policy creation to implementation', and presents co-regulation as the preferred instrument for implementation of this new model. However, the definition of co-regulation is vague: combining 'binding legislative and regulatory action with actions taken by the actors most concerned, drawing on their practical expertise', in order to achieve 'better compliance, even where the detailed rules are non-binding'. This formulation is based on self-regulation by the actors themselves, despite doubts expressed soon afterwards by Commissioner Barnier, concerning 'the temptation of soft law', which valorises self-regulation mechanisms 'at the risk of debasing democracy in favour of corporatist behaviour'.[3] It is true that the White Paper introduces some clarification by observing that co-regulation 'is only suited to cases where fundamental rights or major political choices are not called into question'.[4] However, it does not develop any criteria for implementation of this necessary limit.

Nevertheless, the President of the Convention on the Future of Europe appears to be under the illusion that he can satisfy 'massive demand for more simplicity and efficiency', while claiming not to have heard (during the debate over the Green Paper on the European prosecutor!) 'any request concerning an extension of community competence within the Union'.[5] One does not need to be a lawyer to predict that excluding any extension of *supra*state community competence in favour of *inter*state norms will improve neither the simplicity nor the clarity of European construction. On the contrary, it will increase the complexity of a system bringing together 15 (and soon 27) different legal systems.

Political illusion translates inevitably into incoherent, and above all, discontinuous practices, because the concept of integration (which is consecrated by the treaties founding the European Community), is defended by the Commission and Parliament, whereas States, always keen to preserve their sovereignty (and apparently the Convention, or at least its President), prefer cooperation. This entails a risk of a haphazard evolution, as is currently the case in various areas. In antitrust law, for example, the regulations

[3] M Barnier, 'l'Europe n'aura pas le droit mou' [Europe will not have soft law], *Libération*, 23 April 2002.
[4] Above n 3, p 25.
[5] V Giscard d'Estaing, 'La dernière chance de l'Europe unie' [The last chance for a United Europe], *Le Monde*, 23 July 2002.

implementing Articles 81 and 82 of the EC Treaty provide for the redistribution of power to national authorities, despite lingering doubts as to the effectiveness of the safeguards introduced to preserve the uniformity of community law. 'This is no minor paradox', writes Laurence Idot, adding that 'one cannot have both Europe and its contrary'.[6]

The same applies in criminal law, where normative and institutional overabundance leads to the further paradox of expanding norms and institutions leading to weakened legal guarantees, because no judicial authority truly controls all European investigative bodies. This multiplication undoubtedly stems from the confusion of aims mentioned above: *sometimes* cooperation (Europol created by Convention in 1995, liaison magistrates and the European Judicial Network through joint action in 1996 and 1998, the OLAF by regulation in 1999, and Eurojust, instituted by a Council Decision of 28 February 2002; *sometimes* harmonisation (the 1990 Convention on Laundering, the PFI Convention of 1995 on protection of the financial interests of the community, the Framework Decision on euro counterfeiting in 2000, etc), *sometimes* the partial unification of criminal law and procedure, which started in 1996 with the draft *Corpus juris* proposing the establishment of a European Public Prosecutor[7] (also the inspiration for the Commission's Green Paper of December 2001[8]). However, the paradox is mainly the result of a climate of political tension or even open conflict. Whereas the Europol Convention originated from the Member States, the draft *Corpus juris* was an initiative of the European Commission and Parliament. As for the OLAF, the independent, supranational European Anti-Fraud Office, it was created in 1999 by the three institutions, at the Parliament's initiative, after the resignation of the Santer Commission (1st pillar). Eurojust, on the other hand, with its intergovernmental vocation (3rd pillar), was included in the Treaty of Nice at the initiative of those States which wanted to counter the proposal for a European prosecutor presented by the Parliament and Commission,[9] despite the risk of both competing with the European judicial network[10] and weakening the OLAF by indirectly favouring the 're-nationalisation' of investigations for community fraud.[11]

[6] L Idot, *Recueil Dalloz*, 2001; *Dalloz Affaires Chr* 1370.

[7] *Corpus juris introducing penal provisions for the protection of the financial interests of the EU*, ed by M Delmas-Marty, (Economica, 1997); *The implementation of the Corpus juris in the member states of the EU*, ed by M Delmas-Marty and J Vervaele, Intersentia, vol I–III, 2000, vol IV, 2002.

[8] See the Public hearings of the Commission on 16–17 September 2002; and of the European Parliament on 5 December 2002.

[9] Communiqué by the Commission dated 19 September 2000, inspired by the *Corpus juris*.

[10] See S Brammertz and P Berthelet, 'Eurojust et le réseau judiciaire européen: concurrence ou complémentarité?' [Eurojust and the European Judicial Network: competition or complementarity?], *Revue de Droit Pénal et Criminologie*, 2002, 389.

[11] See 3rd Activity report of the European Anti-Fraud Office, June 2002, OJEC, December 2002 C 234/01, pp 1–39.

Without, as is sometimes said, going so far as 'dissolving the Community in the Union', this entanglement of institutions and rules with an international (Eurojust and Europol, EJN and liaison magistrates) or supranational (OLAF and the future European Public Prosecutor) vocation is difficult to understand. Yet it is reproduced in many others areas. In the field of patent law, a 'European' patent created by the Munich Convention, which is international in character, coexists with the oft-revised regulation of the supranational Community patent. It should be noted that the Nice Treaty announced the creation of a chamber of the Court of First Instance specialised in patent law, without specifying its jurisdiction over the two types of patent.

In private law (*droit civil*), the situation is different to the extent that doctrine seems to have been the motor for development since the creation of the Lando Commission in the Eighties. This was followed by the publication of Principles of European Contract Law in 1995/2000. Initially, the idea was simply to propose the principles to parties and arbitrators (as a source of common transnational law like the UNIDROIT principles),[12] although they were also seen as the starting point for a future European Civil Code. Rendered official by resolutions of the European Parliament in 1989 and 1994 aimed at harmonising the private law of Member States, the project was re-launched in 1999 with the creation of the 'Study Group on a European Civil Code',[13] which should take up where the Lando Commission left off and also cover other questions, such as the law of torts.[14] However, a debate opened by the Commission on 11 July 2001, while focusing exclusively on contract law, showed the difficulties with an approach that, in order to be effective, must be adopted simultaneously by the European Union and national law-makers. As one commentator remarks, 'undoubtedly there may be some exceptions to the desired uniformity; it would be illusory to imagine avoiding such exceptions as long as political unity has not been achieved'.[15]

In summary, instead of promising both to simplify Europe and its institutions and encourage the maintenance of national sovereignty, it would be better to make a clear choice, undoubtedly the most realistic, in favour of progressive, pluralist (and therefore complex) integration,

[12] See *Principles of European Contract Law*, Part I, 1995; Parts I and II, Ole Lando and Hugh Beale (eds) (Martinus Nijhoff 2000); *L'harmonisation du droit européen des contrats*, ed Ch Jamin and D Mazeaud, Economica, 2000.

[13] See Ch Von Bar, 'Le groupe d'études sur un code civil européen' [The Study Group on a European Civil Code], *Revue Internationale de Droit Comparé*, 2001, p 127 et seq.

[14] See A de Vita, 'Au croisement des itinéraires des droits européens, analyse comparative en matière de responsabilité civile: tentatives et tentations' [At the meeting point of the pathways of European laws, a comparative analysis of torts], *in Unifier le droit; le rêve impossible*? dir. L Vogel, Université de Paris 1, LGDJ, 2001, p 73 et seq.

[15] V Heuzé, 'A propos d'une "initiative européenne en matière de droit des contrats"' [Concerning a 'European initiative in contract law'], *Semaine juridique*, 2002.I.152; see also Ph Malaurie, *Semaine juridique*, 2002.I. 110; and Y Lequette, *Recueil Dalloz*, 2002. Chr. 2202.

combining both cooperation and integration, ie in reality superposing the two models:[16] on the one hand *the linear model* with its hierarchical pyramid structure based on the principle of the pre-eminence of community law (*supra*national construction), and on the other hand *the circular model* based on a weakened or even non-existent hierarchy, set up as a network and based on the principle of subsidiarity (*inter*national construction). Given that such superposition is unavoidable, it is time to stop announcing a simplification that is clearly at present impossible. It is better to practise the pedagogy of complexity than the demagogy of simplicity.

1.2. Methodology

As for methodology, the pedagogy of complexity requires an analysis of the paths and means of the internationalisation of the evolving law of variable geometry.

The paths of internationalisation, both ascending (from domestic law to international law) and descending (from international law to domestic law)[17] are spread over an uncertain terminology between harmonisation (the rapprochement of norms around common principles applied with an implicit or explicit State margin), and unification (standardisation of norms according to identical common rules, without any State margin). In principle, Community Law derived from treaties perfectly illustrates the unification/harmonisation dualism through the double techniques of the regulation and the directive. But community practices (regulations too vague and directives too precise) have blurred the distinction to such an extent that judicial review by the European Court of Justice (ECJ) has become the key to integration in both cases. Indeed, the decisions handed down by the ECHR have in time only an indirect influence on the process of European integration, although review by the Court is decisive, because the distinction between harmonisation and unification is indirectly confirmed by the concept of a 'State margin of appreciation', which was recognised very early on by the Commission and then the Court, albeit in some areas only and to a variable extent.[18] Nevertheless, the choice between the two paths is left largely to the arbitrary choice of Community law-makers,

[16] Compare with F Ost and M van de Kerchove, *De la pyramide au réseau ? Pour une théorie dialectique du droit* [From pyramids to networks, For a dialectic theory of law], (Facultés universitaires de Saint-Louis, Bruxelles 2002).

[17] See *Vers des principes directeurs internationaux de droit pénal*, Les processus d'internationalisation du droit [*Towards international guiding principles of criminal law*, The processes of internationalisation of law], dir. M Delmas-Marty, vol VII, (Maison des Sciences de l'homme, 2001).

[18] M Delmas-Marty & ML Izorches, 'Marge nationale d'appréciation et internationalisation du droit' [State margin of appreciation and the internationalisation of law], *Revue Internationale de Droit Comparé*, 2000, N°4; also *Mc Gill Journal*, 2001, vol 46, p 5 et seq.

or even to judges who interpret vague or incoherent norms. This may help to explain State and popular mistrust at the thought of a form of legal integration that can harmonise rules on the composition of cheeses in minute detail, though fails to harmonise sentences applicable to murder, which in turn risks jeopardising extradition from one EC Member State to another.[19]

As regards the means, one of the difficulties with European construction is that the process of internationalisation uses all available techniques simultaneously: supranational law derived from treaties, but also international law with all that it entails (negotiation, compromise and, finally, ambiguity). Rather than disappearing, the latter has recently been enriched beyond the traditional techniques of multilateral conventions by new instruments such as the 'joint action' and the 'framework decision'. The 'pillars' instituted by the Maastricht treaty were supposed to clarify the situation by separating *supra*national Community Law (1st pillar) from the *inter*national law of the European Union (2nd and 3rd pillars). However, rather than simplifying Europe's image, they have blurred it, while the use of 'bridging measures' has weakened the distinction. Moreover, the Amsterdam treaty has 'communitised' some domains and provides for ECJ jurisdiction over the domains included in the third pillar.

The most recent developments have contributed to this blurring effect, by introducing harmonisation measures in for example the 3rd pillar (the Framework Decision of 13 June 2002 on the European arrest warrant), or by communitising rules relating to the recognition and execution of judgements within the European Union in commercial, civil and matrimonial matters, with the two regulations that replaced Brussels Conventions I and II, envisaging the eventual suppression of all *exequatur* proceedings.[20]

In summary, while States have the political tendency to prefer cooperation to integration, it is also possible to observe the opposite tendency in legal reality through integration disguised as cooperation. In order to ensure that the growing complexity of law in Europe does not result in the incoherence of written law and arbitrary decisions by judges, comparative law may contribute to the phenomenon of internationalisation, as long as its functions are subjected to a reappraisal.

2. THE FUNCTIONS OF COMPARATIVE LAW

Comparative law has for relativists traditionally meant gaining a knowledge of foreign systems, allowing criticism and improvement of each system,

[19] As was demonstrated in 2000 by the *Rezzala* case between Portugal and France.
[20] Ch Bruneau, 'La reconnaissance et l'exécution des décisions rendues dans l'union européenne' [Recognition and execution of decisions handed down within the European Union], *Semaine juridique*, 2001.I. 314.

whereas universalists dream of using it as an instrument for unifying the law. At a time when society is becoming internationalised, in both the European and global spheres,[21] each of these views involves risks. Relativism, which privileges *inter*national law and refuses any form of integration is likely to lead to fragmentation of human rights and/or the privatisation of norms in economic matters, which are already largely transnational. Universalism however can lead to imperialism through the hegemonic extension of the most powerful system, and/or arbitrary integration prepared by European officials or imposed by judges without any real democratic supervision.

If it had the means,[22] comparative law could reduce this double risk by contributing to the conception of a more innovative form of internationalisation, neither relativist nor universalist, but pluralist at the meeting point of international law and comparative law.[23] For this reason I am convinced that it is necessary, if not to reconcile the irreducible optimists and pessimists alluded to by Mark Van Hoecke (because 'legal life always presupposes that there are conservative and progressive forces and that they are in conflict'[24]), then at least to recognise that the complexity of European construction requires that warnings from both sides be taken seriously. With the optimists, I would agree that comparative law is essential to pluralist integration because it underlies the elaboration of truly common norms founded on a sort of hybridisation of different national systems—much as the Lando Commission tried to do for the law of contracts, or the *Corpus Juris* group for criminal law. From the pessimists I would borrow the second function—resistance—which either leads to the refusal of any integration or the recognition of a State margin of appreciation by replacing unification with harmonisation.

2.1. Hybridisation

Hybridisation, or cross-fertilisation of systems, is a necessary condition for pluralist integration but it is only possible if no single country imposes its

[21] M Delmas-Marty, 'La mondialisation du droit: chances et risques' [The globalisation of law: chances and risks], *Recueil Dalloz*, 1999. Chr. 43; 'L'espace judiciaire européen, laboratoire de la mondialisation', *Recueil Dalloz*, 2000. Chr. 421; also *Toward a truly common Law, Europe as a laboratory for legal pluralism*, (Cambridge University Press, 2002).

[22] See in particular, along the lines of '*case books for a common law of Europe*', W van Gerven, J Lever, P Larouche, G Viney, *Tort law, scope of protection, Cases, materials and text on national, supranational and international tort law* (Hart publishing, 1998); W Van Gerven, 'L'harmonisation du droit des contrats en Europe, Rapport introductive' [The harmonisation of contract law in Europe], in *L'harmonisation du droit des contrats en Europe*, above n 12, p 3 et seq.

[23] See L Amede Obadia, 'Toward an auspicious reconciliation of international and comparative analyses', *The American Journal of Comparative Law*, 1998, vol 46, p 669 et seq; B Fauvarque-Cosson, 'Comparative law and conflict of laws: allies or enemies? New perspectives on an old couple', *The American Journal of Comparative Law,* 2001, vol 49, p 407 et seq.

[24] Ph Malaurie, above n 15.

system on the others. Even in the times of the *Jus commune* when the 'roman-canonical' model seemed to dominate European legal culture, the common law was built up in England as the 'Law of the Kingdom' at the confluence of the monastic rule and the 'roman-canonical' law that the English monks went to study in Bologna.[25] It should not be forgotten that the famous 'Decree of Gratian' which governed canon law until 1917 was entitled 'concordance of discordant canons'. As legal hybridisation is so strongly integrated into the European tradition, it should be even more so now that Europe is in a historic situation that appears to protect it from any tendencies towards legal hegemony. Most of the so-called 'major' European countries have given in to such a temptation at one time or another, but they have all failed and the current construction will not be accepted by all unless it is sufficiently pluralist not to be seen as imperialism revived. Comparative law is necessary in order to bring to light not only the converging tendencies that lead naturally towards a common law, but also the divergences that call for a more complicated synthesis allowing hybridisation.

This process presupposes the adoption of a common language but goes further, requiring knowledge of the 'grammatical' relationships that structure this language and following different models from country to country. I will take one example, that of the famous opposition between 'accusatorial' and 'inquisitorial' proceedings.[26] This opposition can only be understood if one first succeeds in speaking a common language independently of national systems which can identify the participants in the proceedings (prosecuting party, accused and judge) and the powers that regulate the progression of the trial (initiation of proceedings, investigation, evidence, prosecution, examination, coercion, termination of proceedings and decision). Then one must discover the 'grammar' which links these actors and powers and allows a distinction to be made between two models: the *accusatorial model* on the one hand, which from start to finish links most powers to private actors (no case to answer, guilty plea and plea bargaining), including the search for evidence (to the point of excluding hearsay, except in exceptional cases); and a diametrically opposed *inquisitorial model* on the other hand which favours public actors and in particular the characteristic investigating judge who exercises both police powers (conducting investigations so as to compile a written file during the preparatory phase for transmission to the court) and judicial powers (deciding *inter alia* on pre-trial detention).

[25] See A Boureau, *La loi du Royaume, les moines, le droit et la construction de la nation anglaise* [The law of the Kingdom, monks, law and the construction of the English nation], Les Belles Lettres, 2001, p 151 et seq; on the complexity of the relations between canon law and roman law, p 217: 'The Benedictines copied the jurisprudential construction of canon law, whereas the Cistercians construct their independence through imitation of the Institutes of Justinien'.

[26] See *Procédures pénales d'Europe*, dir. M Delmas-Marty, PUF 1995, English version *European criminal procedure*, John R Spencer and Mireille Delmas-Marty (eds) (Cambridge University Press, 2002), especially the new introductory chapter by J Spencer.

Such major divergences would exclude any attempt at hybridisation if comparative study did not show a convergent evolution, under the double influence of the case law of the ECHR (which also shows that each model has its weaknesses) and continuous reforms: on the continent, most countries have gradually dispensed with the investigating judge, whereas English law has introduced public prosecution bodies. This evolution does not suppress all divergence but does lessen it by reconciling systems (harmonisation), making it possible to posit a hybridisation that would successfully take the best from each national model.[27]

The *Corpus juris* was not meant to be a code.[28] Using a method combining six guiding principles, a total of thirty four articles formulating common rules, and a final article recognising the complementary nature of national law, it was based on the search for a common grammar (which may be described as 'contradictory'), and defined by three principles: European territoriality (jurisdiction attributed throughout Europe to a European prosecutor, a body taken from the inquisitorial model); judicial guarantees during the preparatory phase reviewed not by an investigating judge, but by a 'judge of freedoms' (national or European) sufficiently neutral to be able to arbitrate between the prosecution and the defence in a similar spirit to the accusatorial model; and finally, the principle of 'contradictory debate' defined as a new procedural concept in particular with respect to evidence, combining a written file (inquisitorial model) with strict exclusionary rules (accusatorial model).

However, hybridisation does not necessarily lead to unification: it is only partial in the *Corpus juris* project, because it was seen as unnecessary to unify the trial stage, since national procedures appeared sufficiently similar to guarantee both the effectiveness and legitimacy of judgements handed down by all Member States. The group simply proposed a number of general harmonising rules (concerning the admissibility of evidence and the available appeals, for example), without going so far as to create a veritable European criminal court that would apply identical rules. The project also attracted strong national resistance which led to the suppression of the right to intervene as a civil party, whereas the principle of judgement by professional judges without a jury became optional (and not compulsory as originally envisaged).[29]

[27] At the global level, hybridisation imposed on the ICTs still shows many weaknesses, see *Crimes internationaux et juridictions internationales*, dir. A Cassese and M Delmas-Marty, PUF 2002, especially 'L'influence du droit comparé sur l'activité des TPI' [The influence of comparative law on the activities of the ICTs], p 95 et seq; and 'The interaction of international and national legal systems', in *The Rome statute of the International criminal court: a commentary*, eds A Cassese, P Gaeta, JRWD Jones (Oxford University Press, 2002), p 1915 et seq.

[28] In the same sense, see Ph Malaurie: 'The idea of European codification contains, in itself, a sort of regression that is the contrary of new' (chronicle op. cit.).

[29] See *Prosecuting frauds on the Communities' finances—The Corpus juris*, Select Committee on the European Communities, House of Lords, session 1998–9, 9th Report.

This shows the extent to which the second function is incapable of being dissociated from the first.

2.2. Resistance

Resistance may intervene, either during ascending integration (as was the case for the *Corpus juris* and the Principles set out by the Lando Commission), or descending integration. In the first case, the recourse to comparative law sets the limits of the process. As we have just seen, it may demonstrate that unification is unnecessary because harmonisation is sufficient. Alternatively—and more radically—it may lead to abandoning any integration, even through simple harmonisation, in order to avoid the risk of rejection of solutions that are too difficult for a particular national model to assimilate.

In the second case, involving descending integration, when interpreting norms established by international law, such as those set out in the ECHR, comparative law seems to play a lesser role because each national system is supposed to adapt itself, subject to review by judges empowered to punish violations. Nevertheless, this role which is expressly provided for among the sources of interpretation of international norms of a general (Article 38 of the ICJ Statute) or special (Article 21 of the ICC Statute) nature 'failing' principles of international law, may also be systematised at the European level as shown in the jurisprudence of the ECHR which rapidly introduced the notion of a 'State margin of appreciation' for some provisions of the Convention.[30] Indeed, the observation of wide divergence may lead the European judge to recognise such a national margin, a sort of right for States to be different, which contributes to pluralist integration. This is subject to the need to avoid falling into the trap of expressing the subjectivity of the judge rather than the objectivity of a real comparative statement, as seems too often to be the case.

The underlying idea is that the extent of the margin should vary, *on the one hand* according to international law and the relative or absolute nature of the principle concerned (ie subject to derogation, exception or restriction); and *on the other hand* in accordance with comparative analysis of the degree of homogeneity or heterogeneity of national systems—in other words the existence or absence of a 'common denominator', to borrow the expression often employed by ECHR judges and, less often, by their ECJ colleagues.

This does not completely exclude the risk of manipulation by a judge who is tempted, without any serious comparative study, to invoke a so-called common denominator in order to mask divergences and legitimate

[30] Above n 18 see M Delmas-Marty and ML Izorches.

questionable interpretations when the decision is based in reality on vague general considerations.

That is why the recourse to comparative law should also be systematised as a means of resisting judicial arbitrariness. Procedural democracy is not sufficient, especially for international judges who are trusted much less than national judges, even in Common Law countries which are generally favourable to judicial creativity. This shows the need for a substantive reference that comparative law could help to define, thus illustrating a hundred years on the role described by Saleilles (for a judge whom he could not imagine being other than national): 'The judge may only apply ideas of absolute justice if those concepts have some external objectivity'. He added that 'the closest thing to the data of the positive sciences and experimental method is the comparative law method'.[31]

3. CONCLUSION

Associating comparative law and the internationalisation of law is not neutral: it means choosing 'legal pluralism' in the sense of pluralism *and* integration:[32] by favouring hybridisation and allowing a review of the use of State margins, comparative law can indeed contribute to the transformation of pluralism into a common law that overcomes the opposition between relativism and universalism. However, a second dimension must not be forgotten: 'as compared with the static approach of a model that remains constant in the sole spatial dimension', Xavier Dijon prefers 'the dynamic image of a path that integrates the temporal dimension'.[33] Time pleads in favour of modesty and reminds us that the internationalisation of law in Europe began before us and will continue afterwards.

[31] R Saleilles, 'Ecole historique et droit naturel' [The historical school and natural law], *Revue Trimestrielle de Droit Civil*, 1902, p 105.
[32] See M Delmas-Marty, *Towards a truly common law, Europe as a laboratory for legal pluralism*, above n 21.
[33] See above note 2 Xavier Dijon, 'Itinéraire philosophique vers la source d'un droit commun' [a philosophical path towards the source of a common law], in *Variations autour d'un droit commun*, fn 32 above n 21.

13

Public Law in Europe: Caught between the National, the Sub-National and the European?

JOHN BELL*

1. INTRODUCTION

HOW DO WE think about public law? As Geoffrey Samuel has pointed out, a key general feature of thinking as a lawyer is to categorise facts and situations in terms of legal issues and relations. We sort the mass of information at our disposal into 'legally relevant' categories.[1] The situation thereby appears in its legal colours and is capable of being processed formally by way of legal reasoning. Thus legal categorisation is occurring at both a pre-interpretative and an interpretative stage of legal reasoning. In this way, law is a way of seeing the world in a certain light, as well as of coming to decisions. For Samuel, a core feature of the civilian way of seeing private law relations is in terms of persons, things, actions and individual rights. A situation has to be fitted into these categories before one starts to apply the rules.[2]

What about public law? In my view, the core relations in public law are those between the state and the citizen concerning the general interest. The relationships between the state and citizens involve the authority of the state to impose duties and burdens unilaterally, but also the duty of the state to afford protection, respect and participation to the citizen, and all this in a context of determining and implementing the common good. The sorting of reality into these paradigm categories at a pre-interpretative stage immediately brings the situation within a network of legal concepts and ideas which are distinctive. Even those systems which do not make a distinction

* This chapter is based on my chapter in A Harding and E Örücü (eds), *Comparative Law in the 21st Century* (Kluwer, Dordrecht 2002), 235–48.

[1] G Samuel, *The Foundations of Legal Reasoning* (Maklu, Antwerp, 1994), ch 9.

[2] G Samuel, 'Classification of obligations and the impact of constructivist epistemologies' (1998) 18 *Legal Studies* 448 at pp 464–71.

between the jurisdiction of administrative and civil courts recognise this division of issues in some form or other.[3]

The argument of this paper is that the epistemological structure of public law has to be articulated in a more complex fashion in an era of the decline of the sovereignty of the nation state. That sovereignty is under threat both from the increase of subnational bodies exercising aspects of sovereignty, and the increasing pressure of supranational legal orders in which the nation state is treated as the subject of sovereignty, rather than as a sovereign in its own right.

2. LEGAL PLURALISM AND SHARED SOVEREIGNTY

Modern law is represented affected by legal pluralism. No longer are the sources of law simply found within the national legal order either directly or by incorporation into the national legal order. Rather there is a plurality of sources from which legal standards are derived, some national and some supranational, others sub-national.[4] Public law is usually seen as the law regulating governmental institutions and their relations to citizens. The core institution has been the nation state exercising sovereignty. The expansion of legal pluralism has put this conception of the difference between public law and private law in question. The state does not exercise a broad sovereignty, but shares sovereignty with international and sub-national bodies which it cannot control. This provides a reason for not considering the relationship of the state and its citizens in isolation.

Looked at from the perspective of the citizen and her legal adviser, there are thus a number of competing and interacting legal orders. The citizen owes duties of fidelity to a number of different groupings and participates in them. The nation state is only one of a number of bodies with whom the citizen finds herself involuntarily in relationship. Indeed, not all are strictly governmental. Regulatory bodies for professions may be private organisations, but exercising legal authority with the blessing of a governmental body. At a further extreme, there are organisations of civil society who have a privileged status in the deliberations on the common good and in forming the public conscience, but who are outside the formal relations between the individual and the state. Their ideas and norms may exist as a kind of 'soft law' controlling the activities of both citizens and the state. To capture this complexity, public law needs to move away from the simple model of 'state-citizen-public good' relations and to

[3] J Bell in CERAP, *Le contrôle juridictionnel de l'administration* (Economica, Paris, 1990), 73.
[4] See F Ost and M Van de Kerchove, *De la pyramide au réseau?* (Brussels, Publications des Facultés Universitaires Saint-Louis 2002) 184.

recognise the variety of public-style authorities which affect her life in relation to defining the public good, and the fragmented character of her relations to them.

At the same time, the idea that the public sphere is concerned with the common good remains strong. Regional government has become a focus for local identity, precisely in reaction to the forces of globalisation. At the international level, global summits on the environment or institutions to protect human rights represent the international public sphere promoting the good of humanity. These governmental and para-governmental organisations relate to an international polity. By contrast, the globalised market of goods and services, and the movement of individuals serve to promote the ends of individuals. If anything, there has been an explosion of the public sphere. At national level, more is expected by way of welfare support and regulation of the market and private actors than in the past, even if the fashion is less for the direct delivery of many services than fifty years ago. In other words, the public good has not been simply privatised into the sum of individual self-interests. There is an increasing and complex sphere for debating forms of the public good at different levels, which have a direct impact on the citizen. International law is no longer just the relationship between states. Many international legal orders have a direct effect on citizens and the law affecting them. One impact of globalisation is the increasing regulation of the private sphere.

The result is that we need a more complex model of public law relations. But it is not a matter of building a single, more complex system in which every feature is neatly assigned a function and a relationship. Ost and Van de Kerchove's network model[5] has the advantage that it enables one to recognise the existence of various systems which enjoy relative independence and to hold in tension the relationships between them. Like a suite of software programmes, they can exist independently, yet become connected at the point of decision, at the desktop of the decision-maker.

If you like, my solution to the changing environment is to retain the basic epistemological structure of public law: the relationship of (public) authority—citizen—common good, and to analyse it within each legal order. In turn, each legal order is held in tension, operating at various international, national and sub-national levels. There is an impact on the individual and her actions, and at that point, a resolution has to be reached on what must be done. But there is no neatly pre-ordained solution, as in the hierarchical model offered by Kelsen. To complete the picture, it is necessary to adopt a structural analysis of the individual legal orders.

[5] Above n 4, pp 23–6.

3. STRUCTURAL ANALYSIS OF INDIVIDUAL LEGAL ORDERS

In order to understand an activity in law, it is necessary to locate it within an institutional setting. It may well be that there is a broadly generic function performed in a number of legal systems, but once one examines this within the different institutional settings, the activities undertaken by the law in the different legal systems become significantly different and difficult to compare.

The core of a structural analysis of legal systems would suggest that an ACTIVITY in law involves both a task or function and a procedure for carrying it out. The INSTITUTIONAL SETTING provides a wider context into which the activity fits. The task is defined not only by routine, but by direct inputs at a national level and more broadly from supra-national legislators. This might be described as the EXTERNAL ENVIRONMENT. These also affect the institutional setting, but this is also shaped by HISTORY. The interplay of these features helps to explain the individuality of particular legal systems, but also the specificity of branches of law, among which is public law. While the structural analysis given is not specific to public law and might apply equally to branches of private law, the various elements within the analysis can help to explain why public law is distinctive.

3.1. The Activity of Public Law

The core function of public law is distinctive from private law. Public law is about defining and controlling the powers and activities of government. This is not the function of private law, which exists to provide frameworks within which individuals can act voluntarily, and to provide remedies when they exceed the bounds of the acceptable use of private power.

Public law serves both to define and control power in the hands of government or public authorities.[6] In defining the power of government, the law also serves to legitimate the exercise of power, particularly discretionary power in the hands of politicians and officials. By authorising action, the law sends a signal to society that the actions of certain individuals should be respected and be considered as legitimate in the political society. The law then also sets out the conditions for the control of the power it has legitimated. It may set down procedures before decisions are made, and it may also set out mechanisms and grounds for the review of decisions that are taken.

Now this function of public law in defining and controlling the use of power may seem to be broadly similar to the function of private law.

[6] See J Bell in K Hawkins (ed), *The Uses of Discretion* (Oxford, Oxford University Press 1992), 107–10.

Private law defines the powers of individuals and sets out grounds of control, as well as duties of reparation when powers are exceeded or have unacceptable consequences. But there are important differences. Much private power is not a creature of the state. Within the family, in commerce, in private relationships, private power pre-exists the law. The law is concerned to channel and control the exercise of that pre-existing social power, and uses legal authorisation to achieve this purpose. Of course, the law also creates institutions to facilitate individual endeavours and desires, such as the institution of wills or marriage or civil unions for homosexuals. But this does not deny the importance of pre-existing private power in creating the demand for legal institutions, and for regulating activities.

One can discuss the functions of public law at a very high level of abstraction, in terms of the basic principles of liberal democratic government and the control of abuse of power. This is the kind of discussion you get in works of political philosophers. But if we are going to discuss the role of law, we need to descend to a more detailed level, so the question becomes: how do you govern in a liberal and democratic way in this specific society eg one divided on linguistic grounds which has a relatively short history of independent government and which has a broadly French tradition of institutions (Belgium). The specificity of the context helps to understand the role which law is playing.

3.2. The External Environment

The law consists of a tradition of principles and rules handed down and developed by a caste of lawyers.[7] This body of traditional knowledge has to be updated by lawyers in their practice of the law. This might appear to make it a kind of self-contained system.[8] But this body of law is created and modified by the *national legislator*, both Parliament and the Executive. The legislator wishes to achieve new objectives and has ideas about how the procedures of the law can be improved and who should be entrusted with particular tasks. Therefore a first feature of the external environment of a legal system is the direct intervention of the national legislator to alter the law.

Where there are sub-national legislators, there may be competition between different legislators within the national sphere. This only intensifies the idea that the law is subject to external influences and demands.

[7] J Bell, 'Comparative Law and Legal Theory' in W Krawietz ed, *Festschrift for RS Summers* (Berlin, Duncker and Humbolt, 1994), 19 at 29. See also M Krygier, 'Law as Tradition', *Law and Philosophy* 1986; 5: 237 at p 255.

[8] See, eg N Luhmann, *A Sociological Theory of Law* (London, Routledge, 1985), pp 174–83; G Teubner, *Law as an Autopoeitic System* (Oxford, Blackwell, 1993), esp ch 3.

But, the classical conception of public law as being about the relationship between a state and its citizens, or at least those who are found within its territory tells only part of the story. As in private law, the mobility of individuals and modern forms of communication and interaction (such as pollution) bring non-citizens and those outside the boundaries of the State within the scope of national public law. People and activities are not confined to national boundaries.[9] But there are also important indirect impacts, even in public law. The French have had to admit surrounding states as litigants in its administrative courts to deal with issues like the pollution of the Rhine and the siting of nuclear installations on the frontier with Luxembourg.[10] It may be that public international law deals with the impact of the testing of nuclear weapons, but private international law is invoked for the attraction of investors.[11]

Supra-national instances also claim sovereignty over the citizens and activities within a national territory.

The European Union has gradually supplanted or at least challenged the protection given by public law to the state. In 1988, two French commentators felt able to write that 'if there is one field in which national lawyers should occupy a privileged place, it is in public law, which touches on mechanism which are altogether specific to French society.'[12] Ten years later, Flauss has argued that

> Our administrative law, more than any other branch of French law, used to seem strictly Franco-French, practically a pure legal gallicism. However, "Europeanisation" will lead more or less inevitably towards some cross-breeding of French administrative law.[13]

Traditional French concepts such as '*service public*' have come under challenge from the framework of European competition law (arguably a private law regime), and new structures have had to be evolved.[14]

The European Convention has also offered external benchmarks against which national law is judged. In terms of procedure, the decision in

[9] On the impact of globalisation, see W Twining, *Globalisation and Legal Theory* (London, Butterworths, 2000), 221–38.
[10] See CE 13 Feb. 1987, Actualité Juridique—Droit Administratif 1987, 363.
[11] Avis of 6 March 1986, Etudes et Documents du Conseil d'Etat 1987, 178 on the submission of the French state to arbitration in order to permit companies such as Disney Corporation to establish themselves in France; B Pacteau, Bernard *Contentieux administratrif* 5th edn, (Paris, Presses universitaires de France 1999), § 126.
[12] CL Jessua and C Huglo, Actualité Juridique—Droit Administratif 1988, 127 at p 129.
[13] J-F Flauss, in J Schwarze, *Administrative Law under European Influence* (London, Nomos Verlag, 1996), 113.
[14] See, for example, J Bell, 'The Concept of Public Service under Threat from Europe? An Illustration from Energy Law', *European Public Law* 1999, 5:189; Flauss, above n 13, pp 53–62 (public services) and 34–46 (civil service).

Procula v Luxembourg [15] is seen as a potential threat to the combination of advisory and judicial functions in the *Conseil d'Etat*. Both the Dutch and the Swedes have already had to 'judicialise' their procedures in administrative law matters in the light of judgments of the European Court of Human Rights. The *Osman* taken with *Factortame* are likely to alter radically English law rules on the liability of public authorities.[16] There is clearly a reduced autonomy of national legal systems in public law. These examples show the importance of interaction, the way the law of one nation state reacts to the outside environment. In some situations, the rule from the outside is directly effective and is best conceived as an internal rule. In other cases, it is merely a factor to which the national system chooses the appropriate mechanism for a response. There are different intensities of interaction. In some cases, there is a direct interlocking between systems, where a rule of one system becomes part of another. In other cases, the relationship with another legal order provides a background influencing interpretation, in yet other cases, developments in one legal order provide a trigger or a suggestive influence for change in another system. For most of these situations, it is simplest to describe each legal order independently, and then to examine the character of influence at the particular point of interaction between them.

4. INSTITUTIONAL SETTING

The distinctiveness of public law in individual countries seems to me to revolve predominantly around INSTITUTIONS which arise not only from deliberate design (typically from the national legislator or national legal professions) from both history and underlying social problems, such as religious and linguistic diversity.

4.1. The Power of History and Routine

History not only explains the development of legal and governmental institutions, it often provides points of reference for problems with which public law has to deal. I would argue that public law is particularly influenced by historical contingencies.

In terms of history, René David rightly wrote that 'established ways of working' might well constitute barriers to convergence of legal systems.[17]

[15] ECHR 25 September 1995, 22 EHRR 193: for a discussion of its implications, see Pacteau, above n 11, §§ 46 and 241 and references therein.
[16] See Paul Craig and Duncan Fairgrieve, '*Barrett*, Negligence and Discretionary Powers' [1999] *Public law* 626.
[17] *International Encyclopaedia of Comparative Law*, vol 2, ch 5 (JCB Mohr, Tübingen, 1970), paras 56–9.

I would not see this as a negative feature, but rather as a recognition that routine is part of the life of any society. In public law, the routine of both law and administrative practice combine to ensure that activities occur in a regular way despite changes in political and administrative personnel.

Take a simple example of David's view that different countries have become used to different institutional ways of dealing with a problem, which they would not seek to alter. Every country needs to ensure that public money is properly spent. Every country therefore has systems in place both for the authorisation of public expenditure and the scrutiny of accounts. In the United Kingdom, this process has developed as a *parliamentary* scrutiny through the Comptroller and Auditor General, the National Audit Office and the Public Accounts Committee for central government expenditure. The French system has developed as a *judicial and administrative* process under the *Cour des Comptes* and the separate civil service corps of the *Inspection Générale des Finances*.[18] The French idea that there should be a Treasury official in every government department who is the sole person to authorise expenditure would appear bizarre to British administrators. Well established systems of this kind which have become embedded in administrative practice. They will be very hard to shift, and there existence becomes something taken for granted in administrative design and in developing the law.[19]

The impact of history on political institutions is very significant in public law. How many constitutions are written to deal with problems which occurred in the past? Take a very simple example, Article 54 of the 1958 French Constitution provides that the President or the Prime Minister (and now 60 deputies or senators) can refer a treaty to the Constitutional Council for a ruling whether it is compatible with the Constitution before the treaty is ratified. Now this was introduced explicitly because the Gaullists were unhappy about the way in which the Treaty of Rome was ratified in 1957,[20] which they considered to be a breach of national sovereignty. The German Constitution's provisions on the appointment of the *Kanzler* were an attempt to rectify the problems which occurred in Weimar.[21] Our public institutions are marked by our own history and experience which creates a distinctiveness in terms of the organisations and

[18] See LN Brown and J Bell, *French Administrative Law*, 5th edn, (Oxford, Oxford University Press, 1998), 59–60.

[19] For example, the importance of *ordonnancement* in the procedure for awarding *astreintes* is a barrier to its practical applicability. Under this system, there needs to be an authorisation for payment (*ordonnancement*) for a public accountant is able to make a payment. The court order has to be explicitly made in this form, but courts are reluctant to use this power to force public authorities to pay in France.

[20] J Bell, *French Constitutional Law* (Oxford, Oxford University Press, 1992), 31.

[21] DP Currie, *The Constitution of the Federal Republic of Germany* (Chicago, Chicago University Press, 1994), 135–140.

procedures which we institute and the resonances which we have. Martin Loughlin captures this well in his comment:

> The journey of finding effective, enlightening and liberating conditions of government is a journey through history and on tracks formed within specific cultural traditions. The maps drawn by societies other than our own are undoubtedly of innate interest—But as guides on the journey they must be treated with circumspection.[22]

Public law arrangements are designed as much in dialogue with the past as with the future, and that past is likely to be nationally specific.

Even the 'multispeed devolution' in the United Kingdom builds on many years of administrative and political difference. The prior existence of Scottish legislation with special procedures, a separate Scottish Office administration in Edinburgh, separate courts, a Kirk, and a diverse educational system pushed towards a particular form of devolved government for the Scots, compared with that offered to the Welsh. Northern Ireland has its own history and that leads to different solutions.

My point is that the institutions of government with which public law is concerned develop in very specific ways. There is not just a generic social function to be performed. There are specific, national or regional functions, which are involved in governing this country at this time. In consequence, the institutions and processes of government and administration have to be designed and operate to reflect these situations. This regional or national institutional setting provides a context in which the activities or functions of law have to be performed. There are not generic social functions, which the law serves, but there are institutionally situated functions.

4.2. Common Values?

I am probably too wary of accepting common formulations as a statement of common values. In structural terms, attachments to fundamental rights have a different resonance in different legal traditions. In the English common law, rights-talk has traditionally been down-played. There is a basic right to do anything that the law does not prohibit, but this has not led to positive statements of rights until the Human Rights Act 1998.[23] For all their willingness to state fundamental rights in constitutions and legal texts, the French have traditionally treated them as political ideals, rather than as

[22] 'The Importance of Elsewhere' [1993] *Public Law* 44 at 57.

[23] Eg see the discussion of the right to demonstrate by Charles J in *R v Cunninghame, Graham & Burns* (1888) 16 Cox CC 421; cf J Bentham, 'Anarchical fallacies', in J Bowring (ed), *Works* (Murray, Edinburgh, 1830) II, p 573.

binding legal norms.[24] By contrast, the Germans have been more willing to treat them as legal norms, especially after the enactment of the Basic Law in 1949.[25] Underlying these differences have been different roles assigned to the judges within institutions of government. But there are also different pre-occupations which shape the understanding of even a single common value. Thus the freedom of expression in Article 11 of the Declaration of the Rights of Man of 1789 is concerned with freedom of publication and dissemination of ideas, especially the refusal of government censorship. The German Article 5 of the Basic Law is concerned with access to a plurality of information and freedom of artistic and scientific opinion. If anything, freedom of expression in the United Kingdom has been concerned with the freedom to demonstrate.

4.3. Analysis at Multiple Layers

The external environment and the institutional setting for a particular activity are likely to differ from one legal order to another. Only in that specific context can one understand how concepts, rules and institutions interrelate. The activity forms part of the internal and external setting. Now this argues in favour of an analysis which focuses on a particular setting of a specific legal order.

But, of course, it is possible that the analysis of the issue is different in the different legal orders. For example, the importance of both the European Union and the European Convention is that they eschew a formal distinction between public law and private law, as used in any specific national legal order. They both set out a number of principles and expect certain results. They are not concerned whether individual states achieve these through mechanisms specific to their own public law or their own private law, but there must be some similarity in the results achieved in the different states. But, if they do not worry about national classifications of issues as matters of public law or private law, these external legal frameworks do recognise as space for the state as representative of the public interest. For example, it can award state aids under certain conditions within EU law, and it can determine limitations on fundamental rights in the light of its view of the public interest.

In other words, any analysis of the legal situation has to return to the core conception of public law relationships, as described above, rather than the label which is put on the problem by a particular legal order. But any operating system will have to take account of the network of relationships which a particular legal order sets up, which may cut across boundaries

[24] Above n 20 Bell, *French Constitutional Law*, 166–76.
[25] Above n 21, Currie, ch 4.

between public law and private law. A network model is able to cope with this situation more satisfactorily than an integrated model. The network model allows one to classify the situation as 'public law' for one legal order, and 'private law' for another. An integrated model would not allow such an epistemological cross-over.

5. CONCLUSION

My suggestion is that public law is the law about the organisation, legitimation and control of government and public administration. It involves sets of principles or values, but these have to be realised through organisational structures and procedures, and through people occupying particular roles. Within a specific legal order, these organisational structures, traditions and values constitute an environment in which common functions, common texts and common social expectations have to be implemented. The dynamics of the modern legal world require us to take this core picture of the relationship between the state, the citizen and the common good, and project it into a network of relationships with other legal orders, national, international and sub-national, each of which exercises varying degrees of influence. For this, the network model of Ost and Van de Kerchove provides the most satisfactory way of modelling the epistemological complexity with which we are now faced.

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New Challenges in Public and Private International Legal Theory: Can Comparative Scholarship Help?

HORATIA MUIR WATT

1. INTRODUCTION

PARADIGMATIC CHANGES IN the structure of the international arena, wrought by globalisation and regional integration, affect fundamental categories in classical legal theory as much as they modify the significance of geopolitical boundaries.[1] The compression of time and space, which undermines the traditional foundations of the nation-state and makes a topological approach to the conflict of laws irrelevant, similarly subverts the metaphysical divide between the internal and external dimensions of sovereignty and destroys the philosophical basis of jurisdiction-allocating rules. World citizenship, or governance without government, are beyond the epistemological bounds of traditional theories of public international law;[2] small wonder that the complex fabric of new world no longer fits the old theoretical patterns subtly designed to subordinate the private sphere and avert any risk of individual claims in the international arena![3] The language of the conflict of laws is similarly impotent to express novel regulatory approaches emerging within the multi-level governance

[1] See Joel R Paul, 'The New Movements in International Economic Law', *American University Journal of International Law and Policy* 1995.607; D Kennedy, 'A New Stream of International Law Scholarship', *Wisconsin International Law Journal* 1(1988) 7; H Ruiz-Fabri, 'Immatériel, territorialité et Etat', *Archives de Philosophie du Droit*, 1999, t43, p 187; Symposium, *L'avenir du droit international sans un monde multiculturel*, (Recueil des Cours de l'Académie de Droit International, The Hague, 1983).

[2] See W Heydebrand, 'From Globalisation of Law to Law under Globalisation', *Adapting Legal Cultures*, (ed) Nelken & Feest, (Oxford Hart Publishing, 2001), p 117.

[3] On the rhetoric of classical international legal theory, which will be discussed below, see Annelise Riles, 'Aspiration and Control: International Legal Rhetoric and the Essentialization of Culture', *Harvard Law Review* 1993.723.

system of the European Union,[4] where deliberative solutions are encouraged by the rise of comitology, and 'diagonal conflicts' accompany the dynamics of European integration.[5] Shedding old labels for new systems of reference, emerging patterns of world governance challenge legal theory to construct new forms of knowledge capable of embracing complexity. The purpose of this paper is to explore the idea that inspiration for such a renewal could be sought in recent comparative legal scholarship, which is now engaged in charting the epistemological, ethical and methodological upheavals brought about in the wake of unprecedented intercultural exchange.[6] Theory now neatly parcelled up as 'public' and 'private' international law might gain new insights from interdisciplinary dialogue, and, once unfettered, could, in turn, help develop more sophisticated models with which to understand the interdependencies and multiple identities which undermine traditional categories.

Gunther Teubner once made the stimulating suggestion that interest analysis could be borrowed from the conflict of laws as a method of arbitrating the respective spheres of concurrent legal theories, thus extending the allocatory function of this branch of scholarship well beyond its own technical field.[7] Similarly, comparative legal scholarship, which is designed to help understand intercultural diversity, could be drawn upon to foster new ways of thinking about normative complexity in the international arena. It has already been suggested elsewhere that comparative law may serve a 'subversive' function within legal cultures which do not otherwise cultivate internal criticism, in that by drawing attention to hidden preconceptions and ingrained habits of thought, it can shed light on hidden discourse in legal analysis.[8] In the same way, by suggesting new ways of thinking about law and relationships between legal systems, comparative

[4] M Jachtenenfuchs, 'The Governance Approach to European Integration', *Journal of Common Market Studies* (2001)39, 245.

[5] Christian Joerges, 'On the legitimacy of Europeanising Europe's private Law: Considerations on a law of "justification" for the EU multi-level system', (Berkley Electronic Press, 2002). 'Diagonal conflicts' refer to instances in which the Community and Member States are compelled, de facto, to harmonise their activities since each hold powers over segments of interdependent issues. Conflicts between European competition law and national private law, in ECJ cases such as Pronuptia or Courage, are good examples (Joerges, p 29).

[6] See in particular, G Samuel, 'English Private Law in the Context of the Codes', in *The Harmonization of European Private law*, (ed) M Van Hoecke & F Ost, (Oxford, Hart Publishing, 2000), p 47; H Patrick Glenn, *Legal traditions of the World*, (Oxford, OUP, 2000).

[7] A similar idea can be found in an article by B Schäfer and Z Bankowski, who suggest conceptualising European integration by using the cognitive particularities of a 'private law mentality': 'Mistaken Identities: The Integrative Force of Private Law', in *The Harmonization of European Private law,* (ed) M Van Hoecke & F Ost, (Oxford, Hart Publishing, 2000), p 21.

[8] P Legrand, 'Sur l'analyse différentielle des juriscultures', *Revue Internationale de droit comparé* 1999.1052 ; G Fletcher, 'Comparative Law as a Subversive Discipline', *American Journal of Comparative Law* 1998.683 ; H Muir Watt, 'La fonction subversive du droit comparé', *Revue Internationale de droit comparé* 2000. 503.

theory may well, once more, provide an analytical tool applicable far beyond its own immediate object. In this way, trans-disciplinary cross-fertilisation of ideas may help construct what Geoffrey Samuel has called a 'post-axiomatic' model of legal knowledge, capable of taking in the institutional complexities of the world order with which present 'flat' schemes are impotent to deal.[9] Such an *epistemological* renewal argues in favour of crossing the *methodological* divide between public and private international law and could in turn shed light on the *ethical* issues raised by current legal doctrine in both fields.

2. DEVISING A NEW EPISTEMOLOGICAL MODEL IN INTERNATIONAL LEGAL THEORY

Recent path-breaking pieces of comparative scholarship have highlighted the inadequacy of current legal theory to cope with the increasing complexity of legal systems in an intercultural world, and welcome opportunities offered by globalisation or regional harmonisation as catalysts for the renewal of existing forms of knowledge about law. Thus, in the context of European unification, Geoffrey Samuel explores the possibility of a multi-dimensional epistemological model, better capable of embracing complexity than the 'flat' schemes issuing from present legal theory. In a similar vein, while considering claims of various legal traditions to universal normativity, Patrick Glenn argues that multivalent or 'fuzzy' logic could account more adequately for the multiple interdependencies through which complex traditions accommodate diversity, than can Aristotelian logic, characteristic of Western legal thought.[10] For both these comparative scholars, intercultural exchange represents an epistemological challenge, to which the best response would be to evolve new 'non-brittle' structures of thought, absorbing the 'legal irritants'[11] of difference by their capacity to build bridges between diverse and apparently contradictory facets of legal reality. In such a model, which allows constant dialogue between inconsistent poles, categories cannot be mutually exclusive, or identities irreconcilable.[12]

The need for a renewal of thinking about commensurability and relativism is equally manifest in the field of international law, where

[9] Samuel, p 58.
[10] See Glenn, p 325 et s. Similar ideas may be found in international legal doctrine, such as in A Papaux & E Wyler, *L'éthique du droit international*, *Que Sais-je?*, (Presses Universitaires de France, 1997), which will be discussed below.
[11] The metaphor is borrowed from G Teubner, 'Legal irritants: Good faith in British Law or How Unifying Law ends up in New divergences', *Modern Law Review* (1998) 61, 11. It is used by Geoffrey Samuel to designate the potential impact of the 'undisciplined' common law mentality within a codified system of law issuing from 'a hierarchical mentality of legal dogmatics'.
[12] See P Glenn, p 328, 329.

'flat', clear-cut representations of international normative space provide little understanding of the tectonic upheaval generated by the appearance of heterogeneous actors, new types of interaction between them and unprecedented forms of normativity. Kelsenian representations of the international legal 'order',[13] now perceived as a 'mythological perversion of legal rationality',[14] cannot account for the new network-like fabric of international relations in terms of a static, vertical hierarchy any more than the dogma of sovereignty can explain the decline of the nation-state as sole subject of international law and exclusive source of normative power on the domestic scene. In redistributing regulatory power, globalisation disrupts the neat ordering of normative space: groups with diverse economic or ideological interests bypass state courts to claim protection in the international arena; private international arbitration has succeeded in creating a parallel system of justice which is gaining ground in many fields where state interests were thought to be paramount; transnational agreements between public authorities fall either side of the public/private divide. To grasp these apparent inconsistencies, the need is voiced for a cognitively open model, a renewed narrative or alternative geometry, and above all a relational standpoint which allows for constant readjustment, and accommodates overlapping categories, multiple identities.[15] Such a challenge, stemming from the obvious inadequacy of present legal theory to accept diversity and acknowledge commensurability, bears an obvious resemblance to the epistemological challenge identified in comparative scholarship. What better reason to encourage an interdisciplinary borrowing of ideas?

Devising a post-axiomatic model would entail a number of structural changes in present legal theory, overriding distinctions between the international and the domestic/ the public and the private, or at least requiring constant readjustment of such boundaries. The first would be to erase the clear cut distinction between international law and the domestic legal order, insofar as it is based on a mutually exclusive differentiation of relationships that occur either *between* or *within* the various nation states. Abandoning the tight compartments which currently compress legal space would mean making room, instead, for alternative transnational legal orders with variable scope, crossing traditional boundaries within a flexible framework allowing for new interdependencies. For example, nothing prevents mechanisms of

[13] On the idiom of the legal 'order' as a rhetoric of control (through the expansion of European cultural values into the international arena), see Annelise Riles, p 724 and the various critical contributions on the same theme in *Ordre juridique*, 33, 34 *Droits*, (Presses Universitaires de France 2001).

[14] J Lenoble & F Ost, *Droit, mythe et raison*, (Brussels, Publications des Facultés Universitaires Saint-Louis, 1980).

[15] See M Delmas-Marty & ML Izorche, 'Marge d'appréciation et internationalisation du droit (Réflexions sur la validité formelle d'un droit commun pluraliste)', ,*Revue international de droit comparé* 2000.753; E Jayme, 'Identité culturelle et intégration: le droit international privé postmoderne', *Recueil des Cours de l'Académie de Droit International,* 1995, t 251, p 13.

private ordering such as international commercial arbitration from implementing norms which protect the interests of a larger community; implementation by state courts of a fundamental human right to a normal family life under mandatory international or regional norms may well result in giving effect to a purely religious bond; intergovernmental schemes of jurisdiction and recognition of judgments can no longer ignore private arbitral awards; a factual connection between a given transaction and the territories of several Member States of the European Union may or may not signify a conflict of laws according to whether or not the applicable law is to be found in harmonised legislation, so that defining internationality itself requires a variable geometry.[16] The bridge-building capacities required of such new multi-value logic would give effect to the legal pluralism advocated by Santi Romano, who aptly conceptualised the interaction between different legal orders operating on various planes, in terms of their respective *relevancy.*[17] When a Western court gives indirect effect to an Islamic norm in the field of family relations, or when a commercial arbitrator annuls an international contract in the name of public policy in order to implement the anti-corruption policy of the international community, the relevancy acknowledged by one legal order for another creates the flexible 'middle ground' necessary for intercultural dialogue.[18]

The second theoretical consequence of a such a renewed epistemological model concerns the distinction between 'public' and 'private' (international) law. Traditional conceptual separation of inter-individual relationships governed by norms of private law (albeit foreign in some cases) and interaction between the sovereign states in a higher, non-porous public sphere, has little sense in view of the present intermingling of interests governed by one or other body of legal knowledge. Once again, brittle models based on bivalent logic must make way for a more sophisticated approach congenial to the plurality of transnational legal spheres and relationships. It is already difficult, in contemporary theory, to say that any given body of legal knowledge about the functioning of international relationships qualify exclusively as private or public international law. Thus, for example, value judgments on decision-making within another legal system, which were once the exclusive sphere of private international law, have become a fundamental issue for international legal doctrine as a whole; such a development is fostered by overlapping constitutional and international requirements of due process, whose scope seems to cover all jurisdictional processes indiscriminately, giving rise to new definitions of adjudication which internalise these

[16] See the recent symposium organised at Toulouse on the theme of 'L'internationalité', Toulouse, 2001, *Revue Lamy Droit des affaires*, February 2002.
[17] S Romano, *Ordinamento guiridico*, 2nd ed, French translation, (Dalloz, Paris, 2002), Pref. P Mayer
[18] See Glenn, p 331 et s.

international qualitative standards.[19] Similarly, the economic freedoms under the Amsterdam Treaty, which command mutual recognition of public licences and authorisations in the public sphere, arguably appear as 'occult' conflict rules, limiting choice of law in the field of contract and market torts;[20] the consequences of the internal market on choice of law principles is beyond the scope of traditional private international legal scholarship, which must be supplemented by economic analysis and reflexes borrowed from public law. As this last example shows, the erasing of conceptual boundaries can actually lead to traditional devices or methods specific to one or other body of knowledge being put to new uses, sometimes seemingly inconsistent with their original function. Thus, public policy under Article 31 of the 'Brussels I' Regulation has evolved from being a nationalistic protection clause into becoming the point of entry of due process requirements from the ECHR into the legal orders of the member States of the European Union and an unsuspected opportunity for intercultural dialogue.[21] But this of course heralds *methodological* change.

3. CROSSING THE METHODOLOGICAL DIVIDE BETWEEN PUBLIC AND PRIVATE INTERNATIONAL LAW

The weakening of the traditional academic divide between public and private international law correlatively implies greater osmosis between methods of legal reasoning or analysis, which are no longer assigned to the exclusive use of one or other field. The astonishing lack of communication between the two academic fields during the twentieth century[22] may well be due to the fact that, at least in the Savignian tradition, the conflict of laws never really made state power a central issue; if choice of law rules may appear, formally, to allocate legislative jurisdiction, civilian private international law has tended to be firmly grounded in purely 'private' law concerns, putting the interests of individuals before those of the state. It took a regulatory dispute such as the Siberian pipeline litigation, involving both public and private interests, to highlight the equivocal nature of international jurisdiction, and to suggest that a flexible methodology in terms of interest-balancing or link-weighing was no doubt the most appropriate test

[19] See the research carried out on this theme in the workshop on International law, directed by H Ruiz-Fabri, UMR de droit comparé de Paris, publication forthcoming.
[20] See M Wilderspin & X Lewis, 'Les relations entre le droit communautaire et les règles de conflits de lois des Etats membres', *Revue critique de droit international privé* 2002, p 1.
[21] See ECJ 28th March 2000, *Krombach v Bamberski, Revue critique de droit international privé* 2000.481, note H Muir Watt
[22] It is true that the Italian internationalist tradition (Anzilotti, Ago) ignored the public/private divide. However, French doctrinal supremacy in private international law at mid-century went a long way in fostering the divide, which has been largely consolidated by the practice of the Hague Academy.

in either perspective.[23] Indeed, given their divergent theoretical premises, methods of analysis used either side of the structural divide to arbitrate between norms issuing from heterogeneous sources were naturally entirely different. State interests usually call for a unilateral methodology, in which political factors come to the fore and generalisation is suspect.[24] By contrast, the private sphere tends to require greater certainty, preferring analogy based on the perceived universalism of private law issues: marriage, torts or paternity suits call for choice of law rules based on shared features of given institutions. Indeed, in the heyday of the private/public divide, continental private international law chose to ignore norms of public law, with which its methodology, presupposing commonalities, could not deal.

But what if 'islands' of public law appear in fields traditionally governed by private law[25] and state interests are present behind the screen of private litigation?[26] Areas as far apart as child welfare, consumer protection and antitrust are all composed of heterogeneous norms and policies, whose implementation may depend concurrently upon the assertion of individual claims in the courts and the action of government agencies. The traditional methodological picture has been forced to adjust to the rise of a 'grey area' in which rules bearing public regulatory interests necessarily interfere in private spheres. One of the most difficult theoretical issues raised by the expansion of transnational commercial arbitration is precisely the extent to which a tribunal invested by private agreement can or should be entrusted with the implementation of mandatory state policies linked to an international transaction. Before state courts, the scope of 'private' international law now extends to sectors which clearly involve public interests, whereas methods used for solving conflicts within the private sector borrow to a large extent from unilateral methodologies and interests analysis, hitherto used to define the spatial scope of public law. Thus, a given international commercial sale of goods between private economic actors can be governed at the same time by a hybrid assortment of rules issuing from transnational private sources (the New Law Merchant), applicable by virtue of the parties' own choice, and the mandatory law of the affected market, whose

[23] Litigation involving extra-territorial protective measures taken under the US Export Control Administration Act 1979 gave rise to several court decisions within Europe, at the heart of which was in dispute the United States' 'prescriptive jurisdiction', in other words, its authority to take such measures affecting foreign interests: see B Audit, 'Extraterritorialité et commerce international. L'affaire du gazoduc sibérien', *Revue critique de droit international privé* 1983.402.

[24] The best illustration of such rule-scepticism comes from governmental interests analysis itself, which Currie presented as a rejection of the first Restatement's systematic approach to choice of law and a return to the case by case method inherent in the common law.

[25] See J Heron, 'Publicisation d'un droit et détermination de la méthode de règlement', *Travaux du Comité Français de droit international privé* 1990–91, p 65.

[26] See H Buxbaum, 'The Private Attorney General in a Global Age: Public Interests in Private International Antitrust Litigation' (2001) 26 *Yale Journal of International Law* 219.

claim to affect the private agreement must be assessed with the aid of tools inspired from decision-making in the field of public regulatory interests.

Use of heterogeneous tools of analysis may also help highlight links between sets of concepts and types of reasoning which developed separately in either field, giving them new significance, just as connections may appear, in the field of substantive law, when, one legal system is 'read' through the lens of a concept it formally ignores. Such cross-fertilization creates a methodological model better adjusted than artificially compartmentalised legal theory to the complex intermingling of legal issues in the real world. An example taken from recent research in private international law[27] illustrates the benefits of methodological borrowing by highlighting the parallel between two conceptual 'couples' which have developed entirely separately, respectively in public and private international legal theory. Thus, on the one hand, public international legal theory has long explained the relevancy of the international legal order for each sovereign state whose courts are called upon to implement international norms, in terms of *monism* or *pluralism*. A state with a monist perspective cannot give effect to norms issuing from the international legal order without first reducing or 'translating' them into national law. Pluralistic legal orders can, on the other hand, accommodate norms issuing from other sources, so that a rule of public international law will be applicable as such before the national courts without having first been transformed into a rule of domestic law. On the other hand, private international law has, in turn, long opposed two distinct methods of choice of law. *Bilateralism* or *multilateralism* attaches a 'connecting factor' to a wide legal concept—traditionally inspired by the categories of Roman law[28]—deemed capable of accommodating all sorts of private law relationships responding to its essential features, whether or not they took form under a foreign law. Once the court has ascertained that the legal issue before it raises a problem of 'tort' or of 'contract', it will the proceed to apply the domestic law of the country designated by means of the connecting factor—domicile, locus, or, more recently, the most significant relationship. *Unilateralism*, on the other hand, perceived until recently as a more primitive methodology, consists in defining the spatial reach of a legal norm by reference to its own objectives or policies. Such a method rejects the interposition of connecting factors,

[27] D Boden, *L'ordre public: limite et condition de la tolérance (Essai sur le pluralisme juridique)*, Doct. Thesis, Univ. Paris I, 2002.

[28] Continental bilateral theory is considered as having first been conceptualised by Savigny (Treatise on Roman Law, vol VIII) who believed that this methodology, based on recourse to shared legal categories, was workable only within the cultural community of states of Roman-Christian tradition. It is therefore no surprise to find that the categories used in traditional conflict of laws doctrine are identical to those used in classical comparative literature, designed to emphasise the distinctiveness of the Roman tradition (see below, III). This also explains why attempts to acclimatise the continental system in the United States was so unsatisfactory: the lack of any Roman tradition deprived the method of its theoretical underpinnings.

leaving it up to each rule to determine whether it has an interest in applying to a given issue, in view of the connections it entertains with the fact situation involved.

In different contexts, both these sets of legal reasoning address the difficulty of articulating legal norms issuing from heterogeneous sources. The public international law 'couple' describes the ways in which a given domestic legal system acknowledges the existence of a norm of public international law; in the conflict of laws, the methodological tandem composed of bilateralism and unilateralism accounts for two different ways in which a foreign norm may be fitted into the scheme of forum law. The analogy between these two sets of legal reasoning appears when they are viewed as different methods of dealing with diversity. Where the alien rule issues from international law, monism copes with its strangeness by reducing it to the image of the legal order of the forum. The same is true of bilateralism, when the intruding norm is a rule of foreign law, which must be subsumed under one of the categories devised by reference to the axiology of the forum law.[29] When strangeness is too great to allow any analogy (a unilateral repudiation under Muslim law lacks the essential egalitarian feature of a divorce by mutual consent) or when the interests of the legal order of the forum are too sensitive to concede any difference, however marginal, then bilateralism calls upon internationally mandatory rules of the forum to step in and bridge the gap initially left open to the foreign law. On the other hand, pluralism, like unilateralism in the conflict of laws, is a method designed to accommodate differences, to tolerate diversity. Recognition of the Other is not dependant on its fitting in the categories of the forum; dialogue with a view to finding the best way to acknowledge otherness and respect spontaneous interdependencies between the norm and its subjects becomes a central part of the choice of law process. However, when differences are qualitatively too great to be borne (a repudiation is shocking because it deprives the repudiated spouse of any initiative or means of defence), the instrument used to set aside the foreign norm is not the rigid, intolerant technique of mandatory rules but the flexible and fact-sensitive exception of public policy, whose level of tolerance varies according to the nature and intensity of the connection between the forum state and the litigation.

That unilateralism in the conflict of laws can be likened to pluralism in international public legal theory and thus appears as the methodology most adapted to coping with diversity, is interesting insofar as, traditionally, it was an approach deemed less sophisticated than Savigny's bilateralism, and as such relegated to the public sector, where norms dictate their own scope and provide for the jurisdiction of the courts, without regard for the more subtle considerations which characterise the 'most significant relationship'

[29] On subsumption as implying a static typology of categories determined by a code and deemed to cover all concrete cases in advance, see Papaux et Wyler, p 88, 89.

in the field of private transactions. A closer look shows however that, for some time now, unilateralism has provided an escape route from over-rigid bilateral methodology. It has paved the way for the implementation of the ECHR in conflict situations and inspired new paths for the recognition of unfamiliar legal relationships arising elsewhere.[30] Rejecting essentialism in the belief that the best law is both effective and commensurable to real social practice,[31] unilateralist methodology deals better with diversity in that it recognises difference instead of ignoring or reducing it. But this is of course, in turn, an *ethical* issue.

4. REVERSING THE ONE-WAY ETHICS OF LEGAL POSITIVISM

Recent comparative scholarship has cast doubts upon the ethical underpinnings of traditional classifications of legal systems as among 'families' presenting cultural commonalities (Roman-Germanic, Common law, Asian, ex-Socialist …). For P-G Monateri, such classifications are ideologically biased and as such mask a 'project of governance'.[32] In particular, current efforts to reconstruct the pillars of Western tradition on the basis of the supremacy of Roman law are seen by this writer as 'strategies of legitimization of a "Western" supremacy in the field of law, through the pursuit of genealogies'. Beware, therefore, of depictions of the Western pedigree of the *ius commune*:[33] Gaïus may well have been black! Analysing the 'Aryan model' which emerged with German historicism, Monateri shows in particular how the cult of Roman law entailed an ideology of Roman uniqueness and a logic of exclusion of other cultures. At the same time, comparativism emerged among the followers of Savigny as a strategy for reconstructing the original common Aryan background of Western civilisations. The author then goes on to oppose an alternative 'African—Semitic' model which points to the Middle East and Egypt as places of advanced culture whence the Romans borrowed more sophisticated legal theory. Without entering the historical debate, the point Monateri is making here is that traditional representations of the diversity of legal systems, ordered according to the strength of their affiliation to Roman law, subliminally suggests that the world of law has a centre and an epi-centre. Indeed, the idea of incommensurability between 'us' and 'them' thus commands most classical

[30] See P Piccone, '*La méthode de l'ordre juridique compétent*', (Recueil des Cours de l' Academie de Droit International, The Hague, 1986) vol 197, p 233 ; A Bucher, '*La famille en droit international privé*' (Recueil des Cours de L'Académie de Droit International, The Hague, 2000), vol 283, p 13.
[31] See Papaux & Wyler, p 111 et s.
[32] P-G Monateri, 'A Quest for the Multicultural Origins of the "Western Legal Tradition"', *Hastings Law Journal* (2000) 51, 479.
[33] See, too, J-L Halpérin, *Entre nationalisme juridique et communauté de droit*, (Presses Universitaires de France, Les voies de droit, 1999).

comparative literature, whose world-view builds upon the conviction of the intellectual superiority of the 'family' derived from Roman law. Yet the obvious value judgments these categories involve are hidden behind a screen of cartesian neutrality.[34] At the same time, purporting to be purely classificatory, this scheme excludes relativity linked to multiple identities and leaves little room for evolution or dialogue. Deconstructing these static categories as a form of 'flattening' narrative with an ideological bias prepares new ways of thinking about culture, identity and tradition and their interrelationship in comparative scholarship.

A similar discourse, which presents the world as divided into 'us' and 'them', and uses an ostensibly neutral classificatory scheme to flatten out 'irritants' which do not conform to its axiology, is not hard to find in international legal theory.[35] Acknowledging incommensurability, Western courts applying foreign law act as guardians of the 'shared values of civilised nations',[36] while in international *fora*, the label 'developing countries' applied to states which are striving towards a market economy clearly points to the model considered desirable. Mainstream positivism in public international legal theory projects a purely vertical, abstract, representation of the international legal order, which neglects the customary, the contextual and the complex and projects a rhetoric of control conducive to the spread of Western values in the international arena.[37] It celebrates as a model of progress and reason the European Convention on Human Rights, whose axiological conformity to Western ideals appears to compensate its lack of universal validity.[38] In private international law, the full extent of the ideological underpinnings of legal theory is again hidden by a discourse framed in terms of 'universal science';[39] once more, a classificatory scheme deemed to be universally acceptable is carefully drawn up in the mirror image of the structure of forum law and thus carries a value judgment according to how far a foreign system 'fits' that axiological pattern.[40] In both instances, the projection into the international legal order of a national model is of course epistemologically debatable. But, as Alain Papaux and

[34] A similar line of thought can be found in Papaux and Wyler, p 88 et s.

[35] Thus, for Annelise Riles, classical conceptualisation of the international legal 'order' reflects the values prized by European culture. The idiom of order serves a rhetoric of control, while suggesting communication between Western traditions.

[36] See the famous French case, *Lautour*, Cass civ, 25 mai 1948, *Grands arrêts de la jspd dr intern pr.*, 4ème, éd, n° 19.

[37] Papaux and Wyler, p 99 ; comp. Annelise Riles, p 728, analysing the scholarship of Thomas Lawrence, for whom 'International Law may be defined as the rules which determine the conduct of the general body of civilized states in their mutual dealings' … International law, as order, thus represented a controlled system of communication between European societies.

[38] Papaux and Wyler, p 100.

[39] B Oppetit, 'Droit international privé, droit savant', (*Recueil des Cours de l'Académie de Droit International* The Hague, 1992), III, p 348.

[40] The strength of the Roman axiological model in the conflict of laws was such that it took the full momentum of legal realism and the genius of Brainerd Currie to oust it in the United States. See above, note 26.

Eric Wyler have rightly noted, it is also ethically unsound for a legal theory which evolves in the sphere of the intercultural, to do what amounts to refusing to acknowledge alterity. A flattening scheme of this type cannot function effectively as a means of coordinating norms from different sources without recourse to 'escape devises', which allow furtive readjustments to accommodate friction.[41]

But it is more particularly the human rights ideology, relevant for both public and private international legal theory, which calls for careful analysis in this context. It contains both the flattening effect of abstraction and an ideological project presented as having universal, objective, validity. Through recourse to abstract concepts such as the 'human' or the 'individual', human rights discourse becomes the negation of the complex history of the world's different peoples and reductive of diversity.[42] Like all fundamentalism, it is based on incommensurability, a refusal of otherness.[43] Its individualistic, univocal perspective neglects both the collective dimension of international law, and its cultural or contextual value. Positing individual rights free from all duties to the community, it creates an obvious risk of arbitrariness and conflict, for the solution of which the same rights are then required to intercede: hence criticism derived from the auto-referential circularity of human rights discourse.[44] At the same time, both the concept of individual rights and their respective content are clearly a projection of a purely European axiological model; the positivist appeal to reason or the supposed essence of the human being masks a lack of universal legitimacy. But then the crucial issue is whether this deconstruction of the human rights discourse legitimates indifference, indeterminism, or the acceptance of rival claims to ideological truth in the name of cultural exceptionalism?[45]

Such a step is in no way inevitable if thought is given to the ethical foundations of international law, which in banishing absolutism under any form should provide a framework for dialogue. Here again, a clear parallel appears with the contributions made by comparative scholarship to reflection on commensurability and the acknowledgement of the Other. Human rights discourse is flawed, suggest Papaux and Wyler, because it is insufficiently 'distanced' from its own pre-conceptions. As comparative theory shows, such distance is necessary if differences are to be apprehended without

[41] Tracking down 'escape devises' in the conflicts of laws (characterisation, renvoi, etc) was a favourite theme of the legal realists, who did not succeed in shaking the faith of continental lawyers in traditional doctrine.

[42] See A-J Arnaud, 'Philosophie du droit de l'homme et droit de la famille', in *Internationalisation des droits de l'homme et évolution du droit de la famille*, *Libraire Générale de Droit et de Jurisprudence*, 1994, p 3; comp. Cl Lévi-Strauss, *Race et histoire*, (Folio), p 23.

[43] See Glenn, p 41 et s.

[44] See Papaux and Wyler, p 102.

[45] The issue is raised in clear terms by Thomas M Franck, 'Are Human Rights Universal?' *Foreign Affairs*, Jan/Feb 2001, p 191.

reducing the Other to one's own image. This points to a dialogical model for international legal theory, open to the paradigm of the complex as a matter of ethics as much as of epistemology or of method. In order to avoid any form of cultural imperialism, such a model should flee univocal representations of the legal order; search for abstract 'essences' should be replaced by regard for concrete expressions of different ethos, whose commensurability must be acknowledged.[46] As Glenn has written,

> the argument of incommensurability assumes static and distinct social identities or traditions, whereas in reality they are all composed of variants and even contradictions … The notion of incommensurability is thus incompatible with the fundamental nature of all traditions, which live as a flow of communicable and communicated information.[47]

International legal theory should therefore should turn its back on the metaphysics of conformity, on the ethics of a centre and a periphery and aim to build a relational, pluralistic model, open to dialogue and mediation and allowing for constant readjustment.

5. CONCLUSION

The public/private international law divide is becoming as redundant as is now, increasingly, the once clear-cut distinction between domestic and international law. The source—national or interstate—of a legal rule is no longer any indication as to its potential beneficiaries, nor is its aptitude to transcend territorial boundaries linked to any formal public or private label it may carry; categories deemed fundamental blur and lose their meaning while new sets of norms allow spontaneous communities of individuals or humanity as a whole to accede directly to the protection of international law, by-passing the agency of the nation-state. The criterion of internationality itself has become extremely elusive. These upheavals present far-reaching epistemological, methodological and ethical challenges, with which traditional legal theory is impotent to deal. This paper has attempted to suggest that interdisciplinary scholarship may help rise to such challenges, which require new forms of legal knowledge, enriched analytical tools and a rewriting of the metaphysical narrative.

[46] See Papaux and Wyler, p 121 et s.
[47] Glenn, p 43

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Abridged or Forbidden Speech: How can Speech be Regulated Through Speech?

FRANÇOIS RIGAUX

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AS IS ANY other legal text, the First Amendment to the American Constitution is open to the inventiveness of each interpreter. The part of that provision respecting the freedom of speech, or of the press, does all the more deserve close attention since it is a linguistic utterance respecting speech itself. How can the basic rules of language be enclosed within legal words? A tentative answer to that question will be given in the third and last section of the present report. The other two parts will contemplate: first, the interrelations between the three issues addressed in the First Amendment, second the qualifications and limitations which the Supreme Court of the United States has brought into the clear wording of the text, and a summary comparison with the European situation.

1. THREE FUNDAMENTAL RIGHTS WITHIN ONE SENTENCE

When comparing the First Amendment to the American Constitution (entered into force on December 15, 1791) to other similar constitutional or international guarantees one is struck by the link established between three (and even four) distinct fundamental freedoms: religion, speech, assembly and petition. The last one can be disregarded. It remains that three rights are put closely together. In the French *Déclaration des droits de l'homme et du citoyen*, which predates the entry into force of the American Amendment by two years, the freedom of religion is dealt with in Article 10,

the freedom of speech in Article 11, while the freedom of association is not even mentioned. The Universal Declaration of Human Rights (1948) is still more explicit. The 'right to freedom of thought, conscience and religion', 'the right to freedom of opinion and expression' and 'the right to freedom of peaceful assembly and association' are respectively guaranteed by Article 18, Article 19 and Article 20. A similar structure appears in Articles 9, 10 and 11 of the European Convention for the protection of human rights and individual freedoms (1959) and in Articles 18, 19 and 21 of the International Covenant of Civil and Political Rights (1966). Needless to say, Articles 10, 11 and 12 of the Charter of the fundamental rights of the European Union (2000) do not depart from this strong tradition. Some new rights have been made more explicit: respect for private and family life (European Charter, Art 7), protection of personal data (Art 8), the right to marry and to found a family (Art 9), freedom of the arts and sciences (Art 13), but their enunciation does not add anything specifically new to the list laid down since more that two centuries.

Why did the framers of the First Amendment closely associate three fundamental freedoms which today seem rationally distinguishable from one another? First of all one must scrutinise the different wording of the treble prohibition. A first element is common to the three of them: a prohibition is directed to the public authority and more specifically to the most eminent, *Congress*, the holder of the federal legislative power. The provision embodying the freedom of religion forbids 'an establishment of religion'. What is aimed at is the existence of a State Church, such as existed in England. Most colonists belonged to 'nonconformist' affiliations and abhorred the mixing of Church and State.[1] Up to now the European Court of Human Rights has never decided that the maintenance of a State Church, such as in England, Denmark or Norway is incompatible with Article 18 of the European Convention. Besides the prohibition of a religion established by law, the First Amendment guarantees 'the free exercise' of any religion. Greece has on occasion been condemned by the European Court of Human Rights for having unjustifiably applied the law Nr 1363/1938 to the prohibition of proselytism, which dates back to the Metaxas dictatorial regime.[2]

[1] In his dissent under *Capital Square Review Board v Pinette*, Justice Stevens thoroughly quoted Justice Black speaking for the Court in *Everson v Board of Education of Ewing*, 330 US 1, at 8–10 (1947): 132 L Ed 2d 650, at 694–6 (1995). During the first decades of colonisation, the discriminatory practices of the old world were transplanted to the soil of the new America and resulted in the persecution of dissenters. That's the reason why Justice Stevens pleads for 'a literal interpretation of constitutional text' (at 694), which would more exactly be a historical one.

[2] See for instance: *Manoussakis v Greece*, 26 September 1996, *Reports*, 1996–IV, p 1346. But compare: *Larissis v Greece*, 24 February 1998, *Reports*, 1998–I, p 362. The first decision on the Greek law criminalising proselytism is: *Kokkikanis v Greece*, 25 May 1993, *Series A*, n° 260–A. More recently, the Court has condemned the Republic of San Marino for the obligation of taking the oath on the Gospels: *Buscarini v San Marino*, 18 February 1999, *Reports*, 1999–I, p 628.

The religious clause of the First Amendment has given rise to an abundant jurisprudence of the Supreme Court. While the Court was in the past very hostile to any form of state support to a religious creed,[3] the conservative majority of the contemporary Court is more prone to admit some accommodation between the stringent wording of the prohibition and state help to private organisations which possibly profess religious opinions. Not only is every expression of a religious conviction guaranteed by the constitution, but religion itself is deemed a value to which respect is due. In terms which are not devoid of ambiguity, the Supreme Court has affirmed that the American people is a religious one.[4] Such a bold statement has to be reconciled with the dictum that 'neither a State or the Federal Government can constitutionally force a person 'to profess a belief or a disbelief in any religion'.[5] Moreover there is a difference between characterising the American people as 'Christian' or, more generally, as 'religious'.[6] Both Presidents Bush strongly emphasised their Christian creed and their firm belief in the existence of God. Democrat presidents such as Jimmy Carter and Bill Clinton stressed their adhesion to a religious creed in no less adamant terms.

Before going into some recent rulings of the United States Supreme Court it is useful to stress the link between the three provisions of the First Amendment. The expression of religious opinions is a variety of speech; so is also the case for the exercise of a religion which, moreover, being performed by a group of persons acting collectively, involves 'the right of the people peaceably to assemble'. Although no particular liberty is independent of any other, the redaction of the First Amendment forcefully underlines the special inseparableness of the three fundamental rights it guarantees. The religious clause is undoubtedly the most basic one, it prohibits any *direct* entanglement of the State with the establishment of a religion, but the freedom of speech and the right 'peaceably to assemble' which in most of the cases do support the freedom of religion can inversely justify some deviation from it. Giving judgment of the Court in the above case, *Capital Square*, Justice Scalia reinforces the religious clause with the free speech one:

> Our precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression.[7]

[3] For the case-law prior to 1990, see: F Rigaux, *La protection de la vie privée et des autres biens de la personnalité* (Paris, LGDJ, Brussels, Bruylant, 1990), p 85–119.
[4] 'This is a religious people': *Church of the Holy Trinity v United States*, 143 US 457, at 465 (1892); 'This is a Christian nation', at 471; 'we are a Christian people': *United States v Macintosh*, 283 US 605, at 625 (1931); 'we are a religious people': *Zorach v Clauson*, 393 US 306, at 313 (1951); *Lynch v Donnally*, 465 US 660, at 674 (1984).
[5] *Torcaso v Watkins*, 367 US 488, at 495 (1961).
[6] Comp the different formulations in the quotations in footnote 4.
[7] *Capital Square Review Board v Pinette*, 132 L Ed 2d 650, at 660 (1995). The centrality of the Free Speech Clause is also attested by the reference to it in the field of the freedom of assembly. See: *Thomas and Windy City Hemp Department v Chicago Park District*, 122 S Ct 775, at 778 (2002).

> The contrary view [...] exiles private religious speech to a realm of less-protected expression heretofore inhabited only by sexually explicit displays and commercial speech [...]. It will be a sad day when this Court casts piety in with pornography, and finds the First Amendment more hospitable to private expletion [...] than to private prayer.[8]

The already indicated centrality of religion is also expressed in the following sentence:

> a free-speech clause without religion would be *Hamlet* without the prince.[9]

In his concurring opinion in a previous case, Justicle Scalia already wrote:

> That was not the view of those who adopted our Constitution, who believed that the public virtues inculcated by religion are a public good.[10]

In the last ten years the Supreme Court has not judged unconstitutional the granting of public aid to private religious schools when it seemed that the real beneficiary was a needy pupil and not the religious organisation as such. For instance, the state is allowed to finance the remuneration of an interpreter helping the pupil of a catholic school who is a deaf-mute.[11] A more recent plurality opinion did not deem unconstitutional the Federal State's funding of private schools some of which are confessional ones.[12] Such state entanglement with religious activities would not have been accepted before the nineties.

More noteworthy are the cases where the religious clause is counterbalanced—ie defeated—by the free speech clause. Such is the case where university regulations deny payment to outside contractors out of the student activities fund for a Contracted Independent Organisation's religious activity:

> There is no Establishment Clause violation in the University's honoring its duties under the Free Speech Clause.[13]

[8] *Capital Square*, at 664.

[9] Above n 6, at 660. The plurality opinion of seven members of the Court in that case agreed that the board of the city of Columbus (Ohio)'s denial of the KuKluxKlan's application to display an unattended cross on the statehouse square was not justified on the ground that the issuance of a permit for the display would violate the establishment clause.

[10] *Lamb's Chapel v Center Moriches*, 124 L Ed 2d 352, at 366 (1993). The board of a public school which authorises an evangelical church to show a film on the family in the school precincts beyond the hours of lessons does not infringe the First Amendment.

[11] *Zobest v Catalina Foothill School District*, 125 L Ed 2d 1 (1993). Announced by Chief Justice Rehnquist, the judgment was reached at a close majority (5–4).

[12] *Mitchell v Helms*, 120 S Ct 2530 (2000). Four Justices adhere to the opinion of the Court announced by Justice Thomas, two concur in the judgment under a different motivation and three dissent.

[13] *Rosenberger v Rectors and Visitor of the University of Virginia*, 132 L Ed 2d 700, at 724 (1995). The majority was also close (5–4).

In her concurring opinion Justice O'Connor wrote the following:

> When two bedrock principles so conflict, understandly neither can provide the definitive answer […]. Such judgment requires courts to draw lines, sometimes quite fine, based on the particular facts of each case.[14]
>
> When bedrock principles collide, they test the limits of categorical obstinacy and expose the flaws and dangers of a Grand Unified Theory that may turn out to be neither grand nor unified.[15]

In the first sentence of his dissenting opinion Justice Souter, joined by Justices Stevens, Ginsburg, and Breyer, clearly emphasises the novelty of the ruling of the majority:

> The Court today, for the first time, approves direct funding of core religious activities by an arm of the state.[16]

Still more indicative of the prevalence of the free speech clause when confronted which the free establishment clause is a case where the denial of the use of school facilities by a Christian club was considered a violation of the former clause.[17]

When there is no risk of conflict between the religious clause and the free speech clause, because either one tends toward the prohibition of forced participation of a religious activity, there is no need to balance their opposite claims. Such is the case for a time-honoured solution, the prohibition of any prayer in public schools[18] or at the beginning of a sport activity organised by such a school.[19]

The religious clause of the First Amendment can also be reinforced by some other constitutional guarantees. While the decisions previously noted concern the prohibition of 'establishing' a religion in state (or public) schools, the liberty of religion authorises private confessional schools to impose

[14] 132 L Ed 2d, at 727 (1995).
[15] Above n 13, at 730. The notion of 'a Grand Unified Theory' is borrowed from theoretical physics. Up to now, scientists have not been able two reconcile two such 'bedrock' principles of contemporary physics, the doctrine of relativity and the quanta theory.
[16] Above n 13, at 737.
[17] *Good News Club v Milford Central School*, 121 S Ct 2093 (2001), with the partial concurrence of one Justice and the dissent of three others.
[18] *Lee v Weisman*, 120 L Ed 2d 467 (1992). It was a plurality opinion followed by a strong dissenting opinion of Justice Scalia, joined by the Chief Justice, Justice White and Justice Thomas. One peculiarity of the case was that the prayer was deemed a 'non sectarian civic prayer' read by a Rabbi (at 477). According to Justice Kennedy who pronounces the Court's opinion: 'The suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds strikes us as a contradiction that cannot be accepted' (at 483).
[19] *Santa Fe Independent School District v Doe*, 120 S Ct 2266 (2000), with dissenting opinions of the Chief Justice and of Justice Scalia and Justice Thomas.

religious duties on their pupils. Some state interferences with confessional schools have been curbed by the Supreme Court. When a state legislature imposes compulsory school attendance up to a certain age it may not require that the parental obligation be performed in a state school. Parents enjoy the liberty of being able to send their children to schools of their own choice.[20] In the leading case, the claim was brought before the federal courts by the religious congregation operating a catholic school and the right afforded by the Supreme Court was a patrimonial one. State laws criminalising the teaching in a language other than English are also unconstitutional: the case was brought by a teacher condemned for having used German in a religious school where the Bible had to be read in that language.[21] In both cases the 'fundamental theory of liberty upon which all governments in this Union repose excludes'[22] such encroachments of the public authority in the educational choices of the parents. The freedom of religion is only a branch of liberty *tout court*.

2. MAY FUNDAMENTAL LIBERTIES BE RESTRICTED OR 'ABRIDGED'?

Any literal reading of the First Amendment should exclude any restriction of the religious clause or the free speech clause. The question of the right to assemble is slightly different since that right is qualified: it is 'the right of the people peaceably to assemble', which means that the holders of that right are prevented from breaching the peace. Although the establishment clause and the free speech clause are laid down without any condition or qualification, the Supreme Court did impose notable restrictions upon their exercise, in a manner that went well beyond the conflict of two constitutional rights: the conciliation of unrestricted liberties is no genuine restriction because either is placed on an equal footing.

2.1. The Limitation on the Free Exercise of Religion

Polygamy has since a long time been the test case for qualifying the freedom of religion. A federal law applicable to the territory of Utah (which was not yet a state) and criminalising polygamy is within the

[20] *Pierce v Society of the Sisters of the Holy Names of Jesus and Mary*, 268 US 510 (1925).
[21] *Meyer v Nebraska*, 262 US 390 (1923). According to Robert H Bork (*The Tempting of America*, The Political Seduction of the Law, (New York: The Free Press, A Division of Mac Millan, Inc, 1990), p 49), that decision as well as *Pierce* 'could have been laid under the guarantee of freedom of speech in the first amendment'.
[22] *Pierce*, 268 US 510, at 535 (1925).

legislative power of Congress. The reason given for that solution is not very convincing:

> Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.[23]

The freedom of 'thought' or of 'opinion' is devoid of any significance. State power and constitutional regulation enter into the social field only when the opinion or thought is openly expressed or is acted upon. More recent decisions have however reiterated the distinction between beliefs and conduct:

> Our cases have long recognised a distinction between the freedom of individual beliefs, which is absolute, and the freedom of individual conduct, which is not absolute.[24]

Not only has individual 'belief' no meaning in the societal field, but the text of the religion clause also guarantees 'the exercise' of religion which necessarily involves 'conduct', acts which are protected against the arbitrariness of the government and the ill will of other citizens. Chief Justice Waite supposes a 'belief that human sacrifices were a necessary part of religious worship'.[25] Everyone would of course agree that such 'conduct' may not be protected under the cover of religious freedom. As is written in the same context, 'laws are made for the government of action', but the same is equally true of constitutional provisions. Instead of relying on the unfortunate distinction between belief and conduct, one has to accept that the religious clause protects conduct and not mere belief, but it does not protect any conduct. After the rulings on polygamy, American courts did not have to deal with religions practising human sacrifices, but only with cults dangerous for the safety of the worshippers, such as the handling of poisonous snakes: the statutes prohibiting such practices have withstood the test of constitutionality.[26]

2.2. The Constitutional Abridging of Speech

No first-grade student in any school of law is allowed to ignore the fact that in spite of the rhetorical formulation of the First Amendment the

[23] Chief Justice Waite announcing the opinion of the Court in *Reynolds v United States*, 98 US 145, at 164 (1878). See also: *Davis v Benson*, 133 US 333 (1890).
[24] *Bowen v Roy*, 476 US 693, at 699 (1986).
[25] *Reynolds*, 98 US 145, at 166 (1878). See the critique of that motivation in Justice Douglas' dissenting opinion in *Wisconsin v Yoder*, 406 US 205, at 247 (1972).
[26] *Harden v State*, 216 SW 2d 708 (Tenn. 1948); *Hill v State*, 88 SO 2d 880 (Ala, 1956); *State ex rel-Swarm v Pack*, 527 SW 2d 99 (Tenn. 1975), *certiorari denied,* 424 US 954 (1976).

Supreme Court has submitted freedom of speech to a series of non-written restrictions. In his concurring opinion in *Dennis v United States*, Justice Frankfurter enumerated six series of cases where the Supreme Court dealt with a conflict between the freedom of speech and competing interests.[27] That case concerned the application of a penal statute restricting the freedom of speech of some leaders of the communist party. Since the aim of that party was the overthow of a democratically elected government, speech favouring such a program was itself a form of conduct. The Court was divided on the motivation of the solution, Justice Frankfurter and Justice Jackson having filed concurring opinions, while Justice Black and Justice Douglas strongly dissented. Although that plurality decision has lost any value as a precedent, what remains is the distinction of different kinds of speech placed on a scale with an unequal protection.[28] On the bottom of the ladder is unprotected speech.

One variety of unprotected speech is 'fighting words':

> Argument is unnecessary to demonstrate that the appellations 'damned racketeer' and 'damned Facist' are epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace.[29]

The category of fighting words reverses the dialectics between speech and conduct: speech which can provoke retaliatory conduct is itself a form of conduct.

Another variety of unprotected speech is obscenity. In *Miller v California*, the Court deemed it appropriate 'to focus on two of the landmark cases in the somewhat tortured history of the Court's obscenity decisions'.[30] As is the case with other undetermined or underdetermined concepts, the difficulty is to define obscenity. It is different from indecency, which falls within the scope of the free speech amendment. The Supreme Court is conscious of the indeterminacy of the terminology: 'obscene, lewd, lascivious, indecent, filthy or vile',[31] the epithet 'vile' being a substitute of 'disgusting'.[32] Moreover it is impossible to formulate

[27] *Dennis v United States*, 341 US 494 at 529 (1951). Comp, more recently, *Ashcroft v The Free Speech Coalition, et al*, 122 S Ct 1389, at 1399 (2002).
[28] On commercial speech, see for instance: *Thompson v Western Medical Centre*, 122 S Ct 1497 (2002).
[29] *Chaplinsky v New Hampshire*, 315 US 568, at 574 (1941). Comp. *Street v New York*, 394 US 576, at 592 (1968) and *Hess v Indiana*, 414 US 105, at 107 (1973). But while *Chaplinsky* dismissed a claim against the penal condemnation of a Jehovah Witness, the other two judgments did not accept the characterisation of the attacked decision.
[30] *Miller v California*, 413 US 15, at 20 (1972). In *Ashcroft* (note 27), the value of precedent of *Miller* has remained undisturbed: 122 S Ct 1389, at 1396 (2002).
[31] *Osborn v Ohio*, 45 US 103, at 119 (1990).
[32] *Winters v New York*, 333 US 507, at 518 (1948).

'current community *mores*' or 'community standard'. There is no 'national standard':

> It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississipi accept public depiction of conduct found tolerable in Las Vegas or New York City.[33]

Each jury has to be able to evaluate the local community standards. Recent decisions are more conservative than previous ones. While 'adult bookstores' and 'adult theaters' are as a rule protected by the free speech clause (the epithet 'adult' being a code-word for the display of nude bodies),[34] more recently the Supreme court reversed a decision of a Federal Court of Appeals, having deemed unconstitutional an Indiana statute prohibiting the display of nude dancing.[35] But while the majority did recognise that nude dancing is an 'expressive activity' submitted to the tests applicable to any limitation of the freedom of speech, the concurring opinion of Justice Scalia did announce a future reversal of jurisprudence:

> Indiana's statute is in line of a long tradition of laws against public nudity, which has never been thought to run afoul of traditional understanding of 'the freedom of speech'. Public indecency—including public nudity—has long been an offence at common law.[36]

The reason why 'indecency' is reinstated in the place formerly occupied by 'obscenity' is one of morality:

> Our society prohibits, and all human societies have prohibited, certain activities not because they harm others but because they are considered, in the traditional phrase, 'contra bonos mores', ie immoral.[37]

In a more recent plurality opinion a decision of the Supreme Court of Pennsylvania was reversed because it had deemed unconstitutional a local ordinance prohibiting nude dancing.[38]

[33] *Miller,* 413 US 15, at 32 (1972).
[34] *Erznoznik v City of Jacksonville*, 422 US 205 (1975) ; *Schad v Borough of Mount Ephraim*, 452 US 61 (1981); *City of Renton v Playtime Theaters, Inc,* 475 US 41 (1986). It means that the regulations of local authorities have to comply with the conditions generally laid down for every abridgment of the freedom of speech.
[35] *Barnes v Glen Theatre*, 501 US 509 (1991). The judgment is followed by the dissenting opinion of Justice White to whom Justice Marshall, Justice Blackmun and Justice Stevens join.
[36] 501 US 509, at 515 (1991).
[37] Above n 35, at 517.
[38] *City of Erie v Pap's AM*, 120 S Ct 1382 (2000). Justice Scalia with the support of Justice Thomas excludes any application of the First Amendment to nude dancing. According to four other Justices the power to limit the application of the free speech clause has not been infringed and three Justices file a dissenting opinion.

Indecent speech is not debarred from constitutional protection but the state may regulate it more closely than ordinary speech. For instance the Federal Communication Commission is empowered to address an admonition to the broadcasting corporation where it has sent indecent but not obscene material over the airwaves.[39] More recently, the constitutionality of a federal statute aimed at the protection of minors against indecent speech over the airwaves was the object of a plurality decision of a divided Court.[40]

The Rehnquist Court has also reversed the more liberal tend of its predecessor by admitting that a Federal statute granting subsidies to artists may take 'into consideration general standards of decency and respect for the diverse beliefs and values of the American public'.[41]

2.3. A Brief Comparison with European Constitutional Law and the European Protection of Human Rights

Under the guidance of the United States Supreme Court, American case law has evolved a whole set of restrictions or limitations which in continental countries and in the European Convention on the Protection of Human Rights and Individual Freedoms have been explicitly laid down by the legislature itself. It is sufficient to recall the second paragraph of Articles 9, 10 and 11, of the European Convention and Article 52 of the Charter of the European Union. No fundamental right, nor any liberty, is absolute. Whether or not out of the necessity to fill a gap in the very text of the Constitution, the freedom of speech is more solidly entrenched in the United State than it is in Europe. The numerous condemnations of European States by the European Court of Human Rights imply that the state judiciary of those countries is still reasoning in the context of the *Obrigkeisstaat* of the past, or the memory of monarchical regimes. Within the field of obscenity, the practice of most European countries is so liberal that it has but seldom given rise to judicial interference. Two cases are noteworthy for their similarity to the American approach.[42] The appropriate scaling of diverse categories of speech according to the degree of protection they are afforded is not as finely tuned in Europe as it is in the United States. There remains some difficulty in distinguishing mere advertising from

[39] *FCC v Pacifica Foundation*, 438 US 726 (1978). The judgment was followed by the dissenting opinion of four Justice (against five).
[40] *Denver Area Educ Tel v FCC*, 135 L Ed 2d 888 (1996).
[41] *National Endowment for the Arts v Finley*, 118 S Ct 2168 (1998).
[42] In the *Müller* case, the European Court of Human Rights decided that the national courts were more apt than itself to evaluate an accusation of obscenity: *Müller v Switzerland*, 24 May 1988, *Series A*, n° 133. The displaying of alleged obscene paintings was also attacked and defended on the ground of the freedom of expression (*Müller* Judgment, § 27, p 19). The Swiss Federal Tribunal decided that the cantonal court was the best judge of the requirements of public morality under the test of the '*Durchschnittbürger*': Trib féd, 9 May 1980, *Peepshow, ATF* 106, Ia, 267.

speech pursuing an economic value and from information useful for the consumer.[43]

The discrepancy is much more striking between the religious clause of the First Amendment and European law in that field. First of all, the European approach is far from unified and the European Court of Human Rights is always reluctant to offend national sensibilities. Not only do some European States still accept the existence of a national church or entertain special relationships with the Holy See through a Concordat, but in most of other countries the State is entangled with religious organisations in a manner which would be anathema in the United States. What is more paradoxical is the positive value afforded to religion—and more specifically to the various Christian denominations—by American public officials and by an influential sector of the judiciary, in contrast with the official neutrality of most European States. A further paradox is that such tendency has been on the increase during the last years. Should that be the case in Europe the secularised fraction of the society would be severely offended.

3. WORDS ON WORDS

Constitutional law is law on the law. Constitutional law on the freedom of speech is law on words, on language. But since law is itself a language, a constitutional court or a supreme court exercising the power of the last word regulates the language of all other judges when delimiting the freedom of speech of the citizens. One famous American scholar has written that:

> There's no such thing as free speech, and it's a good thing also.[44]

The negation is somewhat misleading: of course, free speech is not a 'thing', the very idea of reifying language is basically absurd. What is meant—supposedly—is that the freedom of speech—as any fundamental freedom—is defined through its limits and, moreover, that it is impossible to reach any definite agreement on the determination of such limits. Before going back to that question, let us first deal with the freedom of religion.

The link between the two main clauses of the First Amendment is obvious. The religion which the Framers of that Amendment had in view was of course the second religion of the Book, judaism and Islam being at that time beyond their preoccupations. Since all Christian denominations were grounded on the same Gospels, but differed as to their respective readings of them, the non-establishment clause meant that Government had to abstain from supporting any such reading. That clause thus complements the free speech clause. The reading of the Holy Scriptures has to remain free from any governmental interference, but each confession is empowered

[43] See for instance ECHR, 25 August 1998, *Hertel v Switzerland, Reports*, 1998–IV, p 2298.
[44] Title of a book by Stanley Eugen Fish (New York, Oxford University Press, 1994).

to organise the internal discipline of its own reading or interpretation. The freedom of religion as the freedom of assembly or of association forbids any governmental incursion into ecclesiastical affairs:

> The law knows no heresy.[45]

Organised churches are treated as civil associations, church-membership having a contractual basis which implies the duty to obey the ecclesiastical rules without any recourse to state organs.[46] Once again the close relationship between the three main clauses of the First Amendment is put forward.

A summary description of American case-law on the two main clauses of the First Amendment is a convincing testimony of the changing nature of the restrictions deemed congenial to successive and varying readings (or interpretations) of the constitutional text. In the same Court at any moment in its history Justices have not agreed on the 'correct' interpretation of the constitutional text, and dissenting opinions give a means for reversing the majority view. The conclusion is that there is no 'correct' reading of the text and that no majority decision ever has the final word.

If such fundamental topics as the freedom of religion and the freedom of speech are no pacified realms of American legal theory, how can we hope to aim at better results in a divided Europe? There is a lot of illusion in the unifying power of the common adhesion to human rights and fundamental freedoms. We agree upon words but could not agree on how to decipher their meaning. One can share Justice O'Connor's scepticism as to the 'flaws and dangers of a Grand Unified Theory'. Conflicting fundamental freedoms have to be accommodated on a case-by-case basis. Religious convictions (or the absence of them) and the limits of free speech are too embedded in national, regional and, even, local traditions to be subsumed under a commonly shared European heritage. In the most sensitive areas—abortion, gay identity, obscenity, school prayer, state-sponsored confessional activities—the rulings of the United States Supreme Court are informed and overdetermined by the values of a majority among the Justices. After the close of the liberal era a more conservative majority has seized the helm. Legal theorists are not invested with the authority to make a choice between such contrasting trends. Returning to the so-called European common law, we have to deny the members of European courts the power to align themselves with some overdetermined values or ideals. They have to take a middle course between what remain conflicting values. The European Court of Human Rights is like a coalition government that has to reconcile the various

[45] *Watson v Jones*, 80 US (13 Wall) 679, at 728 (1872); *Presbyterian Church v Mary Elisabeth Blue Hull Memorial Presbyterian Church*, 393 US 440, at 446 (1969); *Serbian Orthodox Church v Milivojevich*, 426 US 696 (1976).
[46] *Watson v Jones*, 80 US (13 Wall) 679, at 728–9 (1872); *Gonzalez v Roman Catholic Archbishop of Manila*, 280 US 1, at 16–17 (1929).

political parties which support it. The judicial authority of the United States Supreme Court is akin to the political power of the President of the same State, both being a far cry from the contemporary situation in Europe.

Under American constitutional law the freedom of association and the freedom of speech are granted a twofold line of protection in favour of citizens expressing religious opinions or within confessional assemblies: the free establishment clause reinforces the other two liberties. Different categories of speech are placed on a scale and enjoy a more or less extensive protection according to their position on it. Religious speech is presumably granted the highest degree of protection since it is explicitly guaranteed through the establishment clause. The differences between the constitutional provisions of European countries are noteworthy which still complicates the allocation of a definite step or degree on the scale.

However, even while refraining from an undue stress on the pluralism of European constitutional traditions and relying on the uniform wording of the European legal instruments, the reliance on American case-law remains outstandingly relevant. The submission to a unique constitutional pact does not prevent interpretational discrepancies, which have four main causes. The first is the very wording of diverse fundamental rights and freedoms. Since all of them enjoy the same constitutional pre-eminence over other regulations, their respective fields of application have to determined. Secondly, besides their mutual limitations, no fundamental right is absolute, with the exception of the prohibition of torture and of 'inhuman or degrading treatment or punishment' (European Convention, Art. 3). Even when the authorised restrictions are prescribed by law, the extent of the legislature's competence to infringe constitutional rights remains open to challenge. The third difficulty is related to the task of elucidating the meaning of each particular provision, either of the basic one or of the distinctions which are made within it. Even such basic concepts as 'torture', 'inhuman treatment' or 'human dignity' are far from an unambiguous meaning. What is religion, what commercial speech and advertising, what entertainment? When does an informative speech present an economic advantage? What is the difference between indecent and obscene language? How far is symbolic speech protected? As obvious as may seem the high value of the freedom of speech, it is not easy to elaborate a common language on speech itself. Fourthly one must be aware that in a field so clearly connected with cultural idiosyncrasies, religious and philosophical traditions, the language of the lawyers is too easily predetermined by convictions rooted in their personal biography. As much as the judge has to act as 'the mouth of the law' he cannot refrain from relying on his or her own roots.

16

Legisprudence and Comparative Law

LUC J WINTGENS

1. INTRODUCTION: LEGISPRUDENCE, COMPARATIVE LAW AND EPISTEMOLOGY

BOTH THE THEORY of comparative law and the theory of legislation are in the making. While they may be able to find some agreement as to their object, that is foreign legal systems and law making respectively, they are in some crisis of identity as far as their methods are concerned.

Both comparative law and the theory of legislation are old ideals and ideas. The idea of comparative law can be traced to the work of Aristotle, collecting the constitutions of Greece. A similar observation can be made for legislation. From Plato to Hobbes, philosophers have been thinking of what law making is, in order to provide criteria for good legislation.

From the perspective of jurisprudence, with few exceptions like Bentham and Filangieri, these reflections aimed to be the normative design of law called natural law. With the dethronement of natural law from the seventeenth century on, an institutional design was step by step substituted for the normative design. The hard core of this institutional design common to most Western democracies is expressed mainly in the writings of Hobbes, Rousseau, Montesquieu and Kant. The basic concepts of this institutional design are the sovereign legislator, the independent judiciary and the notion that the proper form of expression of law is rules. Technicalities and details apart, this is what can be considered the *rule of law*.

This idea was pretty new at the time, and Hobbes is proud in announcing that he is the inventor of this new approach called 'civic philosophy'. It gets an update in the work of Rousseau, who claims to have formulated in his *Social contract* the first principles of public law, liberated, that is, from Christian revelation and merely based on the insights of reason. These principles are considered the essence of what will later be called the constitution.

For Rousseau, as the matter had already been raised by Hobbes, the principles of public law or the constitution are *true*, and the rules based on it share the truth of their foundation. Further, any rule that is valid is not only true, but also just, as we read from Rousseau.

From here on, I basically see two possibilities.

First, the principles of public law are true and they provide norms for action because of their truth. We have then a theory of law telling us what *is* and what *is not* law. What is more, the principles of public law also tell us what we *ought to do*, that is, follow the rules. As a consequence, since we know what is law and what we ought to do, nothing more needs to be asked, and, what is more, *can* be asked. Historically speaking, this approach reflects basically the line of thought that takes root at the period of the French Revolution.

The second possibility brings in the epistemological question: how can we know what we know. What, more precisely, makes the first approach 'true'?

The essential difference between the first and the second approach consists of taking the possibility of reaching truth in philosophy for granted, while the second perspective opens up a more relativistic, though not necessarily sceptical avenue. Put differently, if the philosophical question 'what is law' is answered in a philosophical way, the answer claims to be ontologically true.

If the question on the contrary is answered in a theoretical way, the epistemological question as to what can we know and how to do it, bars the direct access to reality, or makes it at least considerably longer. Theoretical answers to philosophical questions are preceded by an articulation of the framework in which the questions are asked, while philosophical answers to the same questions take the framework for granted. Taking the framework for granted includes an epistemological critique of philosophy, that assigns itself the task of exploring the totality of reality and thus feels compelled and legitimated to adopt a 'point of view from nowhere'.

The confrontation of these two perspectives, the philosophical one claiming to have direct access to reality and the theoretical one relying on an indirect or mediated access to reality is, as I believe, apt to help us in articulating what can be meant by a theory of legislation.

In the beginning of the 1970s, a number of convincing attempts were made to show that 'legal science' or 'legal dogmatics'—as lawyers like to call their theoretical occupations—was not a representation of reality. Legal dogmatics as the science of law is not a mere description or systematisation of valid law. Description and systematisation are themselves theory-dependent, just as the comparing of objects requires a theoretical framework that cannot be presupposed in reality without epistemological naiveté. The point is that we do not have any direct access to reality.

Before comparing the specific objects that comparative law aims to compare, some awareness is needed of the fact that the object of comparative

law is a human construct. Unlike what lawyers are tempted to believe, law does not grow in the garden. This attitude can be called 'legalism', that is, the position holding that law is 'just there' as Judith Shklar has eloquently put it. The 'thereness' of the law makes us easily forget that not only the law's application by the judiciary, but also its construction is theory-dependent.

There have been numerous critiques, especially after 1970, that legal theory has been mainly, if not exclusively, focussing on judicial decision-making nearly completely neglecting the legislative part of the story.

Upon this point, comparative law and legisprudence follow the same track. Both comparative and legisprudential scholars are now aware of the necessity of a theory that frames both problem formulation and problem solving. That is, as far as I see, the meaning of a paradigm in scientific research. Paradigms do not only provide exemplary solutions to exemplary problems—connected with well-established methods—paradigms are also needed to formulate problems in an adequate way. Problem formulation, that is, is as much as problem solving, dependent on a theory.

This brings us to the following epistemological position. Theoretical propositions, comparative or otherwise, include the necessity of a theory about these propositions. Most clearly, the latter help us to frame the meaningful questions to which answers are sought. Some use the concept of 'paradigm' here, though I prefer the term 'meta-theory'. The concept of a meta-theory makes much clearer what the process of theory construction is about: it is about framing a coherent set of propositions concerning a part of reality.

The claim I will argue is that judges, scholars (including comparative lawyers) and legislators, in order to follow rules or explain what it is to follow a rule, must share the meta-theory of the system they are dealing with. Upon that claim, I will show some similarities between judicial, scholarly and legislative activity.

2. JUDGES, SCHOLARS AND LEGISLATORS

A legal system, as it follows from the foregoing, is in that sense a theory. It is a theory on what ought or ought not to be done—primary rules of obligation—and how this ought to be done—secondary rules of power. As a theory, it allows for the solution of questions over what behaviour is required, what kind of actions are forbidden, and which actions are 'neutral', like the walk on the beach. It also allows one to say why some actions have the status they have, that is, they get their specific status according to rules of the same system according to which some propositions are legally valid while others are not.

This brief reference to the elementary structure of the legal system, as it is expressed by Herbert Hart can be helpful for a theory of legislation, as it

allows us to see (1) how a legal system is a theory and (2) in what sense it is dependent on a meta-theory. My thesis is that the meta-theory of the legal system that gives an adequate account of it as a dynamic system of rules, can be—embryonically—found in Hart's *Concept of Law*. More precisely, the secondary rules of the system say how to make or change rules. Moreover, it contains rules on how to apply rules. And finally, it contains rules saying how one can correctly recognise rules of the system all together.

Upon a positivistic account of law, it is said, once we are out of rules, there are no clear criteria for action within the legal system any more. Right as this might seem, it is only a part of the story. According to Hart, once we arrive at the borders of the legal system, we face the ultimate rule of recognition.

This 'rule' is not a legal rule in the proper sense of the word. Although it belongs to the legal system, it belongs to it in an improper way, one could say. It does not belong to the system as a rule *q.q.*, though it belongs to the system as part of a practice. It would then be misleading to read Hart as saying that the legal system consists of rules and something more that does not exactly belong to it. That is one reading of his statement that the existence of the ultimate rule of recognition is a matter of fact. Facts are not law, so the ultimate rule does not make part of the legal system.

Another possible reading followed in this article is to say that, according to Hart's position, the legal system consists of rules and something more. This 'something more' is the practice of dealing with rules (their interpretation, including the theories of interpretation relied upon, *etc*). On that reading, the rule of recognition does make part of the legal system, since it is now identified as 'rules plus the practices accompanying our dealing with rules.' It is this 'dealing with rules' that I propose to focus upon for a moment.

In order to understand a legal system, it is not enough to describe and, in addition to that, to systematise it from an external point of view. This is what is done by the legal dogmatic scholar or the legal scientist. This form of description and systematisation results in an explanation of (parts of) the legal system.

Understanding the legal system requires more, however, and this 'more' is that the legal theorist must take into account how people deal with the system's rules. In other words, Hart articulated the view that those living within a legal system take a position different from that of the legal scientist. More specifically, they follow rules in the sense that most people have accepted these rules as norms for their actions. Following rules is something different from their description and systematisation.

Only if 'following the rule' is included in the description of the rule, one gets a fuller (*ie* understanding) account of it. Without connecting the acceptance of rules as reasons for action with their moral quality, Hart has provided us with the insight that, in addition to a description and systematisation of law, we need, in order to really understand it, to include in the description the 'acceptance of a rule as a norm' aspect.

This is however easier said than done, and it is with MacCormick's account of Hart's overall work that we touch upon the richness of this insight. MacCormick has brought to light that, in Hart's approach of the legal system, one finds not only the internal and the external perspective on legal rules, but also what he calls the 'hermeneutic perspective'. From that perspective, the legal theorist does not only establish the fact of observational regularities in people's behaviour or that there are rules and which they are in the legal system under focus. Theorists include—or should do so—in their account of the legal system that people *follow* rules, which means that attention is paid to the actor's motives. Explanation of the latter then gives a more extended and thus more satisfactory account of what people are doing when they abide by legal rules. The interpretation I am relying on comes to this. Following rules presupposes that one knows them. Knowledge is not a representation of reality. It is, on the contrary, theory bound. So, the hermeneutical point of view, explaining what people do when they follow rules, includes a theoretical framework as to what rules mean, how they are or should be applied and related to each other. In other words, law is not 'self-interpreting'. Like law is not self-interpreting, but replete with theories as to its meaning, law is not self-constructing either. Although it is sometimes believed, even nowadays, that law results directly from politics, being itself a clash of value judgments or worldviews, my position is that, like the following rules of law, the construction of law is theory bound.

When presenting his views on law, Hart, like many others before and after him, leaves the position of the legislature somewhat underexposed.[1] It is, all in all, unclear in Hart's work whether legislators are legal actors, or whether they just act in a political way. That is, it is not clear whether, as is the case for judges and scholars in my interpretation, the ultimate rule of recognition of the legal system is connected to legislative activity. In some places Hart suggests that the legislature, together with courts, officials and private citizens uses the ultimate rule of recognition. At other places on the contrary, he leaves some doubt on whether the legislature is or is

[1] One reason is to say that Hart is mainly concerned with the Anglo-Saxon approach to law, in which precedents and not legal rules play the major part. Precedents are judge made, while rules are the result of a legislative intervention in the legal system. This intervention being felt as disturbing the development of law at judicial pace, the legislator is considered a jamming station.

Another reason could be that the attention paid to the legislator as an actor in the legal system is of a relatively recent date. It is not until 1973—commonly invoked as the year of birth of the theory of legislation for which Peter Noll delivered the birth-certificate with his *Gesetzgebungslehre*—that the main focus of legal theorists shifted from one specific form of legal reasoning—judicial reasoning—to legislative reasoning. So, one would have expected too much in wanting to find some more substantial approach to the law including legislation in the early 1960's.

A third reason on which I propose to focus for a moment is related to the conceptual apparatus developed by Hart.

not included in his theory; *eg*, when he speaks of the 'official creation, the official identification, and the official use and application of law'. Is the legislature included or not, is he an official or is the qualification 'official' merely used to refer to the judiciary and the executive? Is the legislator included when he speaks about the use of unstated rules of recognition by courts *and others* or is he supposed not to be included because of his legally unlimited sovereignty? On Hart's account of sovereignty in England, *eg*, one is tempted to believe that the answer is negative, and this could be considered another reason why the legislator does not show up explicitly in Hart's theory. My interpretation of Hart's position however is that this is only a borderline case, due to the specific (Hobbesian) concept of sovereignty appearing in this theory. It is the concept of the almighty sovereign, who is that mighty that he cannot irrevocably cut down his powers.

When adopting an internal perspective, a person abiding by the rule accepts it as a norm. In doing so, he endorses the cognitive content of the rule that will then instruct his action on the volitional level. Both aspects of the internal perspective, cognitive and volitional, are crucial in following a rule.

On the reading of Hart followed here, the ultimate rule of recognition is the synthesis of a praxis on which the legal system as a whole relies. It is, so to say, an inward girdle that keeps the system together. In that sense, it is connected with the legal system as a system of rules. But outside that girdle lies the 'environment' of the legal system. It is on the outside that the legal systems gets in touch with the environment.

How can this metaphorical language be translated in theoretical terms? It is via the ultimate rule of recognition that the information of the environment—facts—is translated into legally relevant knowledge about that environment. In that respect, a legal system is cognitively open, as Luhmann would say. That translation is a specific operation, that could be called 'juridification' or 'legalisation' that is constantly effectuated by judges while implementing rules. This process, however important as it may be, is consistently pushed off the screen of the legal scholar. In a book in preparation, I am arguing that there is built in resistance of the legal system that its norm production is kept under the surface of the legal system, and it requires some deep level analysis to show where this resistance is located, and how it can be unravelled.

The foregoing now paves the way for my view on the position of the legislator.

3. SOVEREIGNTY UNLIMITED? THEORY DEPENDENCE OF LEGISLATION EXEMPLIFIED AND TENTATIVELY EXPLAINED

The legislator is undoubtedly an actor within the legal system. He is even, in modern legal systems, a very productive participant in the legal system with a somewhat unsound preference, it seems, for the chaotic detail of

constant change. As an actor, it goes without saying that the legislator is bound by rules. The rules he is bound by are, roughly speaking, the rules of the Constitution. A similar question that was touched upon above about legal subjects and the judiciary following rules shows up here. What does it mean for a legislator to abide by the rules of the Constitution? In the Hartian vocabulary, following a rule, even by a legislator, must include the actor's adoption an internal point of view. There are two possible interpretations of this.

A first interpretation, just mentioned, is that abiding by the rules of the Constitution means that the legislator must not violate any of its rules. It is relatively easy when procedural rules are concerned. The rules prescribing, *eg*, that a majority in both chambers must vote in favour of a proposed rule is a clear example of that. If there is no majority, there is no rule. Any promulgation of a 'rule' that does not satisfy this requirement is void. Many constitutional rules however are of a more complex nature, which does not fit with the naive, liberalistic and legalist reading of the constitution just mentioned. To abide by rules granting civil rights for example is easier said than done. Compliance with such rules is more complex, because it is not immediately clear what compliance here means. Does it mean that legislators are not allowed to impinge the freedoms granted in these rules? Or can they do so, under certain conditions? And if so, how can these conditions be rationally articulated?

The necessity of a rational articulation of these conditions refers to a refinement of the hypothesis, bringing us to the second interpretation of the internal point of view. Following a rule cannot, on its own, mean 'do not violate it', because even in this legalistic interpretation, the 'non violation instruction' requires that meaning be conferred upon the rule that is being followed. If rules can only be followed according to a theory that confers meaning upon it, then there is a strong case for saying that the position of a judge following rules in his decision making and the position of legislators following the rules of the constitution in their ruling activity are essentially similar. They both need to rely on theories conferring meaning upon the rules they follow.

It is upon that indication that it can be asked how legislation and legal theory can go along and culminate in legisprudence. I propose to explore this alliance in focussing on the paradoxical concept of sovereignty.

The question that is raised in this respect is to know whether there is some support in Hart's work for bringing in the legislator into a theoretical framework. More precisely, the question comes to asking whether it makes sense to argue about the legislator's position in *theoretical* terms, when there is, as in England, no legal limitation to his legislative power.

According to English constitutional theory, where

> (…) there is a legislature subject to no constitutional limitations and competent by its enactment to deprive all other rules of law emanating from other sources of

> their status of law, it is part of the rule of recognition in such a system that enactment by that legislature is the supreme criterion of validity.[2]

This comes to the absence of any legal criterion of limitation of the legislature. Upon this analysis of the concept of sovereignty, there is obviously no place for any theoretical account of legislative activity, since this would only limit sovereignty (let alone any questions of legitimation). This would not only mean that what the Queen in Parliament says is law, but *whatever* the Queen in Parliament says is law.

This radical interpretation of the concept of sovereignty *prima facie* would deny any attempt to construct a theory of legislation even the slightest form of success. It is not, however, because there are no formal or legal limits imposed upon the legislature, that it is unbound on any account.

Although Hart himself, as said above, is somewhat ambiguous, I will argue for the position that the legislator shares the *common public standards of official behaviour*, as they are summarised in the ultimate rule of recognition. If he is not sharing these standards, the legislator is not following rules of the constitution, and he is, more generally speaking, not a participant in the legal system. The ultimate standards of official behaviour cannot, however, simply be assimilated to the constitution, without making the whole theory trivial.

To summarise, the thesis sustained is that it is both possible and necessary to connect legislative activity to the ultimate rule of recognition, an interpretation of which will open up an avenue for a theory of legislation. The reason for adopting this thesis is that, according to the rule of law doctrine, a legislator is bound to (some) rules of the system. Hence, the thesis provides that the legislator must be an official of the legal system.

The issue of the legislator following rules is now confused from within the legal system by holding that the legislator is sovereign. The two interpretations of the internal point of view mentioned above, return in a different dress, a philosophico-theological one in the first case, and a theoretical one in the second. If on the one hand, the sovereignty of the legislator is held to be a true principle of public law, then the issue is an ontological one. Sovereignty, from that perspective, is a true concept ('*une idée claire et distincte*', as Descartes puts it), and the 'theoretical' reflection is a *philosophy* of the state that claims to have direct access to reality. The truth achieved is a realistic truth because of the correspondence between the propositions made and reality. If, on the other hand, the sovereignty of the legislator is a *theoretical* concept, the issue becomes an epistemological one, and the theoretical reflection results in a *theory* of the state. A theoretical concept cannot be 'unlimited', because it would cease to be a concept.

In the first version, the philosophical one, we see the remnants of Hobbes' version of sovereignty, a quasi direct inheritance from the theological version

[2] HLA Hart, *The Concept of Law* 2nd edn (Oxford University Press, 1994) 106.

of the omnipotent God, of which the state is a mortal duplicate. Sovereignty, however, cannot be duplicated, there is only one true idea of it, and that is the legally unlimited, and philosophically confused one. Confused, because no philosophical articulation is provided as to where the 'sovereignty' of God comes from, it is mere theological speculation. If I may permit this allusion to Professor Watson's insightful idea, sovereignty is a transplant form theology into political philosophy, and not a very successful one, if I may say so. It can hardly be called a concept, because a concept is, by its very nature, limited. There are no 'unlimited concepts', that is a contradiction in terms. Concepts do precisely put limits to contents of thought, without which 'thinking' would be nothing but idle haziness.

Still connected to the first version, it could be argued that 'natural rights' would be a good candidate to limit the idea of sovereignty and to transform it into a concept. True as this may seem, there is however an objection. If both sovereignty 'unlimited' and 'natural rights' belong to philosophy, and are, so to speak, grasped directly from reality, then sovereignty as limited by rights is not sovereignty 'unlimited' any more. Further, upon what principle would the priority of rights over sovereignty be rationally argued and what would count as a valid argument in this issue?

In the second version, the theoretical one, these problems do not disappear, but are put in a theoretical framework that enables us to get a hold on them. The price to be paid is that the answer will not be a philosophical one, but 'merely' a theoretical one. Put differently, the philosophical question as to what sovereignty 'is', gets a theoretical answer, that is, an answer that includes the setting up of a framework for putting the question and for answering it. This is, as you remember, what we can understand by a paradigm. Since the framework set up includes the asking of the question as well as its answer, both question and answer depend on that framework that is not grasped directly from reality but is an intellectual or theoretical construct allowing us to structure reality at a human size in order to deal with it in a rational way.

Philosophical 'is' questions, like 'what is law' of which the sovereignty issue is a subquestion, do only make sense, so is my claim, if allowance is made for the theoretical framework accompanying the question. The question gets a slightly different look: from the question of *knowing what is*, we step into a broader framework that indicates *what it means to know what is*. This qualification, paraphrasing Richard Rorty and Jürgen Habermas, can be called the 'epistemological turn'. The consequences of this view are far-reaching. One consequence deserves some closer attention. If, upon the 'epistemological turn' just pointed to, philosophical questioning calls for a theoretical framework resulting in theoretical answers, it follows that legal systems themselves can be considered theoretical systems or theories. As a matter of fact, a theoretical system or a theory is not necessarily axiomatic in nature like a logical theory, nor is it necessarily experimental like natural science.

Many philosophers, most significantly Kelsen, but also many legal scholars of the nineteenth century, have been easily led astray to the belief that law is a science. To be sure, law is not a science, just as 'nature' is itself not a science. Both law and nature can be the object of scientific inquiry that, upon the scientific optimism of the eighteenth and nineteenth centuries, was held to be a picture of reality. This view, as I have tried to make clear above, does not distinguish between philosophical questioning and theoretical answering, or it at least does so insufficiently.

Legal systems as created by ruling institutions, both legislative and judicial, then, are replete with theory. It can even be put more strongly: they are theories, as said above, concerning what ought to be done and how this has to be done.[3]

What we now call 'law' is a practice based on rules, that is, general propositions having the quality of being legally valid because they are based on other rules of the system. Both Austin's command theory and Hart's critique of it, that is, rely on a different theory of what law and legal systems are. These theories are not themselves law. Most clearly, Hart himself admits that the criteria for deciding whether a proposition is a legal proposition are summarised in the ultimate rule of recognition, and the ultimate rule of recognition is a matter of fact. From the internal point of view, officials rely on it in order to justify their action according to the rules of the system, without being able to completely rationalise it. From the external point of view, the possibility of confirming the existence of the practice of following the ultimate rule of recognition, is a necessary condition for the existence of a legal system.

What then does it mean to say that legal systems are theories? It means different things. First, it means that legal systems, like other theories, scientific or others, are theory dependent. Secondly, the theory that a legal system is dependent on is not itself law, as the theory of separation of powers exemplifies.[4]

[3] It could have been different, and it has been different in the past. Austin for example has argued that a legal system consists mainly of commands, that is, orders backed by threats. Hart's insightful criticism of this theory did not however include a denial that legal systems of this type are not law. His critique mainly focuses on the inadequacy of what we now call law.

[4] The theory of the separation of powers as it is now incorporated in most Western legal systems as a set of constitutional rules does not primarily consist of constitutional rules.

It is first of all a *theory*, set up at the middle of 18th century by Montesquieu, relying on what can be called embryonic sociological research. This research provides Montesquieu with enough empirical arguments to claim that unbound power contains the risk of corruption. This claim, for all the realism it contains, is not a logical nor an ontological truth. It is logically possible to think of a benevolent ruler, who promulgates rules and at the same time applies them to disputes. There is no logical contradiction in the idea of a merger of these two powers in one person. Theology provides a good example. God is the creator of rules, and the final judge.

The eventuality or the risk of corruption of power is however very great, if not empirically unavoidable, as Montesquieu's idea implies, but this, again, is not a logical problem, it is a factual issue. The theory of the separation of powers, if it is not essentially part of the legal system, can however get a legal consecration as part of a constitution. But this does not change its theoretical character, just like the legal ratification of a moral rule does not remove its moral character.

What the example of the separation of powers shows is that, what we consider to be law is dependent on a theory. It is, more precisely, the meta-theory of a legal system. If we consider, as I do, the legal system itself to be a theory, then it becomes clear that the main aspects of the legal system, apart from their content, depend on, because they are structured by, a meta-theory.

I think it a sound position to say that what Hart calls the ultimate rule of recognition for a large part covers what I refer to as the meta-theory of the legal system. The ultimate rule of recognition, as I see it, provides us with a bridge along where to go from inside the legal system as a practice of following rules, to the theoretical articulation of that practice from an external perspective. The rules of a practice, in this case the practice called 'law', are not necessarily only legal rules. Any practice consists of rules, otherwise the practice lacks rationality.

This makes the articulation of law as a practice somewhat more complex, but this is due to the theoretical nature of a legal system, or its theory dependence. Any practice incorporates or depends on rules that are not created within the practice itself, that is, practices are not self-identifying. Their rational character depends on criteria that are not part of the practice itself. One needs an external perspective to establish the fact that they exist. And they can only be said to exist as a practice, if they can be recognised in some way or another as a matter of rule following. This in turn depends on a theory that is not part of the practice.

Just like the ultimate rule of recognition, which I prefer to call the paradigm or meta-theory of the legal system, is a complex matter so too is the meta-theory of a legal system. Until now, I have been articulating the necessity of theory dependence of a legal system, and the complex task of analysing the content of the meta-theory has not yet been broached. It is a colossal enterprise, as a combination of theories. From the epistemological perspective, understanding law is to explain it in the light of the theories it is dependent on. It will be no surprise to see as part of the meta-theory some sort of moral theory, sociological theory (of which the separation of powers is a more concrete part), economic theory, and even theology.

This approach expresses the broader view on law underlying a large part of the research within the European Academy of Legal Theory. Its interdisciplinary credo translates the epistemological necessity of theory dependence of a legal system. To understand a legal system is to explain it as it is connected to its context. The relation between law and its 'environment' is itself a theoretical matter, to which interdisciplinarity provides the key. The issue is a double one. Firstly, the 'environment' can only be understood in theoretical terms. The context of legal system gets a moral, economic or sociological shape, in the light of a theory that highlights reality or a part of it through its own methodological devices. That is, the understanding of social

reality 'as such' is epistemologically impossible. Secondly, the relations between these theoretical articulations of social reality and law relies on a combination of the methodologies of these theories that have law as their object of study. Law and economics, or sociology of law are exemplary instances of this interdisciplinary methodology that is the proper focus of legal theory.

Here again appears a parallel between comparative law and legisprudence. Comparative law aiming at the understanding of a foreign legal system, will only succeed in so far as it takes into account the theory dependence of the legal system that is investigated. Understanding a legal system is crucially dependent on explaining its theory dependence, that is, its relation to its meta-theory. While comparative law, as it is usually considered, has a foreign legal system as its object, it appears that, in light of the foregoing, it is not that different from the method of legal theory. To understand one's own legal system is to relate it to the meta-theory on which it is dependent, just as to understand a foreign legal system is to relate it to that system's meta-theory. From the methodological perspective, following rules of one's own system, scholarly investigation of a legal system, comparative or otherwise, judicial decision making and legislative ruling all depend on the same necessity of getting access to the meta-theory that structures the legal system dealt with.

4. PRINCIPLES OF LEGISLATION, THE DYNAMICS OF LEGISPRUDENCE AND THE FUNCTION OF COMPARATIVE LAW

I have tried to show in the above pages that a legal system is a theory that is, by its very nature, dependent on a meta-theory. In the interpretation presented in the foregoing, I have connected the idea of a meta-theory to Hart's 'ultimate rule of recognition' operating as a bridge between a legal system and its environment. This environment, I have argued, can only be known through theoretical study. Theories of judicial decision making can be located within the rule of recognition. They are not law—just as the rule of recognition is not a legal rule—but they are part of the meta-theory on which the legal system as a theory is dependent.

The same can be said of legisprudence. Legisprudence can be defined as an articulation of the meta-theory of the legal system from the perspective of the legislator. While in the foregoing I have mainly focussed on the epistemological issue of both comparative law and legisprudence, and the similarities between both from that perspective, I will henceforth focus on legisprudence, that is, the theory that aims at formulating the principles of legislation.

In focussing on the meta-theory of the legal system, a number of theories were mentioned as forming part of it. I mentioned a moral theory, a sociological theory, an economic theory, while others can be added. The combination

of theories culminating in the meta-theory of the legal system will make this meta-theory fairly complex.

Complex as it may be, the question raises as to what criteria are to be used to guide the choice and combination of theories resulting in the meta-theory. Will just any combination do, so that any meta-theory will satisfy? This hypothesis can hardly be validated, since if everything goes there would be no theory at all.

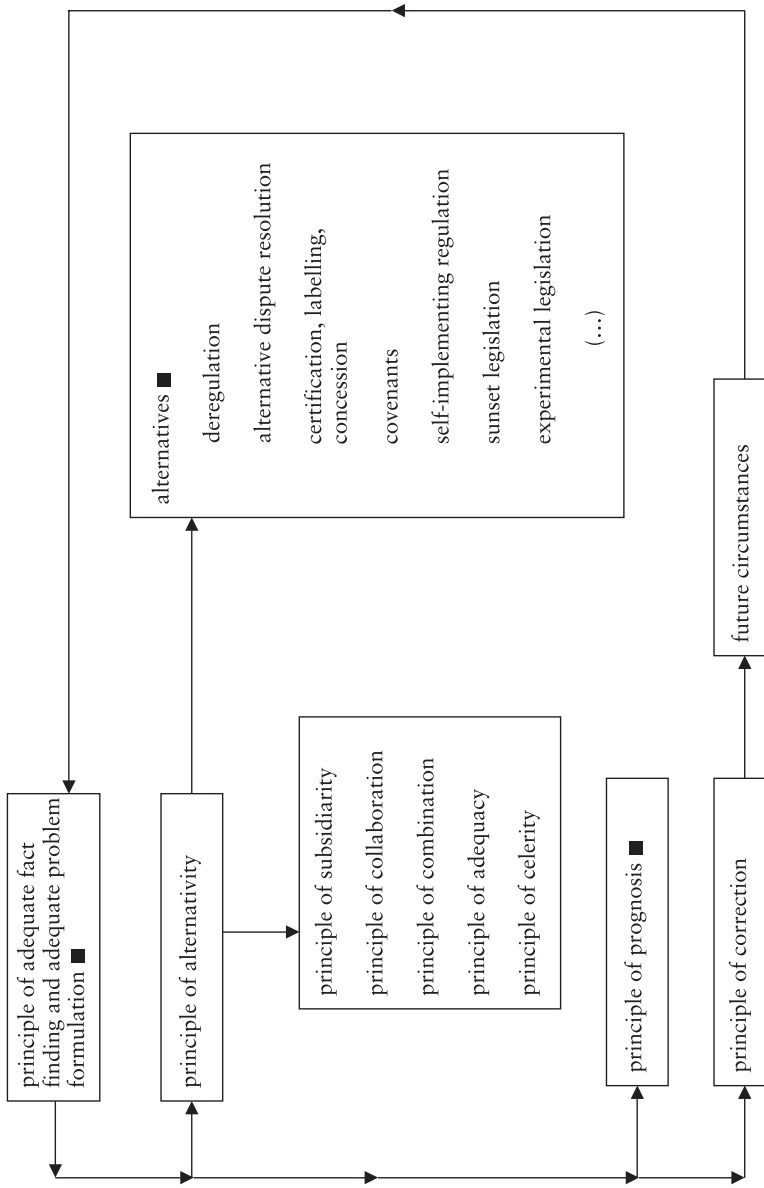
Beyond that legalistic approach, according to which legislators have the right to make rules, while having the duty not to violate the rules of the constitution, he also has other duties. These duties, as I understand legislative action, are included in the constitution, any constitution, or the idea of a constitution. Not only does a constitution limit the legislator's field of action in a material and a procedural way. It also, by its very existence, compels rulers to make *the best rules possible*.

It would be tempting to understand this as a substantive theory of legislation, dictating the content of the rules of the system on the basis of a substantive doctrine of justice, fairness, and the like. This, however, would be hardly a theory of legislation. It would be a theory of justice, which makes part of the meta-theory of the legal system. Legal systems are legitimated only in as far as they can rely on a democratic basis, not on any substantive doctrine.

There is then, one aspect of the meta-theory of the legal system—of any legal system I venture to say—that can be considered the regulative idea of law. This regulative idea, without which it does not make sense to speak of law, is the idea of *freedom*. The core aspect of the legal system since Modernity, as elucidated by Kant in his *Rechtslehre*, is that law serves freedom. This is, if I may use an inappropriate term, is the law's *causa finalis*. A better wording would be: law's *principium*, if it is properly understood, that is, as its starting point *and* as its guiding idea.

Freedom as a starting point includes that, when there are no rules, man is free to act as he pleases. Freedom as the guiding idea on its turn means that it is the law's calling (and its legitimation) to organise freedom. The organisation of freedom necessarily calls for a limitation.

In a trivial though unacceptable interpretation, freedom can be organised in such a way that no one can do anything wrong. If everything is forbidden, no wrong can be done. This hypothesis being included in the above approach, it needs to be refined, because it destroys the very meaning of freedom altogether. If freedom as the *causa finalis* or the *principium* of law entails limitation of freedom, in order not to make this a trivial variant of the police state, certain conditions have to be taken into account. These conditions are not external to the concept of freedom; on the contrary they belong to its very core. They are connected with the reflexive character of the concept of freedom; that is, freedom includes the freedom to be free. Put differently, freedom that is not limited in freedom leaves us with nothing but



Principles and Dynamics of Legisprudence

oppression. So, the conditions accompanying the organisation of freedom must be of such a nature as to enhance freedom and not to destroy it. These conditions I propose to call the conditions of freedom. The exploration of the conditions of freedom is the proper topic of legisprudence, in that they provide us, that is at least my claim, with the principles of legislation. Stated as such, these principles aim at a fine tuning of the idea of democracy or the self-governance of civil society.

I can only briefly touch upon the main principles of legislation here, reserving further argumentation and their epistemological articulation for another occasion. What I want to show here, is how comparative law fits in the scheme of the principles of legislation. Apart from the epistemological proximity of comparative law and legisprudence, I propose to show briefly a normative connection between them.

1. The principle of adequate fact finding and problem formulation is not exclusive to legisprudence. It is, as a matter of necessity, a requirement of any rational activity that deals with facts.
2. The principle of alternativity requires the ruler to provide arguments that ruling is better than not ruling, that is, why his limitation of freedom is better than the organisation of freedom by the subjects themselves. The principle of alternativity means that legislative ruling is an alternative to failing social communication. From that perspective, it must be shown that social communication has failed, and why legislative ruling would be the better alternative.
3. The principle of subsidiarity, in its 'legal' interpretation requires the ruler to act on the lowest level possible. The lowest level possible, from the perspective of legisprudence is, however, the citizens themselves and their potential of self-organisation. From that perspective, the principle of subsidiarity is a further qualification of the principle of alternativity.
4. The principle of collaboration includes the necessity of reflection on how rulers and ruled can collaborate in setting the goals of action and the ways of reaching them. The more social actors and rulers collaborate, the better the ideal of democracy will be realised.
5. The principle of combination requires the analysis of the effects of the new ruling in combination with the existent rules of the legal system, as to avoid that through combination rules negative each other (eg rules subsidising the employment of unemployed and rules guaranteeing a basic income, called the unemployment trap).
6. The principle of adequacy refers to the adequate relation of means to ends.

7. The principle of celerity requires the ruler to take the time dimension into account (how quickly is intervention required, if at all (cf. principle of alternativity), how long should intervention last, etc.
8. The principle of prognosis requires the ruler to formulate the expected effects of his ruling. If the real effects are different from the expected effects, the ruling should be corrected on the basis of the next principle.
9. The principle of correction. To this principle are connected the changes in social circumstances, which are factual in character, and result in a return to the starting position.

What then is the place and function of comparative law within this scheme of principles?

The boxes marked with ■ indicate where the use comparative law fits into the dynamics of legisprudence. First, it goes without saying that adequate fact finding, and even more adequate problem formulation requires a ruler to take cognisance of similar normative patterns in different legal systems. The more decisions on the limitation of freedom are justified by arguments of a factual nature, the 'better' their quality can be expected to be.

Secondly, comparative law has its place in the scheme in relation to the principle of prognosis, on similar grounds. Correct prognosis requires that effects of regulation be evaluated and assessed with all the possible means available. As a consequence, if foreign examples are available, they are to be taken into account.

Thirdly, as a result of the two foregoing aspects, comparative law can provide knowledge of alternative regulative techniques and their effects, in general as well as connected to a specific field. In the first case, comparative study of the foreign law in action can provide substantial arguments pro or contra the use of these techniques. In the second case, comparative study can disclose whether or how far alternative regulative techniques are proper in specific fields.

As was said above, there can be no claim to deep analysis here. The purpose of this brief and necessarily rough sketch of the relation of comparative law and legisprudence is to show that 'good' legislation requires information. Good legislation does not depend on its correspondence with independent normative sources like morality, at least not directly. Good legislation is a matter of justification. Legisprudence as a theory of legislation, as I have tried to show, formulates the principles of legislation as duties to be fulfilled by rulers.

It is within this duty of justification that comparative law takes its place. This place, as it was my aim to show, is not just a matter of intellectual game or luxury. The need for comparative law in the process of legislation, as legisprudence purports to argue, is a normative matter. Legislators have a

duty to justify their rules as the 'best' possible. This normative qualification, as I have tried to show, is not a matter of substantive theory, like natural law. It is a matter of procedural duty, since it is connected to the freedom of the legal subject. And I hope it has, upon the foregoing, become needless to insist that the limitation of freedom cannot be *a priori* justified, but that any limitation of freedom must be justified. It is with this need of justification in mind, that the relation between comparative law and legisprudence also gets a normative character.

17

Rawls' Political Conception of Rights and Liberties: An Illiberal but Pragmatic Approach to the Problems of Harmonisation and Globalisation

PAUL DE HERT *AND* SERGE GUTWIRTH*

INTRODUCTION: THE NATURE OF HUMAN RIGHTS IS POLITICAL, NOT METAPHYSICAL

THE TITLE OF this introduction contains an obvious reference to Rawls' 1985 lecture 'Justice as Fairness: Political not Metaphysical'.[1] A discussion of Rawls' work in a volume of papers that were presented on a 'Conference on Epistemology and Methodology of Comparative Law' should not come as a surprise. Together with academics such as Ronald Dworkin and Jürgen Habermas, Rawls has established himself at the forefront of constitutional democratic thinking. The constitutional protection of rights is a theme common to their work. Recently Cornelia Schneider has tested Dworkin's and Habermas' model of democracy and found out that Dworkin's model is too focused on the American constitutional system, and therefore fails to provide a model of universal validity.[2]

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[1] John Rawls, 'Justice as Fairness: Political not Metaphysical', *Philosophy and Public Affairs*, (1985) Vol 14, No 3, 223–251.

[2] Cornelia Schneider, 'The Constitutional Protection of Rights in Dworkin's and Habermas' Theories of Democracy', *University College London Jurisprudence Review*, 2000, 101–121. Habermas' approach, and in particular his principle of 'unsaturated rights', is more capable of living up to the challenges of the modern, open world. He proposes a certain basic pattern of democracy, which includes the protection of rights, but does not insist on specific manifestations of it. Habermas refrains from offering a catalogue of specific rights to avoid

Our intention is not to explore the differences and similarities between Rawls on the one hand and Dworkin and Habermas on the other. Rather we wish to limit ourselves to an outline of Rawls' theory of rights and liberties and to identify the potential of his theory for legal analysis and legal comparison in a modern world, wherein many look for a basic common legal language, with common legal principles and legal concepts. We are attracted to Rawls' work because the focus is on tolerance and respect for other societies, not on universalisation.

In 'Justice as Fairness: Political not Metaphysical' Rawls distinguishes political and metaphysical concepts of justice. Both are moral theories, but the latter one refers to a comprehensive, general, substantial and 'naturalistic' world-view,[3] whereas the former is of a more restrained nature. A political concept of justice has three distinctive features. It is a moral conception worked out for a specific subject … . This subject can be local justice, domestic justice or global justice.[4] By accepting a political conception of justice, a person does not commit him/herself to a deeper comprehensive theory or doctrine. Thirdly, it is a conception that cannot be found everywhere, since it has its basis in certain fundamental ideas latently present in the public political culture of a democratic society.[5]

Rawls' political conception of justice is historically embedded and constructivist. So-called *basic liberties* play a great role in this conception. They are part of the fundamental ideas that are familiar to all and are drawn from public political culture of a democratic society 'that has worked reasonably well over a considerable period'.[6] Rawls sees the basic liberties as the constitutional essentials of domestic (or Western) justice, since they provide for the central elements of the overlapping consensus between reasonable people with different moral, political and religious backgrounds in Western regimes. In his later work, Rawls will turn his view to global justice. This time *human rights* form an important cornerstone in his construction. Rawls attempts to

becoming too overly focussed on a certain model which could not have universal validity. A discussion of human or basic rights should be of an abstract nature. Political systems can interpret them and give them concrete shape in the way which is most appropriate for their individual circumstances.

[3] Rawls regards a moral theory to be comprehensive when it satisfies the following conditions. First it must apply to a wide range of subjects. This is what makes it general. It becomes comprehensive 'when it includes conceptions of what is of value in human life, as well as ideals of personal virtue and character, that are to inform much of our non-political conduct….' Cf John Rawls *Political Liberalism*, (New York, Columbia University Press, 1993), 175

[4] In the case of domestic justice, the subject is the basic structure of a democratic society. Below.

[5] According to Rawls there are (at least three) fundamental ideas underlying a democratic society (*Political Liberalism*, 175). Next to the 'central organising idea' is that of 'society as a fair system of cooperation over time, from one generation to the next.', there is the idea of 'a well-ordered society as a society effectively regulated by a political conception of justice' and the idea of citizens as free and equal persons.(*Political Liberalism*, 14).

[6] John Rawls, *Justice as Fairness. A Restatement.* (Cambridge, Mass. Harvard UP, 2001), § 11.3.

define a concept of human rights that is free from ethical or normative content, with the aim to enable 'decent states' to coexist in a global world.

This paper focuses on the political dimension of 'human rights' and 'basic liberties' (the two terms do not coincide). How 'political' are these rights and liberties, and, how 'human' ('natural' or 'metaphysical')? Part I contains examples of the 'political' use of human rights in Europe. Part II outlines Rawls' political perspective upon rights and liberties and adds an internal critique of Rawls' theory of basic liberties and human rights. Differences between his older and more recent work will be highlighted. Rawls started within the liberty paradigm, but slowly embraced the rights paradigm. In his later work the idea of rights became closely connected with his view on moral persons. We contend that this connection contradicts the idea that the nature of 'basic rights and liberties' or human rights should be political. Moreover, the connection leads to a significant but troublesome reduction of 'truly basic liberties and rights'. In the sphere of global justice a similar operation is carried out. Parallel to his reduction of 'truly basic liberties and rights', there is again a reduction of liberties and rights. Our conclusion (Part III) underlines the overall pragmatic, but illiberal outlook of Rawls' theory. Globalisation within the western world and on world level becomes synonymous with liberty-impoverishment.

PART I. SOME FACTS ABOUT THE POLITICAL USE OF HUMAN RIGHTS IN EUROPE

Thinking in Terms of Rights

Rawls has a way of warming up when writing books or articles: often he starts out by summing up 'facts' (about Western democracies) or 'characteristics' (about the task of political philosophy). Let us follow his example and summarise some 'facts' about European use of human rights that have drawn our attention in past decades. In one way or another all these examples show that human rights are first a human fabric of things used to serve explicit or hidden 'political' agendas.

First, it should be stressed that legal scholars in Europe have devoted much energy to transforming or translating liberty questions into questions of 'human rights'. One of the advantages of this 'rights approach' is purely strategic: it facilitates the bringing of cases before the European Court of Human Rights, a Court that is considered to have higher legal status.[7] Also,

[7] 'L'intérêt de raisonner en termes de droits de l'Homme est que cela peut permettre de s'adresser à une juridiction internationale qui, comme déjà dans d'autres domaines, pourrait bien faire preuve de suffisamment d'audace pour accorder aux travailleurs français une protection efficace de leurs droits fondamentaux' (Marc Richevaux, 'Droits de l'Homme et protection des droits des travailleurs', *Droit Social*, 1998, No 12, (854–56), 854).

the process of elevating liberty related issues to a more international level is expected to create more distance. Further from home, these issues are better identified and the weight of legislation infringing on liberties is put aside.[8] For instance, the European Court has given priority to the right of workers to strike, whereas the French constitutional court gave priority to the right to property. Also, the European Court has elaborated a doctrine bridging the traditional gap between individual liberties and socio-economic social rights.[9]

There are however more reasons to think in terms of rights. It is rightly observed that the concept of human rights in legal practice is closely linked to the concept of subjective rights.[10] Lawyers do like the idea of subjective rights. They think these offer better protection than 'liberty' or 'liberties'.[11] Partly, on the level of jurisprudence, Wesley Hohfeld can be held responsible for this.[12] In his famous division of rights,[13] there is no specific legal response to a 'liberty right'. When I sing in my bath there is no legal duty for others. Freeden rightly observes that although liberty-rights do not demand duties to *enable* their exercise, they demand duties

[8] 'Les tribunaux français ont une vision si hexagonale du droit qu'ils en arrivent à considérer *a priori* notre législation comme étant, par nature, au-dessus de tous soupçons. Pour nos juges, elle est bien supérieure de tous normes fixés par la Convention européenne des droits de l'Homme et les autres traités internationaux' (Marc Richevaux, above n 9, 855).

[9] Marc Richevaux, above n 9, 856: 'Si l'Europe des marchands est déjà faite, l'Europe sociale est à peine ébauchée. Les travailleurs pourraient puiser les éléments de sa construction dans des recours fréquents à la Cour européenne des droits de l'Homme. Celle-ci, qui a déjà à son actif une oeuvre importante de protections des droits de l'Homme, aurait ainsi la possibilité de transformer en réalité concrète l'indivisibilité des libertés individuelles et des droits économiques et sociaux, qui ne fut longtemps qu'un sujet de polémique'.

[10] AJ, Arnaud, *Entre modernité et mondialisation. Cinq leçons d'histoire de la philosophie du droit et de l'Etat*, (Paris, Librairie Générale de Droit et de Jurisprudence, 1998), 79.

[11] Eg Olivier De Schutter 'La vie privée entre droit de la personnalité et liberté', *Revue Trim. Droits des Hommes*, 1999, 828–63; Erna Guldix, 'De positie en de handhaving van persoonlijkheidsrechten in het Belgisch privaatrecht', *Tijdschrift voor Privaatrecht*, 1999, Vol 36, No 4. This position is discussed and criticised in: Serge Gutwirth *Privacy and the information age*, (Lanham/Boulder/New York/Oxford, Rowman & Littlefield Publ., 2002), 33–48; and François Rigaux, *La protection de la vie privée et des autres biens de la personnalité*, (Brussel/Paris, Bruylant/LGDJ, 1990), 849 p.

[12] W Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning', in *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, (New Haven, Yale University Press, 1923) reprinted as W Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning', in *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, (Westport, Greenwood Press Publishers, 1978), 114 p.

[13] Hohfeld divides rights into four categories of relationships between a right-bearer X and a right-addressee Y, and explains them by their corresponding correlatives. (1) X has a liberty (or privilege) to do A—when X has no duty towards Y not to do A, and Y has a 'no-right' towards X (Singing in the bath is an example); (2) X claims A from Y—and Y has a duty towards X to do A (For instance, provide food or protection); (3) X has a power to bring about a certain consequence for Y (An example would be a policeman requesting to see the licence of a speeding driver, who is thus under a liability), and (4) X has immunity—when Y lacks the authority to bring about a certain consequence for X and is thus under a disability (For instance, elderly people may be immune from being drafted into the army).

of another kind, namely abstention from intervention in the exercise of a liberty.[14] Hohfeld does not identify this correlate as a *duty*, but instead defines it as a *no-right*. In doing so he refuses to endorse the view that liberties exist in social networks. It is then maintained that a liberty is an entirely atomistic right to act, or desist from acting, without reference to anything else.[15]

Hohfeld's scheme is said to be 'neutral',[16] but this is an unfortunate statement, since his scheme undeniably leads to preference for 'claims' or 'subjective rights' entailing a duty on other persons. Many authors have tried to extend the Hohfeldian analysis to non-legal rights or have defended the thesis that liberties, also, can entail duties, viz. a duty of non-interference.[17] This approach merits all our attention. Undeniably in

[14] M Freeden *Rights*, (Milton Keynes, Open University Press, 1991), 77–8.

[15] M Freeden above n 16, 78–9. Freeden adds: 'It is possible to insist that all rights, liberty-rights as well as claim-rights, have related duties when adopting a different ideological vantage point that introduces a far more sociable view of human relations. What disturbs those who query the usefulness of the strict correlativity thesis from rights to duties is the possibility that, if applied on a wide scale, it will generalise the obligations that correspond to any right. This generality may relate both to the nature of the attached duties and to the rights-upholders (or duty-bearers). Take my liberty-right to wear jeans. What duties do others have with respect to that right? Clearly, the basic duty not to interfere with my right to wear them. But what about the duty to supply me with them or at least to make them available for me? The issue of the appropriate right-upholders applies not only to liberty-rights but to claim-rights that are fundamental human rights. If my starving neighbor has a right to subsistence, does he have it against me in particular? And if not, are we talking about rights *in rem*, against the world? Is there such a thing as a right that no one in particular has a duty to honor?'. This passage is followed by arguments for the recognition of the more diffuse duties that are generated by human rights.

[16] M Kramer, 'Rights without Trimmings', in M Kramer, N Simmonds and H Steiner (eds), *A Debate over Rights*, (Oxford, Clarendon Press, 1998), 12.

[17] R Flathman, *The Practice of Rights*, (Cambridge, Cambridge University Press, 1976); M Freeden, above n 16, 76–82; C Wellman, *A Theory of Rights*, (Totowa, Rowman & Allanheld, 1985), 35–80. Following Wesley Hohfeld, Wellman divides the concept of rights into claims, privileges, powers, and immunities. X has a claim against Y if Y must do something for X. For example, a debt is a legal claim in the sense that Y must repay the debt to X. X enjoys a privilege in regard to Y if Y cannot stop X from performing some action. For example, X has the legal privilege to cut the grass in his or her yard, and neighbor Y has no legal means to prevent X's action. The right to make use of our own property is a legal privilege or a 'liberty'. These terms also have their Hohfeldian 'jural opposites.' If X has a claim against Y, then Y has a duty in regard to X. If X enjoys a privilege or liberty in regard to Y, then Y has a no-claim in regard to X. Powers and immunities are also easily defined and they also entail their own jural opposites. X has a legal power over Y if X can do something to change Y's legal status. Judges have the power-right to marry, or to grant a divorce to a man and woman (thereby changing the legal status of the couple). X has a legal immunity in regard to Y if Y is unable to perform any action that changes X's legal status. One person does not have the ability to sell another one's property, or to terminate someone else's rights to personal property. We all enjoy the legal immunity that prevents others from disposing of our personal property. Hohfeld's jural opposites for powers and immunities are liabilities and disabilities, respectively. For Hohfeld, 'claim' is the most accurate legal translation of 'right,' because a right implies a duty, and duties are most closely associated with claims. Hohfeld argues that legal rights are legal claims, exclusively. Wellman goes beyond Hohfeld to argue that any particular right may accurately be said to exhibit the characteristics of any one of these four dimensions. Following Wellman, it seems to make sense to say that legal rights can be divided into four categories: claim-rights, liberty-rights, power-rights, and immunity rights.

European law, a right defining liberty often offers greater protection than the liberty itself.[18] The harm principle as a yardstick for measuring wrongful infringements on liberty is replaced by a more formal criterion,[19] and *ad hoc* balancing is replaced by categorical balancing.[20] Nevertheless, when law through rights does not protect liberty interests, there is still protection available (mainly offered by common tort law).[21] Hence, and contrary to Hofheldian understanding, rights are not indispensable to protect liberty.

Rights Contribute to Penal Inflation

The aforementioned process of reasoning in terms of human rights is not without its drawbacks. There are signals that the European Court through its case law indirectly encourages party states to use criminal law and criminal sanctions to tackle issues such as domestic violence and other infringements of civil law.[22] This evolution suggests that the European case law is contributing to a process of increasing penal inflation in many European countries. Hence, there is a hidden political agenda at work, in full contrast with the existing official rhetoric in European institutions (Council of Europe, European Union) and European countries advocating the use of imprisonment as a last resort and the stimulation of non-custodial sanctions and measures.[23]

[18] 'Que la liberté devienne un droit, la protection en sort renforcée' (Jacques Ravanas, annotation to Cour de Cassation (Fr.), 5 March 1997, *Recueil Dalloz*, (Cahier Jurisprudence), 1998, vol 34, (474–76), 475).

[19] 'la sanction est fondée sur la violation du droit de demandeur, quel que soit le comportement du défendeur' (*ibid*).

[20] Above n 20 with ref. to the work of François Rigaux.

[21] Cf Koen Lemmens, *La presse et la protection juridique de l'individu: attention aux chiens de garde* (Brussels, Larcier, 2004), 603.

[22] See Françoise Tulkens & Sébastien Van Drooghenbroeck, 'La Cour européenne des droits de l'homme depuis 1980. Bilan et orientations' in : *En toch beweegt het recht*, W Debeuckelaere & D Voorhoof (eds), *Tegenspraak-cahier 23*, (Brugge, Die Keure, 2003), 219–20. The authors convincingly argue that the horizontal effect of the Convention generates positive obligations for the States that are now compelled to take measures in order to ensure the respect of the fundamental rights in interindividual (or horizontal) relationships. This seems to put the principle of the subsidiarity of criminal law (criminal law as the *ultima ratio*) under pressure, for the *absence* of a penal enforcement of a right might be claimed against the state.

[23] See Antoine Garapon & Denis Salas, *La République pénalisée*, (Paris, Hachette, 1996), p 140; David Garland, *The culture of control. Crime and social order in contemporary society*, (Oxford, OUP, 2001), p 307 and Serge Gutwirth & Paul De Hert, 'Grondslagentheoretische variaties op de grens tussen het strafrecht en het burgerlijk recht. Perspectieven op schuld-, risico- en strafrechtelijke aansprakelijkheid, slachtofferclaims, buitengerechtelijke afdoening en *restorative justice*' [Theoretical variations along the border of criminal and civil law. Perspectives upon civil-, risk- and criminal liability, claims of victims, extra-judicial conflict resolution and restorative justice], *De weging van 't Hart. Idealen, waarden en taken van het strafrecht*, K Boonen, CPM Cleiren, R Foqué & Th A de Roos, (Deventer, Kluwer, 2002), 121–70.

This is not only a conflict of principles. The idea of criminal law as a last resort is very respectful of liberty and should be taken seriously in a human rights perspective, especially in the light of highly critical studies on the dependence on criminal law and institutions of criminal justice by feminists and new social movements, embracing agendas of penality with goals of amelioration and empowerment.[24]

Rights Protecting Firms

A third fact deals with the object of human rights. Do they only protect humans? Under the Convention the answer is clearly 'no'. Quite generally it is assumed that the rights from the treaty could in part be applicable to artificial persons.[25] The Convention states that the Court can receive appeals from any natural person, any (non governmental) organisation or any private group, which claims to be the victim of a violation of one of its treaty rights. The institutions of the Convention have accepted the admissibility of appeals from churches,[26] syndicates,[27] companies[28] and political parties.[29] Originally a restrictive interpretation of the question as to which treaty rights non-natural persons can appeal to, was defended: not all rights pertaining to natural persons could be successfully invoked by artificial legal persons.[30] However, with respect to some articles, like Article 9

[24] See Laureen Snider, 'Towards safer societies. Punishment, masculinities and violence against women' *British Journal of Criminology*, Vol 38, No 1, Winter 1998, 1–39. Snider seeks to look beyond criminalisation models to examine what is known about building less violent societies, at the macro, middle and micro levels. She argues that criminalisation is a flawed strategy for dealing with male violence against women and criticises the logic that has led feminists and other progressive social movements to mis-identify penality as synonymous with social control. Focusing on wife assault and battery, Snider points out that strategies of criminalisation have benefited privileged white women at the expense of women of colour, aboriginal and immigrant women. Attention should be paid to the construction, roots and maintenance of hegemonic masculinity. Overall it is argued that effective social control of aberrant behaviour must be sought outside criminal justice institutions, and that the feminist and progressive focus should shift towards examining how to create less violent people (particularly men), families, communities and societies.

[25] A Van Strien, 'Rechtspersonen en mensenrechten. De gelding van mensenrechten voor rechtspersonen in het strafprocesrecht', *RM Themis*, 1996 7; H Golsong, 'La Convention européenne des Droits de l'Homme et les personnes morales', in *Les droits de l'homme et les personnes morales*, Premier Colloque du département des droits de l'homme de l'Université Catholique de Louvain (24 October 1969), (Brussels, Bruylant, 1970) 15–33.

[26] ECRM, *Scientology-kerk v Sweden*, 5 May 1979, nr. 7805, *DR*, vol 16, 76.

[27] ECRM, *National Syndicate of the Belgian Police v Belgium*, 8 February 1972, appeal nr. 4464–70, Rec. 39, 26.

[28] ECRM, *Company X v Austria*, 13 December 1979, appeal nr. 7897–77, DR vol 18, 31.

[29] ECRM, *Liberal Party v United Kingdom*, 18 December 1980, appeal nr. 8765–79, DR, vol 21, 211.

[30] G Cohen-Jonathan, *La Convention européenne des droits de l'homme*, (Aix-en-Provence Paris, Presses Universitaires d'Aix-Marseille en Economica, 1989), 59.

and 10 ECHR an evolution has occurred, leading towards a more flexible interpretation, allowing firms, groups and other artificial persons to call upon these articles.[31] Concerning the right to the respect of private life and the right to protection of the house contained in Article 8 ECHR, the restrictive interpretation remained.[32]

However, in *Stés Colas Est et autres v France*[33] the European Court rejected the view that the constitutional right to protection of the house only applies to private houses. Referring to the judgment *Niemietz v Germany* from 1992[34] the Court noted that the French treaty-term *domicile* in article 8 ECHR is of a wider meaning than the English *home* and therefore also can apply to the office of a person with a liberal profession.[35] In a former judgment, the Court had already found the right to have the house protected also to apply to buildings in which a person lives and also has the social seat of his company.[36] In the *Stés Colas Est* case there is a reference to this previous judgment. The idea is supplemented with considerations about the practice and necessity to consider the European Treaty as a living instrument that should be interpreted in light of actual needs.[37]

[31] G Cohen-Jonathan, above n 32, 457, 476, 482 & 487.

[32] See ECRM, *Julien Mersch and others v Luxemburg*, 10 May 1985, No 10439/83, 10440/83, 10441/83, 10452/83, 10512/83 & 10513/83; ECRM, *Brüggemann and Scheuten v Germany*, 12 July 1977, No. 6959/75, *DR*, vol 10, 101. In a decision from 1995 it is said that: 'Unlike Article 9, Article 8 of the Convention has more an individual than a collective character, the essential object of Article 8 of the Convention being to protect the individual against arbitrary action by the public authorities' (ECRM, *Eglise de scientologie de Paris v France*, 9 January 1995, No 19509/92).

[33] ECHR, *Stés Colas et autres v France*, 16 April 2002, via http://www.echr.coe.int (The judgment is available only in French). The applicants are Colas Est, Colas Ouest and Sacer, which are road construction companies in Colmar, Mérignac and Boulogne-Billancourt (France). They were investigated in 1985 as part of an administrative inquiry in which investigators from the Directorate General for Competition, Consumer Affairs and Repression of Fraud investigated 56 companies simultaneously and seized several thousand documents from which they ascertained that illicit agreements had been made in respect of certain contracts. The investigating officers entered the premises of the applicant companies pursuant to the provisions of Order no 45–1484 of 30 June 1945. On the basis of the seized documents the Minister for the Economy, Finance and Privatisation referred the matter to the Competition Council, which fined the applicants for engaging in illegal practices. The applicants appealed to the Paris Court of Appeal challenging the lawfulness of the searches and seizures, which had been effected without a warrant. The Court of Appeal fined the first applicant five million francs, the second applicant three million francs and the third applicant six million francs. The Court of Cassation dismissed their appeals. Relying on Article 8 of the Convention (right to respect for home), the applicants submitted that the searches and seizures, which had been conducted by the investigating officers without any supervision or restriction, amounted to trespass against their 'home'.

[34] ECHR, *Niemietz v Germany*, 16 December 1992, *Série A*, vol 251–B.

[35] ECHR, Stés Colas et autres, § 40 with ref. to ECHR, *Niemietz v Germany*, §30.

[36] The Government accepted that there had been an interference with the exercise of the applicant's right to respect for his 'private life' and 'home'. (…) The Court sees no reason to differ on (…) these points (ECHR, *Ian Chappell v United Kingdom*, 30 March 1989, *Série A*, vol 152–A, § 51).

[37] ECHR, Stés Colas et autres, § 41. The Court held that the time had come to acknowledge that in certain circumstances the rights guaranteed by Article 8 of the Convention could be construed as including the right to respect for a company's head office, branch office or place of

An Ethical or Political Basis for Rights?

Very often it is said that human rights have a strong ethical footing. They are not about biological individual human beings, but about something more. Some legal texts on human rights emphasise the development of the 'person'.[38] Other texts hold that human rights are based on 'human dignity'. The dignity of the human person is not only a fundamental right in itself but seemingly also constitutes the ultimate basis of fundamental rights.[39]

Without any doubt, this protection of 'something more' by human rights serves legitimate purposes,[40] but it may lead to a conception of human rights too restricted to be of universal validity. It is questionable whether the notion of *personhood* in the German constitution has many affinities with a conception of *personhood* existing within, for instance, African or Asian societies where there is less emphasis on the individual. In certain African tribes there is no existence of a person outside the group. Does this mean that there can be no protection of human rights in such a society? What is wrong with extending protection beyond individual biological human beings? The same question of universal validity can be asked about the use of 'human dignity' as an ethical notion, borrowed from

business. The Court found that the investigators had entered the applicants' premises without a warrant, which amounted to trespass against their 'home'. The relevant legislation and practice did not provide adequate or sufficient guarantees against abuse. The Court considered that at the material time the relevant authority had had very wide powers and that it had intervened without a magistrate's warrant and without a senior police officer being present. The Court held unanimously that there had been a violation of Article 8 and awarded each applicant EUR 5,000 for non-pecuniary damage and 6,700 to Colas Est, EUR 10,200 to Colas Ouest and EUR 4,400 to Sacer for costs and expenses.

[38] For instance, the German Constitution holds that 'Jeder hat das Recht auf die freie Entfaltung seiner Persönlichkeit, soweit er nicht die Rechte anderer verletzt und nicht gegen die verfassungsmäßige Ordnung oder das Sittengesetz verstößt.' (Article 2.1). The overall tone of International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, also centers around the notion of 'person'. Article 10 holds that 'All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person' and Article 16 of the Covenant holds that 'Everyone shall have the right to recognition everywhere as a person before the law'.

[39] The 1948 Universal Declaration of Human Rights adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948, enshrined this principle in its preamble: 'Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.' The same idea is contained in the European Charter of the European Union (below) and the German Constitution. Article 1.1 of the German Constitution states that: 'Die Würde des Menschen ist unantastbar. Sie zu achten und zu schützen ist Verpflichtung aller staatlichen Gewalt.'

[40] It results from a footing on 'human dignity' that none of the rights laid down in a text may be used to harm the dignity of another person, and that the dignity of the human person is part of the substance of the rights. It must therefore be respected, even where a right is restricted.

Christianity.[41] Within the Western World there is no consensus on the necessity of this notion,[42] so why export it to other cultures?

How fundamental is this ethical basis for human rights? We are not convinced. As noted above, some texts do not refer to ethical notions, whereas other texts remain rather vague. The International Covenant on Civil and Political Rights subordinates human rights protection to the concept of inherent dignity of the human person,[43] but some of the rights of the Covenant are directly linked to the individual human being.[44]

The case-law of the European courts, especially the *Stés Colas Est et autres v France*-judgment, granting European privacy (and related) rights to firms, stresses the political function of human rights. The essential protective function of these rights lies primarily in restricting the power of the state.[45] This 'political' function of rights explains why basic texts on fundamental or human rights grow longer in welfare states (the delimitation of state powers is more complex), and also explains why other than human actors can enjoy legal protection.[46]

PART II. HUMAN RIGHTS AS A PART OF THE OBJECTIVE ORDER OF LAW

Three Levels of Justice: Local, Domestic and Global

In 1971, Rawls' *A Theory of Justice* sought to determine general principles for measuring the nature of justice and the proper goals, as determined by reason, which a well ordered society should observe in order to maximise benefits to individuals. Justice, Rawls claims, consists of those principles people would agree to under conditions of fairness and equality (hence leading on to the concept of 'justice as fairness'). According to Rawls, a well-ordered society, one that that can commend itself to impartial critical

[41] See A Klink & C Klop; 'Het handvest van grondrechten voor de Europese Unie als juridische positivering van morele overtuigingen', in P Cliteur and others (eds), *It ain't necessarily so*, (Kluwer, Leiden, 2001), (107–26), 112.

[42] More 'liberal' constitutions such as the Belgian and Dutch Constitutions do not acknowledge values such as human dignity.

[43] 'Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, Recognising that these rights derive from the inherent dignity of the human person'.

[44] Article 6: 'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life'.

[45] Of course other functions are not excluded. See Cornelia Schneider, above n 3, 118.

[46] To avoid confusion we could easily make a distinction between civil liberties or fundamental rights (rights considered to be fundamental in a given political society) and fundamental human rights (ie, a right for all humans, wherever in the world).

scrutiny, will be ordered according to two principles. First, each person participating in a practice, or affected by it, has an equal right to the most extensive liberty compatible with a like liberty for all; and secondly, inequalities are arbitrary unless it is reasonable to expect that they will work out for everyone's advantage, and provided the positions and offices to which they attach, or from which they may be gained, are open to all.[47]

Justice as fairness is conceived as a political concept independent of controversial philosophical, moral and religious doctrines. Rawls believes that rational people will unanimously adopt his principles of justice if their reasoning is based on general considerations, without knowing anything about their own personal situation, cultural background or belief. The first principles are constituted by a procedure of construction without appeal to prior moral facts. Although it is undeniable that there is some specific conception of the person at work in Rawls' political constructivism,[48] persons do not ascend to the original position or the constitutional convention to discuss the nature of man and the meaning of personhood. Rather, they agree upon the fundamental terms of their association. Amongst others this implies setting up a legal system, defining the basic structure within which the pursuit of all other activities takes place.[49]

Rawls' characterisation of his theory as political has an important consequence for the scope of these two principles of justice: they only cover the 'basic structure' of society,[50] and regulate only those institutions directly whose regulation is needed to bring about a just distribution of rights, opportunities, and wealth.[51] They do not regulate institutions that are irrelevant to the distribution of these goods and do not apply directly to the internal life of the many associations within society, 'the family among them'.[52] Rawls' original theory does not apply to questions of 'local' justice. Equally it does not apply to questions of 'global justice'. One cannot assume

[47] Our conception of justice, Rawls contends, 'is constituted by principles we would agree to live by under fair conditions, in particular: 1. Each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others (the Liberty Principle). 2. Social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all (the Difference Principle)'. Cf *A Theory of Justice*, § 46.

[48] Below See also: William A Galston, *Liberal Purposes: Goods, Virtues, and Diversity in the Liberal State* (New York, Cambridge University Press, 1991) p 136, 138.

[49] *A Theory of Justice*, § 38.

[50] The basic structure of society is the background political and social framework of a society; it is the way in which the main political and social institutions of society fit together into one system of social cooperation over time. Cf *A Theory of Justice*, § 2; John Rawls, *Justice as Fairness. A Restatement*. (Cambridge, Mass. Harvard UP, 2001), § 4.

[51] 'The political constitution with an independent judiciary, the legally recognised forms of property, and the structure of economy (…), as well as the family in some form, all belong to the basic structure' (*Justice as Fairness. A Restatement*, § 4).

[52] John Rawls, 'The Idea of Public Reason Revisited' reprinted in *The Law of Peoples* (Cambridge, Mass. Harvard University Press, 1999), p 158.

in advance, Rawls notes, that the reasonable and just principles for the basic structure are also reasonable and just for these two other levels of justice.

Consensus and Thoughtful Discussion in the Amended Theory of Justice as Fairness

Rawls' theory has undergone an important evolution and in many ways his position after 1980 became more prudent and more sensitive to problems such as political stability and pluralism.[53] Rawls preserved his spectacular thought-experiment proposed in *A Theory of Justice*, making use of the 'veil of ignorance' by parties placed in 'original position',[54] but he added many restrictions. As he presents his theory from the 1980s on, 'justice as fairness' is an exposition of the Western, especially American consensus.[55] It is not 'metaphysical' but 'political': as far as possible it avoids philosophical questions (eg what is the a-historical nature of man?, what is the nature of the human subject?, what motivates moral behaviour? and what is the sense of human life?). A political conception tries to draw solely upon basic intuitive ideas (necessary to regulate the basic structure) that are embedded in the political institutions of a constitutional democratic regime and the public traditions of their interpretation.[56]

In a sense Rawls proposes to do away with philosophical inquiries about an independent metaphysical and moral order when elaborating a political conception of justice, since they do not provide for workable and generally accepted fundaments. We should limit ourselves to accepted opinions, such as the belief in tolerance and the rejection of slavery. The ideas that are implicit in these positions can ground a coherent concept of justice. 'That there are such ideas in their public culture is taken as a fact about democratic societies'.[57] This restriction of scope clearly shows the pragmatist nature of Rawls' theory.[58] These shared values are the focus of what Rawls

[53] We follow Paul Ricoeur's comprehension of Rawlsian evolution. See Paul Ricoeur, *Le Juste*, (Ed Esprit, Paris, 1995), 99–120.

[54] In this position, all parties know the benefits and disadvantages that will flow from a particular distribution of those goods or of a particular choice of principles of justice, but a veil of ignorance exists for the parties. Neither party in the original position knows their specific place in that future arrangement. Reason should prevail to bring the parties to agree to an arrangement that maximises the benefits to all.

[55] Critical of this movement away from Kant's universal conception of public reason: Onora O'Neill, 'Political Liberalism and Public Reason: A Critical Notice of John Rawls' *Polical Liberalism*', *The Philosophical Review*, 1997, Vol 106, No 3, 411–28.

[56] John Rawls, 'Justice as Fairness: Political not Metaphysical', 225.

[57] *Justice as Fairness. A Restatement,* § 9.1.

[58] Contrary to, for instance, Dworkin's work, one cannot find in Rawls' work a defense of universal rights. Sceptical about metaphysical explanations for the existence of such rights, Rawls will depart from local, cultural premises. Our idea about 'right' or 'just' depends on the group or culture we live in. Rawls' (reduced) theory relies on working up the values of

calls the 'overlapping consensus'.[59] The necessity of an overlapping consensus arises because those with different comprehensive moral views must seek some common ground for reaching consensus about principles of justice. The actual circumstances of living in a democratic society then provide individuals with the motivation for accepting a political conception of justice that is not in conflict with one another's comprehensive views.[60] Justice as fairness is a valid candidate for gaining the support of a reasonable overlapping consensus, since: (a) its requirements are limited to a society's basic structure; (b) its acceptance presupposes no particular comprehensive view; and (c) its fundamental ideas are familiar and drawn from the public political culture.[61] Clearly these three features do not guarantee absolute success, but they may overcome scepticism founded in doctrines such as those of Kant and Mill and religious views that support the basic liberties.[62]

The foregoing (principles found and chosen in the original position through the overlapping consensus) is still insufficient to solve the problem of stability in pluralist societies. Although we cannot avoid starting from some consensus on institutionalised norms that are generally accepted, there is a limit to this consensus. Indeed, norms are not absolute or universal and the persons in the overlapping consensus start from within their own comprehensive view and draw on the religious, philosophical and moral grounds it provides.[63]Something more is needed to reach agreement

freedom and equality that he presumes are shared among citizens in Western society into more determinate principles to govern society. Cf Richard Rorty, 'The Priority of Democracy to Philosophy', in Alan Malachowski (ed), *Reading Rorty: Critical Responses to Philosophy and the Mirror of Nature (and Beyond)*, (Oxford, Basil Blackwell, 1990), 279–302. We use the Dutch translation: 'De voorrang van democratie op filosofie', in *Solidariteit of objectiviteit. Drie filosofische essays*, Amsterdam, Boom, (1998), 76–112, 83.

[59] It is possible and necessary to respond to the 'fact' of pluralism, Rawls holds, for persons with conflicting, but reasonable comprehensive views to agree that the political conception of justice should be the account of justice that is most compatible with their own views. As such the political conception would then be the object of an overlapping consensus about justice. Cf John Rawls *Political Liberalism*, 15. Since democracies cannot and may not use state power, with its attendant cruelties and corruptions of civic and cultural life, to eradicate diversity, 'we look for a political conception of justice that can gain the support of a reasonable overlapping consensus to serve as a public basis of justification' (*Justice as Fairness. A Restatement,* § 11.5.). An overlapping consensus 'consists of all the reasonable opposing religious, philosophical, and moral doctrines likely to persist over generations and to gain a sizable body of adherents in a more or less just constitutional regime, a regime in which the criterion of justice is that political conception itself.' (John Rawls *Political Liberalism*, 15).

[60] John Rawls *Political Liberalism*, 134.

[61] *Justice as Fairness. A Restatement,* § 11.2.

[62] *Ibid.*

[63] All men have two moral powers, Rawls hold: (1) a capacity for an effective sense of justice and (2) a capacity to form, to revise and to rationally pursue a conception of the good. This capacity for reason and this sense of justice allow us to make considered judgements, viz judgements given under conditions in which our capacity for judgment is most likely to have

on matters of political justice. Rawls' method of public justification[64] and the connected method of reflective equilibrium, based on an examination of alternatives and the elimination of doubt,[65] are devised to keep the dialogue between persons with different comprehensive world-views open. Citizens can find a balance between intuitions on the desirability of certain consequences of certain actions and intuitions about general principles. Reflective equilibrium is reached when a person reviews his judgments after having weighed different arguments and leading conceptions of political justice found in our philosophical traditions and in relation to scientific theories of human nature and society in order to establish what seems 'most reasonable to us'.[66] Political principles no longer need extra-political (metaphysical) foundations. The method does not rule out the possibility of a minimal core of moral principles that could be established through critical dialogue between different cultures. On the contrary, practical agreement on matters of political justice is only to be achieved through this capacity of revision.[67] Rawls' method creates the possibility of a society having only one method for resolving socio-political disputes: the quest for a reflective equilibrium.[68]

A Theory of Justice already contained references to the *reflective equilibrium*,[69] but, especially in conjunction with the notion of overlapping consensus, it gained a new meaning in Rawls' later work.[70] In order to face the problem of stability, Rawls renders his theory more dynamic: consensus and thoughtful discussion supplement the abstract hypothesis of

been fully exercised and not affected by disturbing influences. But considered judgements can differ and even our own judgements are sometimes in conflict with one another. 'Justice as fairness regards all our judgements, whatever their level of generality (…) as capable of having for us, as reasonable and rational, a certain intrinsic reasonableness. Yet since we are of divided mind and our judgments conflict with those of other people, some of these judgments must eventually be revised, suspended, or withdrawn, if the practical aim of reaching reasonable agreements on matters of political justice is to be achieved' (*Justice as Fairness. A Restatement,* § 10.2).

[64] See *Justice as Fairness. A Restatement,* § 9.4. ('political liberalism neither accepts nor rejects any particular comprehensive doctrine, moral or religious. (…) It uses a different idea, that of public justification, and seeks to moderate divisive political conflicts and to specify the conditions of fair and social cooperation between citizens. To realise this aim we try to work up, from the fundamental ideas implicit in the political culture, a public basis of justification that all citizens as reasonable and rational can endorse from within their own comprehensive doctrines. If this is achieved, we have an overlapping consensus of reasonable doctrines, and with it, the political conception affirmed in reflective equilibrium'.

[65] *Justice as Fairness. A Restatement,* § 10.1.

[66] Terry Hoy, 'Rawls' Concept Of Justice As Political: A Defense Against Critics', Via http://www.bu.edu/wcp/Papers /Poli/PoliHoy.htm, 6p.

[67] *Justice as Fairness. A Restatement,* § 10.2

[68] Richard Rorty, above n 60, 86.

[69] *A Theory of Justice*, § 9.

[70] See Rawls' discussion of wide and narrow reflective equilibrium, absent in *Theory of Justice*, in *Justice as Fairness. A Restatement,* § 10.3.

decision-making behind the veil of ignorance.[71] The overlapping consensus, Rawls specifies, is not a consensus simply on the acceptance of a certain authority, or simply on compliance with certain institutional arrangements. In order better to understand the idea of an overlapping consensus Rawls contrasts it with another way of reaching agreement on a political conception, that of a *modus vivendi*. A social consensus based upon a *modus vivendi* is reached when the various parties find it to be in their own self-interest to abide by the conditions of a contract or a treaty. The overlapping consensus differs in two crucial respects from a *modus vivendi*. First the object of the consensus is a moral conception. And second, an overlapping consensus is affirmed on moral grounds, not on those of self-interest.[72] The solution to the problem of stability is found in the convergence of the various moral and religious views, each of which accepts the political conception from within their own comprehensive views.[73]

The Overlapping Consensus on Human Rights in Domestic Justice

We do not wish to go into the debate over whether a political conception of justice is possible,[74] but wish to outline the central position of rights and

[71] The insistence on the overlapping consensus should be understood in the same way. Its insertion puts less weight on the decision-making process in the original position. It is an appeal to experience and it expresses the belief that behind the many incompatible world-views in Western society, there is shared adherence in some crucial political ideas. Comp. with Richard Rorty, above n 60, 86, footnote 21. This author suggests that the whole of Rawls' work could be saved without having to make use of the 'original position'-technique.

[72] *Political Liberalism*, 147. Rawls' distinction between 'reasonable' and 'rational' and the idea of a consensus that is more than a modus vivendi, also figures in *The Law of Peoples*, § 2 and 5.

[73] 'For all those who affirm the political conception start from within their own comprehensive view and draw on the religious, philosophical and moral grounds it provides'. Cf *Political Liberalism*, 147; *Justice as Fairness. A Restatement*, § 58. Rawls has been largely criticised on the grounds that this freestanding, non-metaphysical conception is unable to provide an adequate justification for political principles. Many authors agree that something more is required if such principles are to be recognised as valid. Eg Joseph Raz, 'Facing Diversity: The Case of Epistemic Abstinence', *Philosophy and Public Affairs*, 1990, Vol 19, 3–46; Jurgen Habermas, 'Reconciliation Through the Public Use of Reason: Remarks on John Rawls' Political Liberalism', *Journal of Philosophy*, 1995, Vol 92, March, 109–180; Jean Hampton, 'Should Political Philosophy Be Done Without Metaphysics?', *Ethics*, 1989, July, 791–814; Peter Steinberger, 'The Impossibility of a Political Conception', *The Journal of Politics*, 2000, Vol 62, (febr.), No 1, 147–65. With regard to the overlapping consensus, Steinberger sees a contradiction between Rawls' argument that the political conception is accepted by reasonable people 'from within their own comprehensive views' and the argument that the consensus should be more than a modus vivendi, leaving aside the comprehensive views that have existed or still exist (Peter Steinberger, above 150). A possible reply to this argument can be found in: Terry Hoy, 'Rawls' Concept Of Justice As Political: A Defense Against Critics', Via http://www.bu.edu/wcp/Papers/Poli/PoliHoy.htm, 6p.

[74] Not everyone is convinced that the Rawlsian methods and concepts are workable. See the preceeding footnote. Steinberger, for instance, criticises the added value of Rawlsian concepts such as the *overlapping consensus* and the insistence on *reasonable* people following *reasonable* comprehensive doctrines (Peter Steinberger, above 156). Fundamentally, he criticises Rawls' reliance on claims with a highly metaphysical character (truth claims). The argument

liberties in this conception. Human rights and liberties such as political liberties and freedom of thought are essential for the development and full exercise of the two moral powers that men possess as opposed to animals.[75] Liberty of conscience and freedom of association enable citizens to develop and exercise their moral powers in forming, revising and rationally pursuing their own conceptions of the good.[76]

Human rights and liberties not only restrict the power of the state, but also empower citizens (or individuals) to participate in the political system.[77] This important function explains why, within the Western political tradition, it may not be too hard to find an overlapping consensus on the importance of basic liberties. They are part of the fundamental ideas that are familiar and are drawn from public political culture of a democratic society 'that has worked reasonably well over a considerable period'.[78] These rights and liberties are not only instrumental to the building of Rawlsian citizenship (below), they are also an important kind of 'primary goods'.[79] The first kind of primary goods that Rawls actually identifies are 'basic rights and liberties': '*freedom of thought and liberty of conscience, and the rest*'.[80]

for the difference principle, for instance, involves some sort of theory of metaphysical luck, a view on natural life as a sort of lottery generating inequality. A strict Calvinist, Steinberger holds, believing that there is no such thing as a lottery but only Divine election, would therefore have great difficulty accepting the justice of the difference principle (Peter Steinberger, above, 155. Rawls would demand a pragmatic or 'reasonable' Calvinist to adjust his or her view so as to accommodate justice as fairness, but this would be turning Calvinist theology on its head. The analysis shows that Rawls' liberalism is necessarily based on a structure of truth, like any other philosophy of politics. For a defense of Rawls' attempt to avoid philosophical discussion: Rorty, above n 60, 86–101.

[75] We saw that the concept of reflective equilibrium presupposes two moral powers, a capacity for reason and a sense of justice. The existence of these powers is included in the idea of free and equal persons.

[76] *Justice as Fairness. A Restatement,* § 13.4.

[77] See Cornelia Schneider, above n 2, 118 with reference to Charles Larmore ('The Foundations of Modern Democracy: Some Remarks on Dworkin and Habermas', *European Journal of Philosophy*, 1995 Vol 3, No 1, (55), 65) who has observed that 'individual rights serve, not to protect us against the collective will, but rather to protect the means necessary for creating a collective will'.

[78] *Justice as Fairness. A Restatement,* § 11.3.

[79] Primary goods are things that every rational man is presumed to want. They refer to things citizens need as free and equal persons living a complete life; they are not things it is simply rational to want or desire (*A Theory of Justice*, § 11). Social primary goods,—(i) liberty, (ii) opportunity, (iii) positions of authority, (iv) income and wealth, and (v) the bases of self-respect—, are to be distributed equally unless an unequal distribution of any or all is more appropriate. (*Justice as Fairness. A Restatement,* § 17.1 & 17.2). Next to these social primary goods, there are other 'natural' primary goods such as health and vigour, intelligence and imagination. Although their possession is influenced by the basic structure, they are not so directly under its control (*A Theory of Justice*, § 11).

[80] *Justice as Fairness. A Restatement,* § 17.2. A more precise listing of these basic rights and liberties and a closer analysis is absent in *A Theory of Justice*. Rawls only briefly contends that they are 'roughly speaking, political liberty (the right to vote and to be eligible for public office) together with freedom of speech and assembly; liberty of conscience and freedom of thought; freedom of the person along with the right to hold (personal) property; and freedom of arbitrary arrest and seizure as defined by the concept of the rule of law' (*A Theory of Justice*, § 11).

Rawls' theory shows a high priority for liberty. Basic liberties are primary social goods and henceforth stand central in the basic structure.[81] They are one of the first things a just society should distribute equally,[82] and are things that every rational man is presumed to want.[83] Moreover, the serial ordering of principles[84] expresses an underlying preference among primary social goods: claims of basic liberties are to be satisfied first.[85] Although not absolute, liberties have a special status;[86] they are related to the 'higher-order interests'.[87] *Liberty*, rather than wealth (once the minimum is assured) is what we most need to be a person rationally forming, revising and pursuing ends, or a 'plan of life'. Self-esteem is an important primary good, and 'the basis for self-esteem in a just society is not … one's income share but the publicly affirmed distribution of fundamental rights and liberties',[88] 'the public affirmation of the status of equal citizenship'.[89] To trade off equal liberty for income would diminish self-respect; those with less liberty would have to regard themselves as inferior in the public life of their society.

Why would people agree to this construction? Why should they accept the serial ordering? Why accept the first principle requiring basic liberties and allow the most extensive liberty? Rawls advances many

[81] We recall that primary goods are the object of a political conception of justice, which means that the two principles of justice (above) are to be applied to them (and them only): they are to govern the assignment of rights and duties and to regulate the distribution of social and economic advantages. As their formulation suggests, Rawls contends, these principles presuppose that the social structure can be divided into two more or less distinct parts. The second principle applies to those aspects of the social system that specify and establish social and economic inequalities, the first principle to those aspects that define and secure the equal liberties of citizenship. The basic rights and liberties are the object of the first principle. 'These liberties are all required to be equal by the first principle, since citizens, of a just society are to have the same basic rights' (*A Theory of Justice*, § 11).

[82] The first principle 'simply' requires that the constitutional rules defining these liberties apply to everyone equally and that they allow the most extensive liberty compatible with the like liberty for all. (*A Theory of Justice*, § 11).

[83] In *A Theory of Justice*, § 36 Rawls holds that basic liberties such as freedom of speech, assembly, conscience and thought are institutions 'required by the first principle'. With reference to Mill he offers a second justification: these basic liberties are also necessary if political affairs are to be conducted in a rational way.

[84] We recall Rawls' famous serial ordering of principles with the first principle prior to the second. This ordering means that a departure from the institutions of equal liberty required by the first principle cannot be justified by, or compensated for, by greater social and economic advantages.(*A Theory of Justice*, § 11). This conception rules out any trade-off between liberty and other primary goods. For instance, it will not allow restriction of liberty for the sake of productivity. The priority of liberty means that claims of liberty are to be satisfied first (*A Theory of Justice*, § 39). However, it will allow the restriction of one liberty to enhance another liberty. 'Liberty can be restricted only for the sake of liberty itself'. See more in detail about legitimate limitations of liberty: *A Theory of Justice*, § 39.

[85] *A Theory of Justice*, § 11.

[86] John Rawls, 'The Basic Liberties and Their Priority', in S MacMurrin (ed), *The Tanner Lectures on Human Values*, (Cambridge, Cambridge UP, 1982), 8–9.

[87] More in detail: RJ Kilcullen, 'John Rawls: Liberty', 1996, via http://www.humanities.mq.edu.au/Ockham/y64l15.html, 4p.

[88] *A Theory of Justice*, § 82.

[89] *Ibid.*

arguments,[90] but fundamentally he sees a desire for liberty at work,[91] and an opportunity for the adequate development and full exercise of the two powers of moral personality over a complete life.[92]

Rawls' Conception of Moral Personhood

Rawls' conception of moral personhood, introduced in *A Theory of Justice,* elaborated in his 1980 Dewey Lectures,[93] steadily gained importance throughout his work. Justice as fairness does not regard individual human beings (a result of birth) but individual human persons (a result of social processes) that are considered free and equal. Human persons are, according to Rawls, human moral agents that possess to the requisite minimum degree two fundamental moral powers: (1) a capacity for an effective sense of justice (the capacity to understand, apply and act from the principles of political justice) and (2) a capacity 'to form, to revise, and rationally to pursue a conception of the good (of what is of value in human life)'.[94] These two capacities 'define' the moral person,[95] since they allow human beings to engage in mutually beneficial social co-operation over a complete life and to be moved to honour its fair terms for their own sake.

If there is something universal in Rawls' work, it must be this concept of personhood based on anthropological premises.[96] Human beings are

[90] Part of the argument is presented as a fact: basic liberties are part of our political culture; an overlapping consensus about their importance is very likely.

[91] 'Under favourable circumstances the fundamental interest in determining our plan of life eventually assumes a prior place … [because of] the central place of the primary good of self-respect and the desire of human beings to express their nature in a free social union with others. Thus the desire for liberty is the chief regulative interest that the parties must suppose they all will have in common in due course' (*A Theory of Justice*, § 82). This desire is one of the guiding instruments when people placed in the original position chose a concept of justice. 'The supposition is that if the persons in the original position assume that their basic liberties can be effectively exercised, they will not exchange a lesser liberty for an improvement in their economic well-being, at least not once a certain level of wealth has been attained. It is only when social conditions do not allow the effective establishment of these rights that one can acknowledge their restriction. The denial of equal liberty can be accepted only if it is necessary to enhance the quality of civilisation so that in due course the equal freedoms can be enjoyed by all. Eventually there comes a time in the history of a well-ordered society beyond which the special form of the two principles takes over and holds from then on' (*A Theory of Justice*, § 82). When the obstacles that reduce the 'worth' of liberty are overcome there is 'a growing insistence upon the right to pursue our spiritual and cultural interests' (*ibid*).

[92] John Rawls, 'The Basic Liberties and Their Priority', above n 88, 7.

[93] John Rawls, 'Kantian Constructivism in Moral Theory' in *Journal of Philosophy*, Vol 77 (1980), No 9, 515–72.

[94] See for a definitive formulation: *Justice as Fairness. A Restatement,* § 7.

[95] *A Theory of Justice,* §§ 3–4.

[96] Jozef Van Bellingen, 'Gelijkheid in de *original position* bij J Rawls en de *ideale sprechsituation* bij J Habermas' in *Gelijkheid*, De Pauw F, Foriers P & Perelman Ch (Ed), (Publicaties van het centrum voor wijsbegeerte van het recht van de Vrije Universiteit Brussel, 1981), (235–71), 241.

essentially moral persons and as moral persons they are equal. Persons also have a capacity for social cooperation, that is they are capable of being normal and fully cooperating members of society over a complete life.

These two conceptions, the conceptions of the person and the associated conception of social cooperation, explain, according to Rawls, why parties in the original position are willing to accept the first principle and agree to the priority of the basic liberties.[97] People have a sense of justice or a capacity for and disposition to being reasonable and thus find themselves able and inclined to propose and honour fair terms of co-operation with others.

The Non-Metaphysical Nature of Civil Liberties and Human Rights

Once the principles of justice are chosen in the original position, there follow three further stages of implementation, as the parties move to a constitutional convention establishing rights of citizens, then to a legislative stage where the justice of laws and policies are considered, and finally to the stage of judicial interpretation of particular cases.[98] One of the first actions of this convention is to incorporate the basic liberties in a constitution in order to protect them.[99] Nowhere in *A Theory of Justice* does Rawls say that the work of the convention *should* result in the drafting of a bill of

[97] John Rawls, 'The Basic Liberties and Their Priority', 13 & 18.

[98] See the first chapter of the second part ('Institutions') of *A Theory of Justice*. This four-stage sequence is 'evidently' needed to simplify the application of the two principles of justice. In each further stage specific questions are considered. 'After having chosen the principles of justice, the veil of ignorance is partly lifted and the parties move to a constitutional convention to design a system for the constitutional powers of government and the basis rights of citizens' (*A Theory of Justice*, § 31). Note Rawls' use of the term basic rights.

[99] '(T)he first problem is to design a just procedure. To do this the liberties of equal citizenship must be incorporated into and protected by the constitution. These liberties include those of liberty of conscience and freedom of thought, liberty of the person, and equal political rights. The political system, which I assume to be some form of constitutional democracy, would not be a just procedure if it did not embody these liberties' (*A Theory of Justice*, § 31). This constitution, together with the two principles of justice, is a tool for orienting the work of the legislator (the third stage): statutes must satisfy not only the principles of justice, but whatever limits are laid down in the constitution. Rawls proposes an interesting division of labour between the second and the third stage, corresponding to the two parts of the basis structure: the first principle comes into play at the stage of the constitutional convention, the second principle at the stage of the legislature. Since the legislator has to respect constitutional constraints, this situation reflects the priority of the first principle (*A Theory of Justice*, § 31). This construction seems to suggest that not all interests can be uplifted to the constitutional level. Rawls apparently sees no room for such as third or fourth generation human rights. The constitution should establish a secure common status of equal citizenship and realise political justice. Social justice is the prime task of the legislator who can develop social and economic policies aimed at maximising the long-term expectations of the least advantaged under conditions of fair equality of opportunity *and* is subject to the duty to maintain equal liberties.

rights or a chapter on human rights in the constitution.[100] A political conception of justice does not imply a bill of rights,[101] certainly not an extensive one.[102] Also, next to the incorporation of the basic liberties, there is no absolute or pressing need to spell out 'the rights of man' or 'the rights of humans' in detail. There is no constitutional urge to work out an anthropological view on man in the second stage of justice as fairness. Regulating power and setting constraints on the work of the legislator are constitutional requirements.[103] Although more attention is paid to the problem of

[100] 'A bill of rights *may* remove certain liberties from majority regulation altogether, and the separation of powers with judicial review *may* slow down the pace of legislative change' (*A Theory of Justice*, § 37). The italics are added.

[101] One can even ask the question whether rights form an indispensable part of the basic structure. Are rights needed to bring about a just distribution of rights, opportunities, and wealth? Rawls' definition of the basic structure is not very precise. He obviously sees no harm in a general characterisation and makes no hard distinction between the institutions that make up the basic structure and those that do not. This 'loose characterisation of a rough idea' allows for flexibility in time. Depending on changing social circumstances it may even be possible that an institution could be part of the basic structure one day and not a part of it the next. The decision about what counts as part of the basic structure is made on instrumental grounds: would counting X as part of the basic structure enable us to meet the principles of justice? If so, it's in; if not, it's out. We would add the advantage of flexibility in space. For our judgements to be reasonable, they must usually be informed by an awareness of more specific, geographical circumstances. Especially in a historical perspective, but also in a comparative perspective, it cannot be excluded that (constitutional or social) systems without human rights still meet the principles of justice. Comp. *A Theory of Justice*, § 10. There is no ideal constitution; justice as fairness is not an account of how constitutional conventions actually proceed. According to Rawls the idea of a four-stage sequence is suggested by the United States Constitution and its history (cf the first footnote of the second part of *A Theory of Justice* on political justice). We recall that the original 1789 Constitution contained no bill of rights, although the 1776 Declaration of Independence declared their foundational weight and several important rights, especially with regard to the rule of law, are contained in the various provisions of the Constitution. For example the prohibition of ex-post-facto law in Article 1, section 9. An enumeration is contained in Alexander Hamilton, *The Federalist No 84*, (1788), included in The Federalist, *A Commentary on the Constitution of the United States*, (1787–1788), intr. by EM Earle, New York, The Modern Library, s.d., 556–57. See also: P Boon *Amerikaans staatsrecht*, (Zwolle, WEJ Tjeenk Willink, 1992), 125–30.

[102] 'The reason for this limit on the list of basic liberties is the special status of these liberties. Whenever we enlarge the list of basic liberties we risk weakening the protection of the most essential ones and recreating within the scheme of liberties the indeterminate and unguided balancing problems we had hoped to avoid by a suitably circumscribed notion of priority' (John Rawls, 'The Basic Liberties and Their Priority', above n 88, 10).

[103] Rawls stresses the political function of the constitutional convention. A just constitution is one that rational delegates, subject to the restrictions of the second stage, would adopt for their society and in it a legislator can find guidance finding authorised ways to deal with questions of social and economic policy (*A Theory of Justice*, § 31 *in fine*). The idea that power should be checked can also be found in some of the pages in *A Theory of Justice* with a Hobbesian undertone. An effective penal machinery, Rawls contends, is needed to guarantee men's security to one another. At the same time, the risks of setting up such a coercive agency have to be minimised (*A Theory of Justice*, § 38). These paragraphs show that power, or rather the way to control it, is a central issue that stands high on the constitutional agenda. The constitution in a just society is about power and its limits, not about the nature of humans. Power can be exercised by other agents than human individuals. Private organisations can hamper schemes of cooperation and need to be controlled. But the way this control is exercised also needs to be controlled. This can be deduced from the priority rule. When people in the original

regulating the basic liberties in Rawls' later work,[104] there is throughout all of Rawls' work a concern for political consensus: keeping metaphysical values out of the constitutional work and a priority for the liberties contained in the first principle of justice.[105]

The political, non-metaphysical, nature of the constitutional convention finds an echo in Rawls' *general description of liberty*.[106] It follows from this description that, not only humans, but also associations and states are

position assume that their basic liberties can be effectively exercised, they will not exchange a lesser liberty for whatever reason. On the contrary, they will seek to secure the free internal life of the various communities of interest in which persons and groups seek to achieve, in modes of social union consistent with equal liberty, the ends to which they are drawn (*A Theory of Justice*, § 82).

[104] Further specification of the basic liberties into a workable constitutional arrangement to regulate their use, becomes a primary task of the convention in Rawls' later work. See John Rawls, 'The Basic Liberties and Their Priority', above n 88, 11. The outcome of this work is not fixed: 'the delegates to a constitutional convention, or the members of the legislature, must decide how the various liberties are to be specified so as to yield the best total system of equal liberty. They have to balance one liberty against another. The best arrangement of the several liberties depends upon the totality of limitations to which they are subject, upon how they hang together in the whole scheme by which they are defined' (*A Theory of Justice*, § 32). *A Theory of Justice* contains two colorful examples of the kind of arrangements that can be made (see *A Theory of Justice*, § 37 and § 39) In one arrangement political rights are limited to the advantage of those having superior wisdom and judgement. Admitting certain assumptions, plural voting may be perfectly just, Rawls contends with much reserve. In another arrangement less advantageous situations are accepted with regard to the rule of law, for the sake of efficiency. Arrangements of this kind are possible within justice as fairness, granted that arguments for restricting liberty proceed from the principle of liberty itself.

[105] The early Rawls would certainly oppose extensive constitutions with a strong ethical footing (for instance, with references to the dignity of the person). For Rawls, parties must choose principles in light of the possibility that they might be anything from religious ascetics to atheistic libertines. The result is a regime of toleration, with strong protections for the freedom of individuals and associations to pursue different ends in life. The sense of justice should lead us not to want to impose our own conception of the human good on others against their will, even if we have the political power to do it by voting text with fundamental rights. Comprehensive values of religion and ultimate ends should be left to voluntary communal and personal pursuit. See on Rawls' method of avoidance, below.

[106] 'liberty can always be explained by a reference to three items: the agents who are free, the restrictions or limitations which they are free from, and what it is that they are free to do or not to do. Complete explanations of liberty provide the relevant information about these three things. Very often certain matters are clear from the context and a full explanation is unnecessary. The general description of liberty, then, has the following form: this or that person (or persons) is free (or not free) from this or that constraint (or set of constraints) to do (or not to do) so and so. Associations as well as natural persons may be free or not free, and constraints may range from duties and prohibitions defined by law to the coercive influences arising from public opinion and social pressure. For the most part I shall discuss liberty in connection with constitutional and legal restrictions. In these cases liberty is a certain structure of institutions, a certain system of public rules defining rights and duties. Set in this background, liberty always has the above three-part form. *Moreover, just as there are various kinds of agents who may be free—persons, associations, and states—so there are many kinds of conditions that constrain them and innumerable sorts of things that they are or are not free to do. In this sense there are many different liberties which on occasion it may be useful do distinguish.* Yet these distinctions can be made without introducing different senses of liberty.

agents capable of enjoying freedom, liberties and rights. Rights do not have a 'human' character *per se*. Firms and other associations can and may claim protection against limitations of their liberty. Just like the 'peoples' (societies),[107] they form artificial corporate agents of the requisite moral nature, capable of making conflicting claims upon one another—claims the right resolution of which is a matter of justice.

The foregoing shows the positivistic nature of the outcome of the constitutional convention. It may look tempting to draw a distinction between *human rights*—universal rights derived from natural law which has evolved out of natural rights—and *civil rights* or *civil liberties*,—rights that the state has contracted with its citizens and are political in nature.[108] In this context *human rights* are understood not as positivistic in the sense that the state has contracted a deal with its citizenry, but as natural in origin.[109] They are rights necessary in order for people to be able to survive in the world at large: the right to life; freedom from torture or inhuman or degrading treatment or punishment, freedom from slavery, servitude, and forced labour; the right to free movement (mobility); and, the right to food and shelter.[110]

However, there is no basis on which to consider the basic liberties that Rawls identifies as *human rights*. Rawls does not speak of *human rights* in the context of domestic justice and he would certainly object to a natural law foundation for the basic liberties.[111] In his last work, *The Law of*

Thus persons are at liberty to do something when they are free from certain constraints either to do or not to do it and when their doing it or not doing it is protected from interference by other persons. If, for example, we consider liberty of conscience as defined by law, then individuals have this liberty when they are free to pursue their moral, philosophical, or religious interests without legal restrictions requiring them to engage in any particular form of religious or other practice, and when other men have a legal duty not to interfere. A rather intricate complex of rights and duties characterises any particular liberty. Not only must it be permissible for individuals to do or not to do something, but government and other persons must have a legal duty not to obstruct. I shall not delineate these rights and duties in any detail, but shall suppose that we understand their nature well enough for our purposes' (*A Theory of Justice*, § 32). The italics are added.

[107] See on this notion: John Rawls, *The Law of Peoples*, (Cambridge, Mass. Harvard University Press, 1999), § 2.

[108] Jonathan Black-Branch, 'The Evolution and Development of Human Rights and Civil Liberties', (Chapter 1 in E Shorts & Cl) De Than, *Civil Liberties. Legal Principles of Individual Freedom*, (London, Sweet & Maxwell, 1998), 1–14.

[109] Jonathan Black-Branch, above, with ref. to Hart's analysis of natural law and the minimal content of natural law in chapter IX of *The Concept of Law* (HLA Hart, *The Concept of Law*, (2d ed) (Oxford, Clarendon Press, 1994).

[110] *Ibid*.

[111] Basic liberties can only be given priority under 'reasonable favourable conditions', that is, under social circumstances which, provided the political will exists, permit the effective establishment and the full exercise of these liberties. 'These conditions are determined by a society's culture, its traditions and acquired skills in running institutions, and its level of economic advance (which need not be especially high), and no doubt by other things as well' (John Rawls, 'The Basic Liberties and Their Priority', above n 88, 11).

Peoples, published in 1999, the issue of human rights is considered in the context of global justice. No approximation is made between these rights and the basic liberties at the heart of the principles of justice in the context of the political project of domestic (Western) justice.

There are many interpretations possible of the minimal content of natural law. Hart, a defender of the natural law basis of law, discusses a range of interpretations, ranging from very attenuated (a right to survive) to more complex (for instance, the right to cultivation of the human intellect).[112] In the line of thought of Hobbes and Hume, Hume singles out the goal of survival as the core essence of natural law, which results in a very limited list of human rights (above). Rawls' list is longer and comprises rights that are not only conducive to survival.[113] Rawls refutes all reference to natural law as a basis for his list.[114] Human rights, Rawls contends, are just those rights possessed by all human beings by virtue of their compelling basic interest in or claim to genuine membership of one or another group of people. Rawls describes these rights as the 'necessary conditions of any system of social cooperation',[115] and as a special class of urgent rights.[116] They express the minimum social conditions that one must obtain if individual human beings are to realise themselves as human persons through social life with others, through belonging to a people. They are properly speaking the only human rights.

The Political Function of Human Rights

The Law of Peoples is a book about 'global justice' as opposed to 'domestic justice' (above). This book tries to specify what kind of foreign policy liberal justice requires. How should political liberalism seriously address people outside the modern liberal consensus? Are we to reject all political systems that do not honour our basic liberties? Is trade possible with systems that do not acknowledge the Universal Declaration of Human Rights?

[112] HLA Hart, above n 111, 191–192.
[113] These rights are, in Rawls' view, subsistence and security rights, certain liberty rights (freedom from slavery, serfdom, forced occupation, and a freedom of conscience sufficient to underwrite freedom of religious practice and thought), the right to personal property, and the right to formal justice and the rule of law (*The Law of Peoples*, 79).
[114] The non-metaphysical nature of human rights is explicitly stated. 'These rights do not depend on any particular comprehensive religious doctrine or philosophical doctrine of human nature. The Law of Peoples does not say, for example, that human beings are moral persons and have equal worth in the eyes of God; or that they have certain moral and intellectual powers that entitle them to these rights. To argue in these ways would involve religous or philosophical doctrines that many decent hierarchical peoples might reject as liberal or democratic, or as in some ways distinctive of Western political tradition and prejudicial to other cultures' (*The Law of Peoples*, 68).
[115] *The Law of Peoples*, 68.
[116] *The Law of Peoples*, 79.

Rawls addresses the issue in terms of 'peoples' (societies), not 'states' or 'individuals'. According to Rawls, the fundamental division is not between democratic and non-democratic societies (peoples) or liberal and non-liberal, but between decent and non-decent or outlaw peoples. Reasonable liberal peoples, that is societies that satisfy the criteria for a liberal democracy, should show respect for decent societies,[117] but not for non-decent societies that violate human rights.

We have already discussed Rawls' list of human rights. It is a limited list, which implies that foreign liberal policy should not be as demanding as can be expected in relations between liberal democratic states.[118] Rawls' conception of human rights falls well short not only of liberal democratic principles of justice, but also of the Universal Declaration of Human Rights and contemporary human rights discourse and practice. But it is nevertheless a liberal conception and is so in several regards. First, it tries and claims to be liberal without any metaphysical foundations.[119] Secondly, it is more extensive than the list of human rights based on the natural law concept of survival (discussed above), especially where it includes typical liberal rights such as freedom of conscience. Thirdly, it is liberal in the sense that it calls for tolerance towards other systems or concepts of justice. Rawls is much more looking for a theory on human rights which takes account of the differences that exist between societies, without prejudicing the universal moral core of

[117] The significant difference between reasonable and decent peoples is one of degree; decent peoples are capable of achieving that which exists in a liberal society, the problem being that electoral representation is not equal: one person does not necessarily equal one vote. As a result, such peoples may be seen as potentially liberal, only the mechanisms are not in fully in place to realise this.

[118] On Rawls's account, there is no human right to democratic domestic institutions. There is also no human right, where there are democratic domestic institutions, to universal suffrage. Rawls tries to make a clear distinction between the basic rights of a human being and the rights that every citizen has in a constitutional democracy. The rights mentioned in Articles 3 to 18 in the Universal Declaration on Human Rights, are, following Rawls, human rights in the strict sense of the word (*The Law of Peoples*, 80). Rights that fall outside this core of basic rights, do not belong to the category of human rights. Human rights are a subset of liberal rights. It is clear that Rawls does not attach great value to the precise content of the Universal Declaration on Human Rights. This text, supplementing a list of traditional individual and political liberties, with rights such as those to social security (Article 22), to work (Article 23) and to rest and leisure (Article 24), does not contain any overlapping consensus envisaged by Rawls, but is only a *modus vivendi*. It is a compromise, not a basis.

[119] Rawls' firm rejection of all ethical footing for this list (above) can account for this. However, we are not wholly convinced by Rawls' assertion that his list does not depend on a comprehensive world-view. One can easily discern the typical Rawlsian concern for the need to develop as a moral person. The equality of humans as moral persons is the anthropological starting-point in *A Theory of Justice* and in *The Law of Peoples*. Humans are moral agents possessed to the requisite minimum degree of the two fundamental moral powers, are a complex social achievement. Essential to that achievement, on Rawls's view, is genuine belonging to a people, for individual human beings cannot collectively and fully constitute themselves as human persons apart from membership within a people. Cf David A Reidy, 'Peoples, Persons and Human Rights: Defending Rawls's View', via http://web.utk.edu/~dreidy/ rawlshuman-rights.html (consulted in 2002), 7p.

these rights. Rawls' political conception of human rights suggests a reason for the lack of human rights theories which do not depart from pluralism at the international level of different societies each of which has its own language, culture, history and an all-embracing conception of justice.[120] Rawls does not regard human rights so much as fundamental rights that should belong to every human being, but more as the minimum condition for the decency of modern societies. Human rights are primarily presented as part of the political relations between peoples. Peoples are to honour human rights. Political liberalism entails a degree of inter-societal toleration for differences in conceptions of justice, including some 'decent' non-liberal conceptions.[121] However, tolerance has limits, and does not extend to outlaw societies that violate the most basic human rights of their subjects or engage in aggression against their neighbours. An outlaw state that violates human rights is to be condemned and in grave cases may be subjected to forceful sanctions and even to intervention.[122]

After having highlighted the liberal aspects of Rawls' conception of human rights and its potential for legal understanding of rights in comparative law, we want to focus on the price paid by Rawls in terms of coherence and liberalism.

PART III. AN INTERNAL CRITIQUE OF RAWLS' THEORY OF HUMAN RIGHTS

The Liberty Paradigm in Theory of Justice

With the notion of a *liberty paradigm*, which we oppose to the notion of a *rights paradigm*, a political view is characterised that departs from the interlinked ideas of freedom of the individual, liberalism and of government by consent.[123] Beccaria, Constant and Mill are typical exponents. In this

[120] These societies will have their own interpretation of rights that belong to their members and they will enforce these rights in their own way. In this it might occur that members of different societies will have different kind of rights. For instance, there is in practice no right on periodical paid holidays outside some Western states. In theory this does not say a lot on the universality of this right, but it does show that there is no consistent body of rights which can be applied everywhere in a consistent way. Such a demand would go against the principle of respect which underlies every theory on human rights. Rights can't be imposed upon societies in an abstract way. Every theory of human rights will have to take notice of the interests, beliefs and the identity of individuals and the values and way of live of communities. Without such sensitivity for the context in which rights have to function, a theory on human rights will lose its meaning.

[121] Thomas Nagel, 'The rigorous compassion of John Rawls. Justice, Justice, Shalt Thou Pursue', *The New Republic*, 1999, via www.thenewrepublic.com, 8p. sub VI.

[122] *The Law of Peoples*, 81.

[123] Cf P De Hert & S Gutwirth, 'Tussen vrijheid en grondrechten. Een paradigmastrijd met blijvende actualiteitswaarde' [Between freedom and rights. A paradigmatic strife with persistant actuality] , *Nederlands Tijdschrift voor Rechtsfilosofie & Rechtstheorie* 2000/3, 205–14.

liberal paradigm the public sphere is created by the general consent of free and equal subjects. Notwithstanding the fact that individuals are naturally free and private entities, the necessity for the creation of a collective state is readily accepted (precisely because this state must enable the concrete experience of this individual liberty). The justification for the state is often found in the fiction of a social contract, in which the individual contracts with the sovereign to give up a portion of his freedom in return for the security of civil society.[124] Under the social contract, power is conceived of as flowing up from the individual, rather than down through a natural hierarchy. The individual is the basic political unit. Free consent is the only legitimate foundation for any binding relationship. Government and other social actors cannot infringe upon liberty without a contractual basis or without consent, and this only when restrictions of liberty are needed for the sake of liberty. The state is the servant of the individual, and not vice versa.[125] Human rights, viz. prerogatives for the citizens, are not likely to be needed in a system of liberty based on a reversal of principle. The prerogatives of the state, rather than these of the citizen must be outlined.

Historically, the liberty paradigm had a brief moment of institutional glory at the end of the eighteenth century. The ideas behind it are clearly recognised in articles 4 and 5 of the French 1789 *Déclaration*[126] and in the work of Hamilton laying the foundation for the 1787 US Constitution. We recall that this constitution was originally conceived without a bill of rights. To Madison's question 'Is a bill of rights essential to liberty?'[127] Hamilton answers firmly 'no',[128] and he advances several arguments that taken together account for the core essence of the liberty paradigm.[129] Wilson took a corresponding position on the protection of rights. A bill of rights

[124] The contract method, absent in Mill's work, is not indispensable, but broadens the argument. In a strict understanding of this method, it should be assumed that the contractors do not give away their freedom. They contract in order to form government by consent.

[125] Luke Harris, 'The State, the Family and the Private Space: Reconstructing the Liberal Vision', *University College London Jurisprudence Review*, 2000, (278–300), 280–82.

[126] Article 4 reads as follows: 'La liberté consiste à pouvoir faire tout ce qui ne nuit pas à autrui; ainsi, l'exercice des droits naturels de chaque homme n'a de bornes que celles qui assurent aux autres membres de la société la jouissance de ces mêmes droits. Ces bornes ne peuvent être déterminées que par la loi'.

Article 5 reads as follows: 'La loi n'a le droit de défendre que les actions nuisibles à la société. Tout ce qui n'est pas défendu par la loi ne peut être empêché, et nul ne peut être contraint à faire ce qu'elle n'ordonne pas'.

[127] James Madison, *The Federalist No 38*, (1788), included in The Federalist, above n 103, 240.

[128] Alexander Hamilton, above n 101, 555–67.

[129] Some crucial rights against 'the favorite and most formidable instruments of tyranny', such as arbitrary imprisonment and the creation of crimes after the commission of the fact, are already explicitly contained in the 1787 Constitution and that should be enough, Hamilton held (A Hamilton, above n 101, 557). But, he continues, there is also a matter of principle. History teaches us that bills of rights are no more than reservations of rights not surrendered to the government, and therefore, they have no place in constitutions based on the power of the people: 'Here, in strictness, the people surrender nothing; and as they retain every thing they have no need of particular reservations: We, the people of the United States, to secure the

was not necessary because the people could recall governmental powers at will:

> Those who ordain and establish have the power, if they think proper, to repeal and annul. A proper attention to this principle may, perhaps, give ease to the minds of some who have heard so much concerning the necessity of a bill of rights.[130]

An additional argument focuses on popular sovereignty. Incorporating (comprehensive) values into the constitution would be detrimental to politics, since constitutions have higher legal value and bind the legislator.[131] Technically this implies that in legal systems with no flexible procedures to initiate constitutional amendment, the democratic process is seriously impeded.

There is a lot in the early Rawls, which brings him within the liberal liberty paradigm,[132] and Rawls' use of the contract doctrine can be easily framed within Hamilton's conception of liberty and government by consent. In political liberalism, there is no such thing as a duty free (or a free from

blessings of liberty to ourselves and our posterity, do *ordain* and *establish* this Constitution for the United States of America' (A Hamilton, above n 101, 558. Italics in the quotation of the Declaration are in Hamilton's paper). Why should some rights be reserved, when the only matters that need to be discussed are the duties of the governmental institutions? Including a bill of rights is not only unnecessary, but would even be dangerous, since the provisions would contain various exceptions to powers not granted. Moreover, every enumeration of rights would offer a pretext to infringe them. Take for example, a provision stating that 'the liberty of the press shall not be restrained'. Not only is there no reason for such a provision (since no power is given by which restrictions may be imposed) but also it would be easy for people in power to hold that the provision in question implies that a power to prescribe proper regulations concerning it was intended to be vested in the national government (A Hamilton, above n 101, 559).

[130] James Wilson, Pennsylvania Convention, in *Documentary History of Ratification*, 2:383, 388 (28 November 1787). About the similarities and differences between Hamilton's and Wilson's analysis and about the general context of the debate about a bill of rights: Wayne Moore, *Constitutional Rights and Powers of the People*, (Princeton, Princeton UP, first edition 1996), (2nd edn 1998), (296 p) chapters 3 and 4, esp. p 111.

[131] The immunisation of issues by giving them the status of human rights, is also strongly criticised by Richard Bellamy, *Liberalism and Pluralism. Towards a Politics of Compromise*, (London, Routledge, 1999), 245p. The second part of this work contains an alternative for the traditional Western model based on separation of powers and a bill of rights. The first part contains a critique of Rawls. It is our contention that the young Rawls was much closer to Bellamy, than is shown by the analysis of Bellamy. At the end of this chapter we will see that the later Rawls moves much more in line with the traditional model.

[132] The focus on the basic structure (and on nothing else) echoes the observation made by J S Mill that individuality should belong to the part of life in which it is chiefly the individual that is interested; to society, the part which chiefly interests society (Mill, *On Liberty*, (first published in London 1985) pf Collier & son, (Harvard classics Volume 25) 1990, p 141. Very much like *On Liberty, Theory of Justice* does not provide an explicit answer to the question of what is to be included in 'liberty'. There is seemingly no need to identify the components of liberty. Also, there is Rawls' notion of 'greatest equal liberty', meaning that liberty could only be restricted for the sake of liberty.

constraints) zone for the government. From the start, justice as fairness has inbuilt limitations, for instance regarding its scope.[133] The desire for liberty is the chief regulative interest, and explains why all forms of accumulation of power or use of power are assessed in the light of their impact on liberty. Hence, all actions of governmental agencies, also when directed against agents other than individuals, have to confirm to the two principles. There is no need to reduce the scope of the constitution to the protection of the liberties of individuals. 'Associations as well as natural persons may be free or not free, and constraints may range from duties and prohibitions defined by law to the coercive influences arising from public opinion and social pressure'.[134] The role of public opinion set aside, there should be a legal basis to constrain the liberties enjoyed by moral actors such as citizens and associations.

Although Rawls often speaks of 'basic rights and liberties', he actually has in mind mainly 'liberties'.[135] Liberty, for Rawls, is a complex of rights and duties defined by institutions. Rawls' observation that 'the various liberties specify things that we may choose to do, if we wish, and in regard to which, when the nature of the liberty makes it appropriate, others have a duty not to interfere'[136] is very far from Hohfeld. In an important footnote he then acknowledges a strong link between liberties and duties, denied by Hohfeld.[137] No need, for Rawls, to rephrase his liberty thoughts in terms of rights, or to make any distinction. When he says 'basic rights' he means 'basic liberties', when he says 'rights' he means 'rights defining basic liberties'.

The Rights-Paradigm as a Response to Hart's Critique

Most of Rawls' work written after *A Theory of Justice* has been devoted to the elaboration and defence of the two principles of justice. Many critics considered them to be too indeterminate.[138] Hart in particular made a dual

[133] We recall that the principles of justice have a limited reach. They do not apply to all social institutions, but regulate only those institutions whose regulation is needed to bring about a just distribution of rights, opportunities, and wealth. They won't regulate institutions that are irrelevant to the distribution of these things.
[134] *A Theory of Justice*, § 32.
[135] When discussing 'roughly' the *basic rights and liberties*, Rawls continues in the following terms: 'These *liberties* are all required to be equal by the first principle, since citizens of a just society are to have the same basic *rights*' (*A Theory of Justice*, § 11. The italics are ours).
[136] *A Theory of Justice*, § 38.
[137] 'It may be disputed whether this view holds for all rights, for example, the right to pick up an unclaimed article. See Hart in *Philosophical Review*, vol 64, p 179. But perhaps it is true enough for our purposes here' (*A Theory of Justice*, § 38).
[138] More subtle is the argument that a broad interpretation of this term could endanger the social policies called for by the second principle. 'If this term used in the first principle would be taken broadly so that it includes unrestricted economic liberty, the result would be extreme

critique of Rawls' *A Theory of Justice*.[139] According to Hart the grounds upon which the parties in the original position adopt the basic liberties and agree to their priority are not sufficiently explained.[140] In response, Rawls stresses that the basic liberties and the grounds for their priority can be founded on the conception of the citizens as free and equal persons.

We already discussed anthropological premises behind Rawls' concept of personhood. Every human being has a capacity to act as a moral person. On these (anthropological) premises Rawls built his ('normative') idea of the equal citizen, viz. moral persons that are considered free and equal and willing to engage in mutually beneficial social cooperation over a complete life. Justice as fairness does not regard individual human beings (given by nature) but individual human persons (not given by nature) that are considered free and equal. Those who can take part in social cooperation over a complete life, and who are willing to honour the appropriate fair terms of cooperation, are regarded as equal citizens.[141] Rawls insists on the political nature of these concepts,[142] which are culturally

economic laissez-faire; but that is not what Rawls has in mind. The equal liberties that he thinks justice requires are personal and civil liberties, and basic political rights; they do not include unrestricted freedom of contract and disposition of property, or freedom from taxation for redistributive purposes'. Cf Thomas Nagel, The rigorous compassion of John Rawls. Justice, Justice, Shalt Thou Pursue', *The New Republic*, 1999, via www.thenewrepublic.com, 8p. Very often the critiques on *A Theory of Justice* are juiced by traditional arguments against liberalism. This school of thought is refuted by its opponents because it is found to lack definite content with respect to the nature, distribution, and limits of the liberty it seeks to prioritise. The principles of liberty advocated, be it Mill's harm principle or Rawls' principle of equal liberty and his account of basic liberties or other formulations, are considered to be intractably vague and inherently controversial. Cf J Gray, *Liberalisms: Essays in Political Philosophy*, London, Routledge, 1989), 233.

[139] HLA Hart, 'Rawls on Liberty and Its Priority', in Hart, *Essays in Jurisprudence and Philosophy*, 232–38. Hart's critique was first published in N Daniels (ed), *Reading Rawls. Critical Studies of A Theory of Justice*, (Oxford, Basil Blackwell, 1978), 230–53. Rawls' first reply is contained in: John Rawls, 'The Basic Liberties and Their Priority', in S MacMurrin (ed), *The Tanner Lectures on Human Values*, (Cambridge, Cambridge UP, 1982), 1–88. Later responses are to be found in *Justice as Fairness. A Restatement,* § 32.3 and *Political Liberalism*, §§ 2, 3 and 9. See also Chandran Kukathas & Philip Pettit, *Rawls. A Theory of Justice and its Critics*, (Stanford, Stanford UP, 1995), 130–31

[140] See, John Rawls, 'The Basic Liberties and Their Priority', 13–18.

[141] John Rawls, 'The Basic Liberties and Their Priority', above n 88, 16.

[142] In a very short paragraph in *A Restatement*, Rawls discusses the four terms (free, equal, capacity for justice and capacity for the good) that are crucial for understanding his concept of personhood. Most of his attention goes to the notions 'free' and 'equal' (about the meaning of 'free' and 'equal': *Justice as Fairness. A Restatement,* § 7.3 & 7.4) and how his 'normative' standpoint of liberal democratic citizenship can be most profitably understood. The accompanying powers are not to be taken as part of human nature or as universally present as faculties in all human beings. His idea of a person is not taken from metaphysics or the philosophy of mind, or from psychology, but belongs to a political conception of justice, that is, the conception of the person as citizen. John Rawls, 'Justice as Fairness: Political not Metaphysical', *Philosophy and Public Affairs*, above, 240. The said powers are culturally produced in persons in order to enable those persons to be full participants in a liberal democratic

produced.[143] His view of liberal democratic citizenship is of a normative nature. The source of liberal democratic moral ideals is to be found in the public culture of modern constitutional democracies. His contention that a lot of this cultural production has taken place in human rights bills is amusing.[144] Legal arguments, not wholly plausible,[145] are used to introduce and give weight to a philosophical concept that must enable Rawls to attempt to win the acceptance of his Western audience and especially of those who oppose a thin, political liberal concept of justice (below).

Hart also pointed out an ambiguity in *A Theory of Justice* in which Rawls defended specific basic liberties and yet maintained a principle of

political community. 'I emphasise that the conception of the person as free and equal is a normative conception: it is given by our moral and political thought and practice, and it is studied by moral and political philosophy. Since ancient Greece, both in philosophy and in law, the concept of the person has been that of someone who can take part in, or play a role in, social life, and hence who can exercise and respect its various rights and duties. As suits a political justice that views society as a fair system of cooperation, a citizen is someone who can be a free and equal participant over a complete life. This conception of the person is not to be mistaken for the conception of a human being (a member of the species homo sapies) as the latter might be specified in biology or psychology without the use of normative concepts of various kinds, including, for example, the concepts of the moral and political virtues' (*Justice as Fairness. A Restatement,* § 7.6.). Interesting is the example of slavery. Slavers are human beings who are not counted as sources of valid legal or social claims. 'Slaves are, so to speak, socially dead: they are not recognized as persons at all' (*Justice as Fairness. A Restatement,* § 7.5.).

[143] We recall Rawls' insistence on the noncontroversial nature of the political conception of justice, having its basis in ideas that are 'latent in the public political culture', one of which is precisely the idea of free and equal citizens (*Political Liberalism*, 14).

[144] Also illustrative is his contention that 'the conception of the person is worked up from the way citizens are regarded in the public political cultural of a democratic society, in its basic political texts (constitutions and declarations of human rights) and in the historical tradition of the interpretation of those texts. For these interpretations we look not only to courts, political parties, and statesmen, but also to writers on constitutional law and jurisprudence, and to the more enduring writings of all kind that bear on a society's political society' (*Justice as Fairness. A Restatement,* § 7.2).

[145] In our introduction we highlighted some basic political texts, such as the German Constitution and International Covenant on Civil and Political Rights, that were centered around the notion of person. However, not all rights and liberties are linked to the notion of person (some protect the 'human being' or 'everyone'), and not all basic texts in the Western world have the same ethical content, as the German one, drafted after Word-War II, with the atrocities of Hitler in mind. It is amusing in this regard to look at the 1948 Universal Declaration of Human Rights. Some of Rawls' intuitive ideas find a strong echo in the Preamble stating that 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world'. Nevertheless, there is talk of 'human beings' not 'persons' in the opening articles. Cf *Article 1:* 'All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood'. *Article 2:* 'Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty'.

greatest equal liberty in more general terms (holding that liberty could only be restricted for the sake of liberty). Hart's critique was politically neutral: he simply did not see how the notion of 'greatest equal liberty' was to be further specified in the three next stages of implementation (constitutional convention, legislator, judges). How could the first principle, understood as a principle of greatest equal liberty in more general terms, be of much use in this process? A coherent interpretation of *A Theory of Justice*, Hart noted, suggested that Rawls meant only to defend certain basic liberties and not liberty in general. Rawls concurred[146] and altered the formulation of the first principle of justice, making it look less an account of *liberty* and more an account of *liberties* or *rights*.[147] The departure from the liberty-paradigm in *A Theory of Justice* is clear.

Rawls, in response to Hart, not only selects basic liberties from others, but also introduces an additional criterion of significance, based on his concept of person and especially on the two moral powers that are implied in this concept.[148] Not all basic liberties are basic, Rawls seems to think, and even within the truly basic liberties there are differences. Some of the basic liberties are more valuable than others, and different liberties are

[146] He did not wish to defend the priority of liberty as such, but certain basic liberties. Wherever he used the phrase 'basic liberty' or simply 'liberty' in *A Theory of Justice*, he should have used 'basic liberties'. Not *liberty* but a specific list of basic liberties is to be considered as one to be specified further at the constitutional, legislative, and judicial stages (John Rawls, 'The Basic Liberties and Their Priority', 7). See also *Justice as Fairness. A Restatement,* § 32.3: ('A serious defect in *Theory* is that its account of the basic liberties proposes two different and conflicting criteria, both unsatisfactory. One is to specify those liberties so as to achieve the most extensive scheme of the liberties (*Theory*, § 32, 37 and 39); the other tells us to take up the point of view of the rational representative equal citizen, and then to specify the scheme of liberties in the light of that citizen's rational interests as known at the relevant stage of the four-stage sequence (*Theory*, § 32 and 39). But (as Hart maintained) the idea of the extent of a basic liberty is useful only in the least important cases, and citizens' rational interests are not sufficiently explained in *Theory* to do the work asked of them').

[147] In *A Theory of Justice* Rawls states the first principle as follows: 'Each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others'. Later on in *A Theory* this principle receives its definitive formulation: 'Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all' (*A Theory of Justice*, § 46). In his later work Rawls alters the beginning of the first principle by replacing the phrase 'each person has an equal right' to 'each person has an equal claim.' He also replaces the phrase 'the most extensive system of basic liberties' with the phrase 'a fully adequate scheme of equal basic rights and liberties' (John Rawls, 'The Basic Liberties and Their Priority', above n 5). Here is how the principles are stated in *Political Liberalism*: (1) Each person has an equal claim to a fully adequate scheme of equal basic rights and liberties, which scheme is compatible with the same scheme for all; and in this scheme the equal basic liberties, and only those liberties, are to be guaranteed their fair value. (2) Social and economic inequalities are to satisfy two conditions: first, they are to be attached to positions and offices open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least advantaged members of society. (*Political Liberalism*, 5–6).

[148] *Justice as Fairness. A Restatement,* § 32; John Rawls, 'The Basic Liberties and Their Priority', above n 88, 46–87.

valued for different reasons. Some have intrinsic value, while others such as the political liberties are valuable largely because they are instrumental in preserving other liberties.[149] When basic liberties conflict, there is no need for balancing. The fully adequate scheme of the truly important basic liberties provides for all the answers.[150] This claim is followed by a demonstration with regard to free speech and the problem of libel [151] and with regard to property.[152]

Strategic Advantages and Merits of Rawls' Fully Adequate Scheme of the Truly Important Basic Liberties

Some authors have been dissatisfied about Rawls' failure to explain the changes to the first principle and how they affect his conception

[149] In short this assessment has the following result: equal political liberties and freedom of thought are truly basic because they are instrumental to our sense of justice; liberty of conscience and freedom of association are truly basic because they are instrumental to the capacity for a conception of the good; the remaining basic liberties (the liberty and integrity—physical and psychological—of the person and the rights and liberties covered by the rule of law) are also important, but a bit less, since they are merely supporting liberties (*Political Liberalism*, 292–298; *Justice as Fairness. A Restatement,* § 32).

[150] 'Given this division of the basic liberties, the significance of a particular liberty is explained as follows: a liberty is more or less significant depending on whether it is more or less essentially involved in, or is a more or less necessary institutional means to protect, the full and informed exercise of the moral powers in one (or both) of the two fundamental cases. The more significant liberties mark out the central range of application of a particular basic liberty; and in cases of conflict we look for a way to accommodate the more significant liberties within the central range of each' (*Justice as Fairness. A Restatement,* § 32.5).

[151] 'Libel and defamation of private persons (in contrast with political and other public figures) has no significance at all for the free use of public reason to judge and regulate the basic structure'. Therefore a different solution is conceivable (*Justice as Fairness. A Restatement,* § 32.5).

[152] The right to property forms a basic right, since it allows a sufficient material basis for personal independence and a sense of self-respect, both of which are essential for the adequate development and exercise of the moral powers. Wider conceptions of the right to property are not taken as basic, for instance, the right to private property in natural resources and means of production generally. These wider conceptions of property are not used because they are not necessary for the adequate development and full exercise of the moral powers, and so are not an essential social basis of self-respect (*Justice as Fairness. A Restatement,* § 32.6). They may, however, still be justified, Rawls notes depending on existing historical and social conditions, 'the further specification of the rights to property is to be made at the legislative stage, assuming the basic rights and liberties are maintained. As a public political conception, justice as fairness is to provide a shared basis for weighing the case for and against various forms of property, including socialism. To do this, it tries to avoid prejudging, at the fundamental level of basic rights, the question of private property in the means of production. In that way perhaps discussion of this important question can proceed within a political conception of justice that can gain the support of an overlapping consensus' (*Justice as Fairness. A Restatement,* § 32.6). The demonstration with regard to property is of interest because it shows what kind of work (still) can be done by the legislator. It also shows that citizenship is not the only yardstick that Rawls uses for the significance of a particular liberty. Historical and social conditions also come into play. Cf John Rawls, 'The Basic Liberties and Their Priority', above n 88, 11 & 48–9.

of justice.[153] There is however a clear logic behind all of Rawls' revision.[154] Most of Rawls' later work, including the revision of the first principle, should be understood as a pragmatic move[155] to meet criticism uttered by communitarians *and* legal scholars such as Hart. Indeed, the reformulation of the first principle and his use of a conception of citizenship offers many strategic advantages to Rawls. To list a few:

— with regard to Hart and others, their critique is met. By selecting important liberty interests (or liberties) and adding a criteria of significance,[156] justice as fairness now offers enough starting information for further specification in the three further stages of implementation.[157] The result of the selection is known: '*freedom of thought and liberty of conscience, and the rest*'.

[153] 'For example, does Rawls now acknowledge that there are certain rights and liberties that are more fundamental than others when he claims that only the political liberties are to be given their fair value? What is his basis for determining that the political liberties have priority here?' (Ted Vaggalis, 'John Rawls' Political Liberalism' via http://caae.phil.cmu.edu/Cavalier/Forum/meta/background/ Rawls_pl.html, consulted December 2002, 3p) See also Rex Martin, 'Rawls' New Theory of Justice', *Chicago-Kent Law Review*, 1994, Volume 69 (737–61), 745–7.

[154] Chandran Kukathas & Philip Pettit, *Rawls. A Theory of Justice and its Critics*, (Stanford, Stanford UP, 1995), 143–46. Rawls' shift from the rational (desirable) to the reasonable (feasible) is well-known, The later Rawls wants to find workable solutions for the problem of stability in a pluralist, American society. All his modifications after *A Theory of Justice,* including his idea of public justification (discussed above), together with his account of the (pragmatic) role that political philosophy should play (See *Justice as Fairness. A Restatement,* § 1), aim at stable social unity. Crucial to this goal is his 'method of avoidance', viz. a method establishing principles that do not challenge or reject competing comprehensive conceptions, but try, as far as possible, to transcend and accommodate them. Kukathas and Pettit rightly question this 'unfortunate' turn: the divisive questions that Rawls wants to take off the political agenda are often those which people are most reluctant not to have addressed; the tactic of seeking to keep issues off the agenda does not always serve to conciliate, since it is distinctive of some of the least conciliatory comprehensive philosophies; it remains to be established that an overlapping consensus is necessary or sufficient for stability and social unity (Chandran Kukathas & Philip Pettit, above, 149). See also Stephen Mulhall & Adam Swift, *Liberals & Communitarians*, (2nd ed Cambridge, Blackwell Publishers), 1996, 363p. The central proposition in this work is that most changes in Rawls' position can be understood as providing him with responses precisely to the sorts of criticism which communitarians brought against the theory as originally formulated (see in particular page 2).

[155] There is an amusing page in Rawls' essay *The Basic Liberties and Their Priority* where this revision is carried through for the first time. 'As a philosopher I should not amuse myself with summing up basic liberties', Rawls seems to think, 'but if it helps to reach agreement between the parties in the original position, why not' (John Rawls, 'The Basic Liberties and Their Priority', 6–7).

[156] We saw that many critics considered the meaning of the principles of justice too indeterminate. An extensive liberty approach with regard to property and economic liberty, would result in extreme economic laissez-faire. Of course, this is not what Rawls meant, but it is not refuted explicitly in *A Theory of Justice*. The criterion of significance allows Rawls to conceptualise his position in the desired way.

[157] 'Since the basic liberties have a special status in view of their priority, we should count among them only truly essential liberties. (…) If there are many basic liberties, their specification into a coherent scheme securing the central range of application of each may prove too cumbersome. This leads us to ask what are the truly fundamental cases and to introduce a criterion of significance of a particular right or liberty. Otherwise we have no way of identifying a fully adequate scheme of basic liberties of the kind we seek'.(*Justice as Fairness. A Restatement,* § 32.3).

These are the truly 'cases' or liberties, which will enable the constitutional convention, the legislator and the judge to interpret the principles of justice;[158]

— Rawls can operate this modification with a very simple reference to tradition and facts that are acceptable by all.[159] This is crucial for his enterprise seeking social stability and an overlapping consensus, bypassing mere agreement.[160] Reducing the list of protected liberty interests is but a small price for 'very urgent consensus';

— even within the liberal tradition the idea of rights-defining-liberty is very familiar. The loss in terms of protection of liberty interests that results from the replacement of a most extensive scheme of liberties by a scheme of certain basis rights is not immediately evident. On the contrary, bourgeois liberalism will not experience many difficulties with the actual list of rights that Rawls considers to be basic;

— with regard to communitarian and other non-liberal views, rejecting liberty from the core of the principles of justice creates more distance from the classical liberal thinkers such as Mill.[161]

Justice as fairness is about political liberalism, not about comprehensive liberalism.[162]

[158] To serve Hart, Rawls not only selects basic liberties from others, but also introduces an additional criterion of significance, linked to his conception of moral personhood, that renders his theory rather complex. This will be the object of our next paragraph.

[159] 'Throughout the history of democratic thought the focus has been on achieving certain specific liberties and constitutional guarantees, as found, for example, in various bill of rights and declarations of the rights of man. The account of basic liberties follows this tradition' (John Rawls, '*The Basic Liberties and Their Priority*', 6).

[160] 'Of course, it is too much to expect complete agreement on all political questions. The practicable aim is to narrow disagreement at least regarding the more divisive controversies, and in particular those that involve the constitutional essentials, for what is of greatest importance is consensus on those essentials (…). The point is that if a political conception of justice covers the constitutional essentials, it is already of enormous importance even if it has little to say about many economic and social issues that legislative bodies must consider. To resolve these it is often necessary to go outside that conception and the political values its principles express, and to invoke values and considerations it does not include. But so long as there is firm agreement on the constitutional essentials, the hope is that political and social cooperation between free and equal citizens can be maintained' (*Justice as Fairness. A Restatement,* § 9.3.) This quote clearly shows that Rawls' theory became less a theory of the distribution of primary goods, but more a theory of the liberal freedoms. Cf Kilcullen, 'John Rawls: Liberty', 1996, via http://www.humanities.mq.edu.au/Ockham, 4p.

[161] *A Theory of Justice* is full of influences indebted to Mill. For instance, Rawls' first characterisation of the first principle borrows undeniably from the harm principle that stands central in Mill's work. 'The first principle simply requires that certain sorts of rules, those defining basic liberties, apply to everyone equally and that they allow the most extensive liberty compatible with a like liberty for all. The only reason for circumscribing the rights defining liberty and making men's freedom less extensive than it might otherwise be is that these equal rights as institutionally defined would interfere with one another' (*A Theory of Justice*, § 11).

[162] *Justice as Fairness. A Restatement,* § 47.4. Rawls uses the example of extreme religious sects to illustrate the difference between comprehensive liberal answers and political liberal answers. For a critical account of this demonstration: Chandran Kukathas & Philip Pettit, above n 156, 140–41.

The ideas of Kant and Mill extend beyond the political, and are therefore not suited for a political concept of justice.[163] Again this stand is not wholly incompatible with classical liberalism. Even such prominent liberal thinkers as Berlin, to whom there are references in Rawls' work,[164] hold that liberty, autonomy and individuality have to compete with other principles to which many have attached greater importance: happiness or equality, social justice, democracy, or other values.

Critical Comment on Rawls' Concept of Citizenship

We observed that Rawls refers not entirely correctly to legal history to introduce and give weight to his philosophical concept of citizenship. With this move Rawls seeks to win the acceptance of his Western audience and especially of those that oppose a thin, political liberal concept of justice.[165] In his essay *The Priority of Democracy to Philosophy* Richard Rorty makes fun of the philosophical inability, especially of communitarians, to think about problems of justice without invoking a comprehensive notion of personhood.[166] According to Rorty the resources latent in the political culture of liberal democracies seem to be all that is available, and so must be all that is required, to justify a liberal political system. Rorty appreciates Rawls' careful handling of the concept of citizenship,[167] and even claims that

[163] Justice as fairness does not seek to cultivate the distinctive virtues and values of the liberalisms of autonomy (Kant) and individuality (Mill). 'A society united on a form of utilitarianism, or on the moral views of Kant of Mill, would likewise require the oppressive sanctions of state power to remain so' (*Justice as Fairness. A Restatement,* § 11). On Rawls's objection against the liberalism of Kant, see Chandran Kukathas & Philip Pettit, above n 156, 139–141.

[164] See for instance the important reference to Berlin's essay 'The Pursuit of the Ideal' in *Justice as Fairness. A Restatement*, § 47.2.

[165] At least one author sees in Rawls' idea of moral personhood, especially in its post-1980 conception of the normative standpoint of citizenship, an important new element of Rawls' liberal doctrine. Bridges sees in this move 'the teleological turn in postmodern liberal political philosophy' (Thomas Bridges, 'Rawls and the Rethinking of the Priority of the Right over the Good' 1997–2002, via http://www.civsoc.com/reviews/review1c.html, (4p), 2–3). It is indeed not very difficult to recognise the specific substantive content of Rawls' concept, especially when he discusses the two moral powers. On the communitarian objections to the liberal concept of personhood, associated with Alasdair MacIntyre and Michael Sandel, see Stephen Mulhall & Adam Swift, *o.c.,* 10–13 & 192–98. According to these authors only a shared conception of the human good can justify a social order. The kind of mutual respect based on fairness that Rawls proposes is not adequate to keep in check more comprehensive values, should they conflict.

[166] Richard Rorty, above n 60, 86. See on Rorty's position: Stephen Mulhall & Adam Swift, above n 156, 259–75.

[167] 'He does not *want* a 'complete deontological vision', one that would explain *why* we should give justice priority over our conception of the good. He is filling out the consequences of the claim that it is prior, not its presuppositions. Rawls is not interested in conditions for the identity of the self, but only in conditions for citizenship in a liberal society. (…) Rawls is not attempting a transcendental deduction of American liberalism of supplying philosophical foundations for democratic institutions, but simply trying to systematise the principles and intuitions typical of American liberalism' (Richard Rorty, above n 60, 92). See also Thomas Bridges, 'Rawls and the Rethinking of the Priority of the Right over the Good', above n 167, 2.

Rawls could have done without any citizen-concept to realise his project.[168] However this may be desirable (below), we believe that Rorty's claim is only valid for the Rawls behind *A Theory of Justice*, not for the later Rawls. With regard to the opposition between the liberty and rights paradigm, Rawls' concept of citizenship is far more than an innocent optional adjunct to the Rawlsian project.[169] In the following paragraphs we advance three arguments showing the illiberal consequences of the amended Rawlsian project.

First, there is the problem of popular sovereignty. The political conception of justice, elaborated in *A Theory of Justice*, did not imply a duty for the constitutional convention to dress a bill of rights. Its duty was to incorporate the principles of justice and to set constraints on the work of the legislator. Depending on the circumstances certain liberties were identified (out of the many),[170] and several arrangements were possible. In *A Restatement*, Rawls on the contrary stresses the need for a fully adequate scheme of the truly important basic liberties. The paragraph about the basic right to property (above) shows that the freedom of the constitutional convention is curtailed in a considerable way: 'the further specification of the rights to property *is to be made at the legislative stage*, assuming the basic rights and liberties are maintained' (emphasis added). One could argue that the later Rawls allows for doing away completely with the constitutional convention, since there is not much left to do, but regulating the use of *the* basic liberties.[171] Undeniably there is an insistence on a certain outcome of the constitutional convention. The scenario for political liberalism becomes more tightly circumscribed.

Secondly, there is a perfectionist flavour to Rawls' criteria of significance for each particular liberty. We return to the rights-oriented nature of the eighteenth century constitutions and human rights declarations. These documents, Isaiah Berlin notes, are not instruments to guarantee individual freedom by drawing frontiers against infringement, but they are documents containing the rules of reason to be found in nature, identified with

[168] Richard Rorty, above n 60, 91.
[169] Comp. with Stephen Mulhall & Adam Swift, above n 156, 263.
[170] 'The adjustment of the complete scheme of liberty depends solely upon the definition and extend of the particular liberties. Of course, this scheme is always to be assessed from the standpoint of the representative equal citizen. From the perspective of the constitutional convention or the legislative stage (…) we are to ask which system it would be rational for him to prefer'.(*A Theory of Justice*, § 32).
[171] The truly basic liberties are contained in the first principle and more controversial arrangements are to be discussed at the legislative, not the constitutional stage. The four-stage sequence could be reduced to a three stage sequence. This view on Rawls is however much too exaggerated. The difference is only a question of degree. Already in *A Theory of Justice* there were indications that the political decision-making process at the level of the constitutional convention should be oriented towards arrangement of the political liberties and 'certain' non-controversial 'civil liberties', whereas other liberties and issues that can be related to the second principle of justice are the object of the third, legislative sequence (see *A Theory of Justice*, § 31).

individual freedom, on the assumption that only rational ends can be the true objects of a free man's real nature.[172] Rights are the indispensable tools for 'responsible human beings' needed in the ideal, rational society. Berlin's essay *Two Concepts of Liberty* contains a thorough critique of this perfectionist conception of rights.[173] For Berlin, western thought in ethics and politics has for more than two millennia mistaken virtue and knowledge (or reason) for freedom.[174] We believe that this kind of fallacy is

[172] 'This is the thought and language of all the declarations of the rights of man in the eighteenth century, and of all those who look upon society as a design constructed according to the rational laws of the wise lawgiver, or of nature, of history, or of the Supreme Being' (Isaiah Berlin, 'Two Concepts of Liberty', (1958), included in *Four Essays on Liberty*, (Oxford, Oxford University Press, 1969), 148).

[173] Isaiah Berlin 'Introduction' to *Four Essays on Liberty*, (Oxford, Oxford University Press, 1969), xliv. According to Berlin, there is not only no consensus about the supreme ends of life, but also there is no consensus about what people should do with their liberty and what this term is supposed to be. He therefore rejects political and other doctrines that assume that freedom is more than just independence and hold that individuals are only free when they take part in the collective control over the common life. These theories erroneously assimilate liberty into morality and identify the higher self with institutions, churches, nations, races, states, classes, cultures, parties, and with vaguer entities, such as the common good, the general will, the enlightenment forces of society, etc. Berlin especially attacks rationalist assumptions about the empirical self that can be molded like nature can be molded by technical means (Isaiah Berlin, *Two Concepts of Liberty*, above n 173, 146). 'Rationality is knowing things and people for what they are: I must not use stones to make violins, nor try to make born violin players play flutes. If the universe is governed by reason, then there will be no need for coercion; a correctly planned life for all will coincide with full freedom -the freedom of rational self-direction- for all' (Berlin, *Two Concepts of Liberty*, above n 173, 147). The common assumption of thinkers such as Spinoza, Locke, Kant, Hegel and (even) Montesquieu, together with many of their predecessors and the Jacobin and Communist after them, is that the rational ends of our true natures must coincide, or be made to coincide, 'however violently our poor, ignorant, desire-ridden, passionate, empirical selves may cry out against this process'. Freedom in this conception is not freedom to do what is irrational, or stupid, or wrong and the policy of forcing empirical selves into the right pattern is no tyranny, but liberation. Cf 'Thus Spinoza tells us that 'children, although they are coerced, are not slaves', because 'they obey orders given in their own interests', and that 'The subject of a true commonwealth is no slave, because the common interests must include his own.' Similarly, Locke says 'Where there is no law there is no freedom', because rational laws are directions to a man's 'proper interests' or 'general good'; and adds that since such laws are what 'hedges us from bogs and precipices' they 'ill deserve the name of confinement', and speaks of desires to escape from such laws as being irrational, forms of licence', as 'brutish', and so on. Montesquieu, forgetting his liberal moments, speaks of political liberty as being not permission to do what we want, or even what the law allows, but only 'the power of doing what we ought to will', which Kant virtually repeats. Burke proclaims the individual's 'right' to be restrained in his own interest, because 'the presumed consent of every rational creature is in unison with the predisposed order of things' (Isaiah Berlin, *Two Concepts of Liberty,* above n 173, 147–48).

[174] Isaiah Berlin, *Two Concepts of Liberty,* above n 173, 154. All these doctrines which define liberty as self-realisation, and then prescribe on *a priori* or dogmatic grounds what liberty is, end up by defending liberty's opposite: despotism and the rule of experts (Isaiah Berlin, *Two Concepts of Liberty,* above, 153–54). Once people do not regard all ends as of equal value, there is no need to draw frontiers between individuals and the state or other individuals— 'No one has … rights against reason' (Fichte quoted by Isaiah Berlin, *Two Concepts of Liberty,* above, 151)—, but there is on the contrary need for education and compulsion (Isaiah Berlin *Two Concepts of Liberty,* abvoe, 149). See also Serge Gutwirth, *Privacy and the information age*, (Lanham/Boulder/New York/Oxford, Rowman & Littlefield Publ., 2002), 33–48.

inherent in rights-thinking[175] and Rawls seemingly had neglected Berlin's message. Not all liberties are equal. Rawls knows how to distinguish them and to evaluate their importance. We are not free to act or think, until we infringe on the liberty of others. No, we have rights that are instrumental for our role as citizen. Rights are tools for citizenship. There seems to be an ambiguity between this stand and Rawls' rejection of non-political values in the work of the constitutional convention.[176] Rawls should have better reflected about constitutional texts that depart from the individual human being, and not from derived notions such as *persons* or *human dignity*. Individuals possessed of liberty should be the starting point of political liberty. We are persons because we are free, not the other way around.[177]

Thirdly, there is the problem of power. There are many definitions of liberalism. With Foucault[178] we consider a critical stand towards accumulation of power as the core essence of this political movement. Rawls' attachment to the concept of man as a moral person carries him away from liberalism. Rights are about empowering the individual to participate in liberal democracy, Rawls seems to think, while forgetting the first function of constitutional law, which is to restrict the powers of the state and other actors. Rawls' new approach is a step away from the contract method: in the name of personhood contractors now accept considerable curtailing of their initial liberty. Cutting away less basic liberties in an attempt to avoid

[175] Klink and Klop for instance applaud the ethical content of the recently adopted 'Charter of fundamental rights of the European Union', published in the *Official Journal of the European Communities*, C 364/1, 18 December 2000. These authors hold that, contrary to Rawls, fundamental texts should reflect the ethical values of societies. Active maintenance of values and moral education are two goals that should be pursued by the conventional convention (see A Klink & C Klop, 'Het handvest van grondrechten voor de Europese Unie als juridische positivering van morele overtuigingen', in P Cliteur and others (eds), *It ain't necessarily so*, (Kluwer, Leiden, 2001), 107–26). Although many, as seen in Part One above, sympathise with the idea of rights, we believe that not all are aware of this more or less secret ethical agenda behind human rights full with nostalgia for a mythical past of harmonious communities. Did human rights became a religion?

[176] See on this Simon Clarke, 'Contractarianism, Liberal Neutrality, and Epistemology', *Political Studies*, 1999, Vol. XLVII, 627–42, in particular p 641 'the principle of equal basic liberties lists a wide range of different liberties (…) which must be weighed and adjusted against each another, and which are of value for different reasons. Such a complex principle is surely just as subject to the burdens of judgement, and the difficulty of making an overall assessment—as any conception of the good. If any conception of the good could be reasonably rejected due to the burdens of judgement, it is difficult to see why the principle of equal liberties could not also be reasonably rejected'.

[177] Comp. Jacques Mourgeon, 'Les droits de l'être human, destructeurs de sa liberté', in *Territoires Liberté. Melanges en hommage au Doyen Yves Madiot*, (Brussels, Bruylant, 2000), (391–407), 403: 'En voulant remplacer l'initial (la liberté) par le dérive (la dignité) dont on ne sait ce qui fait la dignité de l'être humain, on me répond: sa qualité d'être humain. Et si je me demandece qui fait sa qualité d'être humain, on me répond: sa dignité. Le cercle vicieux de la tautologie est parfait'.

[178] Michel Foucault, *Résumé des cours 1970–1982*, (Paris, Julliard, 1989), 172p.

controversy around the constitutional essentials,[179] Rawls fails to see that the whole process of formulating liberties or rights defining liberties at the constitutional level is primarily meant to avoid unwanted restrictions of freedom.[180]

PART IV. CONCLUDING REMARKS

In the above paragraphs we have highlighted three illiberal aspects of Rawls' new conception of basic liberties. Nevertheless the Rawlsian apparatus is and remains a powerful tool for understanding current human rights practice, especially in Europe. His distinction between basic liberties and human rights should be taken more seriously and the problem of harmonisation should focus on basic liberties rather than on human rights. Rawls' general description of liberty provides an explanation for constitutional protection

[179] Whether Rawls's scheme of basic liberties can avoid controversy or can be deemed acceptable remains to be seen. Richard Bellamy discusses the problem of conflicting liberties such as freedom of expression and privacy and sees no solution for it within Rawls' analysis. Rawls' assumption that a consensus is more likely to emerge with regard to constitutional essentials than to social and economical issues is not realistic. For some, social and economical rights are as essential as individual liberty rights. There is little hope that a large majority can be found willing to exclude the question of private property and the means of production from the political agenda. In general, there is no indication that people or citizens are willing *not* to put controversial or 'less basic issues' on the constitutional agenda. Rights are the object of ethical or metaphysical battlegrounds. Richard Bellamy, *Liberalism and Pluralism. Towards a Politics of Compromise*, (London, Routledge, 1999), 245 p. Significant, for instance, is Raz's refutation of the idea of a right to liberty: 'Such a right, if it exists, cannot capture our concern for liberty because it is indiscriminate. It protects equally the liberty to eat green ice-cream and to religious worship' (J Raz, *The Morality of Freedom*, (1986), (Oxford, Clarendon Press, 1988), 245–47). Rights, in this view, are ways to express values, to choose metaphysical or ethical values that should receive priority. Recognition of liberty cannot serve this enterprise. Some hold that liberty is too indiscriminate to be of any help for philosophical, ethical and political enterprises that seek to define the duties of the state and of the citizen and to define their relationship (D Meuwissen, 'Reactie van DHM Meuwissen op de brief van CW Maris', *Ars Aequi*, 1998, vol 47, 673–77; M. Heirman, 'De mensenrechten: alleen het individu is universeel', in J De Tavernier & D Pollefeyt (eds.), *Heeft de tradtitie van de mensenrechten toekomst?*, (Leuven, Acco, 1998), 29–30). Others consider liberty to be too detrimental for societal interests and paves the way to a cold, atomic world without community spirit (D Kommers, 'Can German Constitutionalism Serve as a Model for the United States?', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV)*, 1998, Vol 22, 793).

[180] In this respect Mill's harm criterion is far superior: it protects against unwanted restrictions of freedom (by governmental agents or by others) and at the same time allows for the settling of conflicts of liberties. For instance, freedom of expression stops being legitimate in principle when there is harm to the liberty or privacy interest of others. We fail to see how the Rawlsian selection of basic liberties, combined with additional criterion of significance, would work in these cases. Amusingly, Rawls suggests at one point to supplement his theory with a kind of harm criterion. 'We hope that the liberties that are not counted as basic are satisfactorily allowed for by the general presumption against legal restrictions, once we hold that the burden of proof against those restrictions is to be decided by the other requirements of the two principles of justice' (*Justice as Fairness. A Restatement*, § 32.3).

afforded to artificial (or legal) persons, such as commercial firms. His description of the four sequences shows that liberties, and not rights, are at the heart of a political and legal regime. The original position, amended with methods such as the reflective equilibrium explains why within the context of the Western world intercultural dialogue is possible at the level of the basic liberties, however different the respective world-views of the actors involved may be.

Basic liberties can play a special role in this. Within Europe, they trump differences of a more technical nature.[181] They are part of the fundamental intuitive ideas that exist in Western culture. Although there may be different interpretations and convictions as to their content, there exists an overlapping consensus about a minimal list of basic rights and liberties. Through the process of wide reflective equilibrium these initial convictions may be subject to modification.

On the level of epistemology, Rawls calls for prudence with the use of ethical or comprehensive values in constitutional issues. There is no reason to see progress in long or ethically inspired bills of rights.[182] Rawls' theory on basic liberties is based on a strong commitment to the controversial claim that certain political values of freedom and equality take precedence over divergent conceptions of the human good, and that these conceptions should not be allowed to overthrow the political fundamentals. The trump card-nature of basic liberties is a result of this non-neutral claim about the correct hierarchy among values for the purpose of determining the basic structure of society'.[183] All citizens must normally allow political goods to trump other goods. Apparently there is a strong temptation to introduce ethical values into constitutional law, in view of its hierarchical place in the legal system.

[181] Ronald Dworkin, *Taking Rights Seriously*. New Impression with a Reply to Critics, (London, Duckworth 1994) (first published 1977) p xi: 'Individual rights are political trumps held by individuals' and p xii: 'Legal rights may then be identified as an distinct species of a political right, that is, an institutional right to the decision of a court in its adjudicative function'.

[182] Comp. A Klink & C Klop, 'Het handvest van grondrechten voor de Europese Unie als juridische positivering van morele overtuigingen', in P Cliteur and others (eds.), *It ain't necessarily so*, (Kluwer, Leiden, 2001), 107–26. In this analysis of the 'Charter of fundamental rights of the European Union', the Rawlsian apparatus is applied to understand the strange mix of values in the Charter, such as solidarity, dignity, liberty, subsidiarity, borrowed from world views such as christianity, protestantism, humanism, liberalism. The authors conclude that the Charter cannot be understood as a product of one comprehensive world view, but should be understood as a product of an overlapping consensus, in a sense that is the result of a convergence of the various political, moral and religious views within our society. These authors also introduce the idea of a dynamic overlapping consensus (A Klink & C Klop, above 124). In part this new concept is necessary in view of their belief that bills with rights and liberties should not be restricted to the uncontroversial.. Apart from this perspective, that Rawls would certainly reject, it can be observed that the idea of dynamics is already contained in Rawls' notion of reflective equilibrium.

[183] Thomas Nagel, 'The rigorous compassion of John Rawls. Justice, Justice, Shalt Thou Pursue', above n 123, sub V.

The exclusion of non-political values has a more restricted scope than might appear. Rawls himself concedes that most political questions do not concern these basic liberties,[184] but he is unable to draw a clear line between matters that concern basic justice and other matters.[185] Also he creates epistemological problems when introducing a concept of citizenship in his later work.

With regard to the debate, initiated by Legrand, in the sphere of comparative law, Rawls furnishes an example of philosophical thought free of pretensions to universality.[186] By emphasising the normative content of the Western concept of citizenship that he embraces, Rawls rules out any sort of universalist and essentialist tendencies. The principles of justice are not deduced from the universal natural human condition or from principles of pure practical reason. The source of liberal democratic moral ideals is to be found in the public culture of modern constitutional democracies. They are contingent products of history and their status is defined accordingly.[187] Unification or harmonisation of law in Europe is neither possible nor impossible, but historical and to be (or not to be) constructed. There is no unbridgeable normative gap between the different European legal cultures or traditions, nor is there a given and static common set of normative values from which harmonisation and unification will automatically follow. Harmonisation and unification are political projects, which should be built up upon an overlapping consensus. After that, every step will have an impact on the question whether and which further steps are possible and desirable. But no step at all is possible without an overlapping consensus on basic liberties. Such a consensus is absent in non-liberal states. No great value should be attached to the precise content of legal texts, such as the Universal Declaration on Human Rights, which do only contain a *modus vivendi*. These texts are compromises, not a solid basis for harmonisation. Greater value should therefore be attached to the political concept of human rights. Rawls' interpretation of this concept (that goes beyond the notion of mere survival) and his insistence on respect for non-liberal, but decent societies has then, again, the advantage of modesty and respect.

[184] *Political Liberalism*, 214.
[185] Stephen Mulhall & Adam Swift, above n 156, 225.
[186] See also Stephen Mulhall & Adam Swift, above n 156, 19.
[187] Thomas Bridges, 'Rawls and the Rethinking of the Priority of the Right over the Good', above n 123, 2; Thomas Nagel, 'The rigorous compassion of John Rawls. Justice, Justice, Shalt Thou Pursue', above n 123, sub V. Both authors highlight the modesty of the Rawlsian position that does not express a judgement of value about other societies and their attachment to basic liberties and excludes arrogance. Liberal democratic moral ideals will continue to have adherents as long as those adherents continue to be persuaded of the desirability of liberal democracy as a form of political association and as a way of life.

18

Family Trees for Legal Systems: Towards a Contemporary Approach

ESIN ÖRÜCÜ

INTRODUCTION

THIS IS A project that aims to bring a fresh approach to the classification of legal systems—a 'family trees' approach within which legal systems would be classified according to their parentage, their constituent elements and the resulting blend, and then grouped on the principle of predominance.

What is being proposed here is not the construction of a 'theory', but an illustration of the kinds of issues such a project would have to tease out. The chapter works towards this by taking stock of the conventional handling of legal systems by comparatists, and then makes its proposal by going back to observe the seeds of the trees, the emerging roots, the growing of the shoots and the trees, and the spreading of the branches and their intertwining. In fact, this is first a deconstruction process, though construction is what is contemplated in the long run. Parts of the new landscape may resemble the old, but parts, and the whole will look different.

TAKING STOCK AND THE PROPOSAL

Even if solely for taxonomic purposes, ease of handling and explanation, legal systems have been grouped into legal families. This has been one of the traditional tasks of comparative law. In fact it has been said that, 'The idea of a "legal family" does not correspond to a biological reality; it is no more than a didactic device.'[1] The pattern was the study of legal systems that best represented these large groupings and then the making of generalisations. Concepts such as originality, derivation and common elements

[1] R David and JEC Brierley, *Major Legal Systems in the World Today*, *An Introduction to the Comparative Study of Law* 3rd ed, (Stevens & Sons, London, 1985), p 21.

seemed to surface during these efforts.[2] Similarities and relationships have been at the basis of any such endeavour at classification. External criteria and context have generally been ignored by comparative lawyers and their attention rather focused on substance, sources and structure. Until recently, context was seen to remain in the domain of sociologists, anthropologists and economists. It must also be noted that classifications relied only on private law, were Eurocentric and therefore weighted towards the civil law and the common law families. This already made existing classifications relative to subject-matter, that is, the area of law in mind when comparisons are made.[3] It has also been pointed out that classifications can only be temporary as legal systems may shift from one cluster to another, so that the positioning of legal systems in the legal families framework may have to be rethought from time to time.[4] In addition, new families may emerge. For example, it has been suggested that an 'African legal family' is emerging,[5] and an interest in mixed jurisdictions is now re-born, these jurisdictions being regarded as members of a so-called 'Third Family'.[6]

It is true that the task of dealing with individual legal systems is simplified by containing the diversity under a limited number of categories, and as Bogdan points out, 'legal genealogy' does appeal 'to the comparative legal scholar's sense for order and classification, just as a botanist receives satisfaction from classifying plants and discovering the relationship between them.'[7] However, the interest in classifications is confined to general characteristics, and the essence does not lie in diversity of rules on a given topic. It is beyond the rules that a classification must look, to factors linked to legal tradition and legal culture emanating from the diverse sources that make up the legal soil and to the seeds that grow into the legal systems.

Historically, comparatists used criteria such as language group, race, culture, source of law, structure, substance and ideology as the basis of classifications. Rene David talked of constant elements[8] and Zweigert and Kötz

[2] For a summary of some past efforts at classification see K Zweigert and H Kötz, *An Introduction to Comparative Law*, Translated by T Weir 3rd ed, (Oxford, Clarendon Press, 1998), pp 63–67. Also see M Bogdan, *Comparative Law* (Goteborg, Kluwer Tano, 1994), pp 82–91. See, for a further critical discussion of theoretical assumptions and points of departure for existing classifications, TP Van Reenan, 'Major theoretical problems of modem comparative legal methodology (3): The criteria employed for the classification of legal system' XXIX *CILSA* 1996, pp 71–99.

[3] See for problems, Zweigert and Kötz.

[4] Above n 2, p 66.

[5] Above n 2, p 66.

[6] Mark the recent launching of the World Society of Mixed Jurisdiction Jurists in New Orleans (November 2002), and see VV Palmer, *Mixed Jurisdictions Worldwide: The Third Legal Family*, (Cambridge University Press, Cambridge, 2001).

[7] Bogdan, above n 2, p 82.

[8] David and Brierley, above n 1, pp 17–20.

proposed using 'legal styles' to discover shared distinctive elements between legal systems.[9] However, they also pointed out:

> In any case, as the example of 'hybrid' systems shows, any division of the legal world into families, or groups is a rough and ready device. It can be quite useful for the novice, by putting the confusing variety of legal systems into some kind of loose order, but the experienced comparatist will have developed a 'nose' for the distinctive style of national legal systems and will either not use the device of legal families at all, or will use it with all the circumspection called for by any attempt to force into a schematic order social phenomena as highly complex as living legal systems.[10]

Rene David also warned us,

> The suitability of any classification will depend upon whether the perspective is world-wide or regional, or whether attention is given to public, private or criminal law. Each approach can undoubtedly be justified from the point of view of the person proposing it and none can, in the end, be recognised as exclusive.[11]

Yet in the Europe of today in search of a 'new *ius commune*', it is commonplace not only to talk of civil law and common law families, but also to treat them as if they are the two and the only two monolithic entities. Such an approach, which might be useful for teaching purposes within Europe, cannot be forgiven in comparative research.

Neither is it any longer satisfactory in our so-called globalising age to group localisms under the broad headings of civil law tradition, common law tradition and, begrudgingly, socialist laws, others being regarded as derivatives of the civil or the common law traditions, and with others again, pooled as the 'fourth tradition' usually under the name 'traditional and religious legal orders'.[12]

Recently there has been increasing interest in mixed or hybrid systems. Palmer calls these the 'Third Family'[13]—the first and the second being for him, the civil law and the common law—and Smits has published a monograph entitled '*The Making of European Private Law: Towards a Ius Commune Europaeum as a Mixed Legal System*'.[14] These are indications

[9] See Zwiegert and Kötz, above n 2, pp 67–8 in defence of 'style'.
[10] Above n 9, p 72.
[11] David and Brierley, above n 1, p 21. Also see Bogdan, above n 2, p 85.
[12] However, note that Zweigert and Kötz suggest eight such families. See for a criticism of present day classifications and an attempt to 'trim' and take account of globalisation in classifications, B de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization and Emancipation,* 2nd ed, (Butterworths, LexisNexis, 2002), pp 191–3. Santos uses a multi-layered comparative strategy, draws on a three-fold analytical framework to survey seven specific types of legal globalisation, and combines three positions in the world system with four trajectories into modernity and with eight world legal cultures based on the classification of Zweigert and Kötz.
[13] Palmer, above n 6.
[14] J Smits, *The Making of European Private Law: Towards a Ius Commune Europaeum as a Mixed Legal System,* (Metro, Maastricht, 2002). Also see J Smits, 'A European Private Law as

that the current classification of legal systems into legal families is no longer satisfactory. I suggest here that it must be abandoned in its present shape.

It should be pointed out at the outset that two important questions have been asked.[15] The first is, 'Is there an emerging "European legal family" which is transcending or at least overlapping the traditional classification of Common law—Civil Law?' The second question is, 'Do we have to distinguish different classifications into "legal families" according to the area of law in question?'

The discussion might centre on whether there is indeed an emerging 'European legal family', but this would be yet another monolithic approach, a new creation not taking into consideration developments outside Europe. From time to time, there has been talk of a 'Western legal family',[16] but those legal systems allocated to this overarching family covering both the so-called common law and all versions of civil law have not been comfortable in it. In any case, this new family would only cater for a specific region, with constantly changing borders, and only for a limited period of time. This approach would also restrict the valuable capacities of comparatists. Their work would remain 'within the family', rather than approaching the wider problems that comparison brings.

To talk of a new family with the name 'Mixed Jurisdictions' would not be satisfactory either, as clearly, not all 'mixes' can be pooled together and not all the existing members of such a family would have the same or similar ingredients. It would be extremely difficult to place for example Quebec and Algeria, both mixed systems, into one family. The simple mixes, the complex mixes, as well as the dual systems and systems adhering to legal pluralism cannot just be lumped together.[17]

One might ask, why talk of legal families at all, when their only advantage seems to be at the level of pedagogy and convenience? Instead, it could be suggested that one should look only at areas of law and determine in

a Mixed Legal System', (1998), 5 *Maastricht Journal of European and Comparative Law,* pp 328–40; and J Smits (ed) *The Contribution of Mixed Legal Systems to European Private Law* (Groningen, Intersentia, 2001).

[15] See the 'aims of the conference' in the brochure of the Conference on 'Epistemology and Methodology of Comparative Law in the Light of European Integration, Brussels 24–26 October, 2002.

[16] See A Malmström, 'The System of Legal Systems, Notes on the Classification in Comparative Law', (1969) 13 *Scandinavian Studies in Law*, 127; and G Eörsi, 'Convergence in Civil law?', in Szabo & Peteri (eds) *A Socialist Approach to Comparative Law* (Budapest, Leyden, 1977) pp 45–94; G Eörsi, 'On the Problem of the Division of Legal Systems', in M Rotondi (ed) *Inchieste di diritto comparato 2. Buts et methodes du droit compare* (New York, Padova, 1973), pp 179–210. Also note David's prediction that there will be a merge into a common family of Western law, above n 1, pp 22–31.

[17] See E Örücü, 'Mixed and Mixing Systems: A Conceptual Search', in E Örücü, E Attwooll and S Coyle (eds) *Studies in Legal Systems: Mixed and Mixing* (London, Kluwer Law International, 1996), p 344.

which group the present legal systems sit for the purposes of these areas only. But these areas too may change and new subjects be added to the list as law develops in areas hitherto outside the domain of law. Although it is perfectly acceptable for the purposes of individual research projects to devise classifications according to the area of law in question, if any generalisations were to be attempted, the result might be disjointed, not holding together at all. Moreover, even when distinct areas of law are under scrutiny, a comparatist can detect further cross-pollination between systems sitting on the branches of the family trees.

What is necessary is an assessment of individual legal systems according to the old and new overlaps and blends and, of how the existing constituent elements have mingled and are mingling with new elements entering these legal systems. Hence, the scheme proposed here regards all legal systems as mixed and overlapping, overtly or covertly, and groups them according to the proportionate mixture of the ingredients. Therefore, it is essential to look at the constituent elements in each legal system and to regroup legal systems on a much larger scale according to the predominance of the ingredient sources from whence each system is formed. Both horizontal and diachronic analyses are called for at all times. The starting point is that all legal systems are overlaps and mixes to varying degrees.

Thus some continental systems are combinations of Roman law, French Law, German Law and indigenous law such as the Dutch, and some of Canon Law, Roman Law, French Law and German Law such as the Italian. Indeed, all European systems can be better understood as overlaps. Then there are other combinations such as common law, religious law and customary laws as in India and Pakistan; and French, Socialist, Islamic and customary tribal laws as in Algeria. It must be remembered that French law, German law and common law are themselves outcomes of overlaps of different ingredients.

The old overlaps on the European continent for example, are of Roman Law, Canon law, various versions of the civilian tradition and indigenous local customary laws. The new overlaps in Europe contain in addition, elements of common law, British or American. English Law is becoming more and more an overlap of common law, various civilian systems and European Law. Classical English common law was an overlap of Roman Law, civilian ideas, canon law, equity and domestic common law. In this new approach the underlays and the overlays must be carefully distinguished, because the layers may also shift their positions.[18] For example, in Hong Kong, until 1990, English common law was the overlay with Chinese customary law as the underlay, but now, it is becoming an underlay alongside Chinese customary law under a growing overlay of modern Chinese law.

[18] In addition, there is the 'knock-on effect' to be considered.

This scheme makes it especially easy to classify systems such as those of Malaysia, Singapore, Burma and Thailand. The whole of South East Asia would be better served by this approach. Off-shoots and sub-groups can be more clearly seen and catered for. For example, Thailand, which was never a colony, has had in its modern texture a real mixture of sources such as English Law, German Law, French Law, Swiss Law, Japanese Law and American Law since the end of the nineteenth century, alongside historic sources in existence since 1283, such as rules from indigenous culture and tradition, customary laws and Hindu jurisprudence, still to be found in some modern enactments. In addition, Thai Codes were originally drafted in English and French and then translated into Thai.[19] So, where do we place this legal system in our traditional classification of legal families?

For me, the present project has three antecedents. The first was an effort on my part to establish the internal logic of legal systems when I attempted to draw a picture of the civil law, common law and socialist law, as the traditionally accepted legal families, portraying them in three columns, indicating their typical logical unfolding, the first step reflecting the values and assumptions in the capital of the column, with each step in the unfolding being the *sine qua non* of the next. These three can be regarded now as the grandparents of many of the legal systems in the family trees. The classification at that time was not all-inclusive, as Islamic law for example, was not covered. It was suggested that scholars expert in that subject could attempt to elaborate on its internal logic and draw the appropriate picture.

The second antecedent was where I tried to trace trans-frontier mobility of law, its paths and consequences. Of special interest were four kinds of encounters: those between systems of socio and legal cultural similarity, those between systems of socio-cultural similarity but legal cultural diversity, those between systems of socio-cultural diversity but legal cultural similarity, and those between systems of both socio and legal cultural diversity.

The third was my attempt to explain mixed and mixing systems and systems in transition by approaching law as transposition as in music, the concept 'transposition' helping to highlight the crucial importance of the internal tuners or gardeners who deal with the mix, adapting it to the new instrument or soil. The first attempt in 1987 led to an article, 'An Exercise on the Internal Logic of Legal Systems',[20] the second, to 'Transfrontier Mobility of Law' in 1995[21] and the third, to 'Law as Transposition' in 2002.[22]

[19] I am indebted to my PhD student Jutharat Compeerapap in Erasmus University Rotterdam, working on 'The Reception of Legal Language in Thai Contract Law: A Comparative Perspective' for kindling my interest in Thailand.
[20] E Örücü, 'An Exercise on the Internal Logic of Legal Systems'. (1987) 7 *Legal Studies*, 310.
[21] E Örücü, 'A Theoretical Framework For Transfrontier Mobility of Law', in R Jagtenberg, E Örücü & A de Roo (eds) *Transfrontier Mobility of Law* (The Hague, Kluwer Law International, 1995) pp 5–18. Also see Örücü, above n 17.
[22] E Örücü, 'Law as Transposition', (2002) 51 *International and Comparative Law Quarterly*, 205.

The time has now come to look at legal systems through the lenses of both internal logic and transposition, and yet, approach them more closely as overlaps, marriages and off-spring. Terminology used could include fertilisation, pollination, grafting, intertwining, osmosis and pruning. My 1987 effort was concerned with 'day one', this present attempt is interested in our own time, with a view of paving the way for the future.

It would be impossible to classify all the legal systems in the world and place them on the branches of the family trees here in this paper. Instead, it is suggested that a grid be produced and scholars dealing with an individual system find a place for their specific system in the family trees. The starting point would be with the ancestors, the seeds, that is 'day one'. Thus, civil law and common law will appear near, but not necessarily at, the roots of their trees, as it is of course possible, even before considering Roman law, to go back further to the laws of Hammurabi, to Greek laws and beyond.[23] Indeed, some systems of the olden days must have died prematurely, their seeds lost, fallen on barren ground or destroyed. It might even be said that some plants are annual, some biannual and some perennial, that some plants are hardy and some are not; and it is the hardy that survive even bad gardeners, poor soil and lack of fertilisation!

Comparatists must understand the relationship between legal systems, legal cultures and legal traditions and be able to find rules beyond the framework of the formal legal system held to be binding by the people. Both the top-down and the bottom-up models of law have to be appreciated. This broad approach must include the ordinary and the extraordinary legal systems.[24] I see such a family trees approach as the most appropriate for an understanding in our century where overlaps are the norm. This approach would lead to neutral classification and classification would accord with all the ingredients.

THE SOWING OF THE SEEDS OF THE TREES AND THE GROWING OF ROOTS

Starting the story with the civil law, one could take a definition suggested by Alan Watson for an all-encompassing approach to the systems that fall under this heading. This definition fits the bill for the purposes of our approach.

[23] See E Hondius, 'The Supremacy of Western Law' in L de Ligt. J de Ruiter, E Slob, JM Tevel, M van de Vrugt & LC Winkel (eds) *Viva Vox Iuris Romani: Essays in Honour of Johannes Emil Spruit*, (Amsterdam, JC Giben Publisher, 2002) pp 337–42, for his concern that Western lawyers regard Western civilisation in general as superior to other civilisations and his argument that Western law does not have a monopoly.

[24] See E Örücü, 'Comparatists and Extraordinary Places', Chapter 13 in P Legrand & R Munday (eds) *Comparative Legal Studies: Traditions and Transitions* (Cambridge, Cambridge University Press, 2003) 467–89.

> A working definition of a civil law system would be a system in which parts or the whole of Justinian's *Corpus iuris civilis* have been in the past or are at present treated as the law of the land or, at the very least, are of direct and highly persuasive force; or else it derives from any such system[25]

By analogy one can create a working definition for common law systems in a like manner:

> A system in which parts or the whole of the English common law have been in the past, or are at present, treated as the law of the land, or at the very least, are of direct and highly persuasive force; or else it derives from any such system.

Although it may be claimed and accepted that civil law and common law are the main parents of the world's legal systems, there are surely others.[26] These other parents could also be given their working definitions in a similar manner to the above. When one looks at legal cultures or traditions, one sees that civil law and common law are but two of the parents, the others being, according to one divide suggested by Patrick Glenn, Chthonic, Talmudic, Islamic, Hindu, and Asian.[27] Even then, Glenn says that

> In looking at (only) seven legal traditions of the world, it has been impossible to avoid the existence of other recognisable legal traditions. Some might say the other legal traditions are minor ones, which complement or oppose the traditions which have been examined. This may or may not be accurate, since there are no well established criteria for distinguishing major from minor traditions ... If the traditions in law which have been examined here ... appear presently as the major ones of the world, it may be that this is only a conclusion of first impression, and that there are other legal traditions ... which are still more profound and which await investigation, and recognition, as being of primary importance.[28]

Marriages have taken place between systems and sub-systems of different parentage. Some are cohabitation, some are life-long and some passing. It may be difficult to determine with exactitude the level of hybridity. There are a number of overlaps, cross-fertilisations, reciprocal influences, fusions, infusions, graftings and the like. The conclusion is that there are no pure systems in the legal world and that there are also various degrees of hybridity arising from various degrees, levels and layers of crossings and intertwinings between the roots and branches of adjacent trees.

[25] A Watson, *The Making of the Civil Law* (London, Harvard University Press, 1981), p 4.
[26] For an intriguing sideline which, if true, would have fundamental impact on our mental framework see, PG Monateri, 'Black Gaius/A Quest for the Multicultural Origins of the "Western Legal Tradition"', (2000) 51 *Hastings Law Journal*, pp 479–555. Also see, M Bernal, *Black Athena: The Afroasiatic Roots of Classical Civilisation*, 2 vols, (New Jersey, Rutgers University Press, 1987, 1991).
[27] HP Glenn, *Legal Traditions of the World* (Oxford, Oxford University Press, 2000).
[28] Above n 27, pp 318–19.

Some of the off-spring showing clear signs of their different legal cultural, racial, ethnic and religious parentage overtly, have already been grouped as 'mixed jurisdictions', and are usually treated as *numerus clausus*. However, this is not a correct approach, as there are many more covert mixtures, the results of the same marriages or of other combinations.[29]

As noted above, even within the continent of Europe, it is easy to see sitting on one family tree, crosses between indigenous law, French law, German law and Roman law such as in the Netherlands and crosses between customary law, neo-canon law, German law, Greek law and Roman law such as in Greece, as well as more complicated crosses such as those in Malta.[30]

In Malta legal history starts with the settling Phoenicians; continues with the conquering Romans bringing in the *Corpus Iuris*; the invading Normans bringing feudal law as applied in Spain, Naples and Sicily; the invading Moors with direct influence on the Maltese language; the sovereignty of the Knights of St John recognising local usages and issuing declarations of private law drawing on laws of other countries, mostly Italian; the conquering French with their Napoleonic laws; and finally ends with the arrival of the British. Here we see for example, an eclectic Criminal Code drafted under a strong Italian influence but with pervasive English and Scottish impact, and a Commercial Code based on the French Code except in the field of Maritime law which follows English law. The 1873 Civil Code is predominantly based on the French and Italian Codes and also on the Municipal Code de Rohan, the Civil Code of Louisiana and the Austrian Civil Code. Canon law applies in family law where there is also the influence of English law, German law, Italian law and French law. Constitutional law is mainly British. The official languages are Maltese and English. The ingredients apply cumulatively and interactively. How can this legal system be defined with the conventional tools that we have?

There are of course even more extreme and unexpected crosses. It may be that the seeds were scattered far and wide. For example Turkey is a cross between Swiss law, German law, Italian law, French law, Roman law, a covert Islamic law and local customary law, as well as more recently, European law and American law. This came about as a result of grafting, pruning and intertwining. It might even be said that germination was 'forced' under green-house conditions by an élite concerned with changing not only the law and legal culture but the people themselves and the way of life from traditionality to modernity by the introduction of radical social reform laws, still protected under the Constitution, to accompany the forging of the new legal system by receptions from abroad. Parentage varies for

[29] Örücü, above n 17, pp 344–5.
[30] See JM Ganado, 'Malta: A Microcosm of International Influences' in Örücü, Attwooll and Coyle, above n 17, pp 225–47.

different fields, such as Swiss in Civil law, German in Commercial law, Italian in Criminal law and French in Administrative law, all intertwined with each other and with what existed before, and with the diverse socio-culture, to make up the present legal system.[31] Where could this system be placed looked at through the lenses of the old classifications?

It is possible to say that European law today reflects marriages between common law such as Irish law, English law, American law and civil law in its many varieties such as German law, French law, Dutch law, Danish law, as well as mixed jurisdictions such as Scottish law and so on, all with their own diverse historic ingredients. In addition, an enlarged Europe will have to accommodate and therefore to at least flirt with socialist law and legal culture and other varieties of the civilian tradition. The status of Islamic law and its impact in Europe is now also a subject of study. People are on the move in Europe and so are legal systems.

THE CONVENTIONAL HANDLING OF LEGAL SYSTEMS BY COMPARATISTS

It is first necessary for comparative law to move on from its exclusive interest in the top-down model, that is the legal system as laid down by a formal law-maker and the appropriate high courts. A broader approach rather than mere normative inquiry is needed. Neither can the comparison be limited to classical and faceless civil law/common law comparison, though the 'ordinary' world often appears to be so divided when viewed from within Europe. This approach does not lead to useful and comprehensive research in our century. More important, one should not concentrate solely on what are regarded classically as the great 'parent' systems. Nevertheless, it has been suggested that only the mature systems should be studied:

> Mature legal systems are often adopted or extensively imitated by others; as long as these other so-called 'affiliated' legal systems maintain the style of the parent system, they usually do not possess to the same degree that blend of originality and balanced maturity in solving problems which characterise the 'significant' legal systems. While they are at this stage of development, the comparatist may ignore the affiliate and concentrate on the parent system.[32]

According to this view then, some systems justify intense investigation while others do not! Surely, regions of the world other than Europe, and also the

[31] I have called this legal system 'hyphenated' elsewhere, since the roots have not been cut off from the parents and the source laws are still referred to with a hyphen, as for example in the case of 'Isvicre-Türk hukuku', when referring to the civil law. See E Örücü, *Critical Comparative Law: Considering Paradoxes for Legal Systems in Transition,* (Nederlandse Vereniging voor Rechtvergelijking No: 59, Deventer, Kluwer, 1999) pp 80–118.
[32] Zwiegert and Kötz, above n 2, p 41.

'extraordinary' places, even when seen as extensions of the two traditional families, must be studied by comparative lawyers. In the scope of the present project this is an essential activity with a view of re-placing and re-arranging them on the branches of the family tress. In the past, the legal world appeared to Western comparatists to be largely divided between the heirs of Rome and Westminster, but these heirs have joined together in various ways both with each other and with those of other parentage, such as Islamic, Hindu, Jewish, traditional and tribal. Ignoring these developments will not be forgiven in the coming years.

Yet another point is the fact that there is a significant division of belief among comparatists. On the one hand, it is claimed that only convergent or similar systems can benefit from each others' experience; hence, for example, the attempts to enlarge the catchment area of systems covered by the 'new *ius commune*' within the context of a wider Europe. For us, these systems would be sitting on the branches of one family tree. On the other hand, it is claimed that, it is differences that must be stressed for their value in enhancing our understanding of law in society, as it is only by observing differences that we can learn lessons. Whichever view one takes, one must always be aware of overlaps and cross-fertilisations.

It has been said that 'the last thing we need is "distinctiveness for its own sake"'.[33] This is true. However, this should not mean that we can ignore distinctiveness. Even when comparative law is used as an instrument of integration there are virtues in 'distinction' and 'diversity' In the family trees approach distinctiveness matters as well as similarity. The relevant amounts of distinction and similarity give a legal system its place on the branches of a tree. Today, the 'sameness and difference debate' seems to dominate most 'theoretical comparativism'. It has been claimed that we as comparatists, are either 'identifying difference, and cherishing it', or 'trying to suppress it, by effective same-ness'.[34] At present, comparative law within Europe is used predominantly 'as a means of effecting same-ness and suppressing difference',[35] and therefore, comparative lawyers are seen as 'powerful players', not 'neutral observers',[36] and, comparativism is seen as a threat.[37]

In fact, 'comparativism' offers the only way to see legal systems as they actually are by adopting a family trees approach, which neither cherishes nor denies diversity, but creates a true and reliable map of the legal world. The approach is not an 'either—or' between the integrative and contrastive. We know for example, that often in the framework of nationalist movements,

[33] E Clive, 'Scottish Family Law' in JP Grant (ed) *Independence and Devolution: The Legal Implications for Scotland* (Edinburgh, Green and Son, 1976) 162 at p 173.
[34] I Ward, 'The limits of Comparativism: Lessons from UK–EC Integration', (1995) 2 *Maastricht Journal of European and Comparative Law*, 23, at p 31.
[35] Above n 34.
[36] Above n 34, at p 32
[37] See above n 34 for Derrida, p 32.

only differences are underlined with the aim of stressing the individual worth of a particular legal system. Since all legal systems have their own distinctive characteristics and unique institutions, this can be easily done. It is equally possible and easy to stress the similarities between the legal systems under comparative survey. Stressing the similarities is the target of the researcher wanting to encourage a particular movement of integration and harmonisation. For example, a researcher involved in the Scottish nationalist movement might prefer to stress the differences that exist between the English and the Scottish legal systems—and there are many—in order to prove that they are insurmountable for even a partial harmonisation of the two legal systems. Whereas a Scottish researcher who believes in the unity of the UK and is perhaps also in favour of paving the way for western European unity, might pick up similarities between the English and the Scottish legal systems—and again there are many—in the hope of generating a unification movement at home as a first step to a harmonisation movement within Europe. Again, it is possible to claim that the Dutch and the Scottish legal systems are quite different in their approach to, and use of, European law and 'never the twain shall meet'.[38] But, it is also possible to stress the similarities between the two if there is the will to facilitate European co-operation within the European Union.

Thus, in the course of comparison, the researcher may look at similarities only or differences only, or similarities as well as differences. These can all be legitimate research strategies. Which one is chosen depends on the political and theoretical orientation of the researcher. In a sense, it is reminiscent of a court deciding to follow one line of precedent rather than another, one dictated by policy rather than by legal considerations. Methodologically however, there is a problem in this choice, since each will lead to a different result.[39] These are operational choices tied up with the comparatist's strategy. The family trees project needs and uses both approaches.

It has been claimed by some comparatists that when comparing closely related systems it is usually more rewarding to explain the differences, while in two entirely unrelated, or apparently unrelated, systems it is more rewarding to explain the similarities.[40] In practice, it seems a matter of

[38] See M Aitkenhead, N Burrows, R Jagtenberg & E Örücü, *Law and lawyers in European integration*, (Rotterdam, Erasmus University No: 43, 1988), p 34.

[39] Another slant to the above would be to stress the differences arising from similarities or similarities arising from differences. From this the comparatist would move on to generalisation. Since to compare means to observe and to explain similarities and differences, the emphasis can indeed be sometimes on differences and at other times on similarities. For example, Schlesinger talks of periods of 'contractive', or 'contrastive' comparison with the emphasis on differences, alternating with periods of what might be called 'integrative' comparison, i.e., comparison placing the main accent on similarities. He concludes that the future belongs to 'integrative comparative law' See, RB, Schlesinger, 'The Past and the Future of Comparative Law', (1995) 43 *American Journal of Comparative Law*, 477.

[40] Bogdan, above n 2, p 18.

preference or policy, whether the comparatist highlights one or the other. If comparative legal studies were to interest itself seriously in searching for and explaining divergencies, especially those between the similars,[41] with a 'constructive' attitude in order to develop further a 'critical comparative law', rather than with the 'negative' attitude of stressing 'irreducible differences in *mentalité*' or '*summa differentia*' within the context of a 'contrarian challenge', then comparative law could only benefit.[42]

The strategy for the family trees approach would be to look at the picture as objectively and neutrally as possible with a view of discovering the ingredients and historical antecedents of each legal system together with its present blend. One methodological problem of comparative law research in determining where legal systems sit, is how to decide on what to ignore as accidental rather than vital and what as changeable rather than constant. In addition, certain factors may be deemed irrelevant for the purposes of a particular project. The problems associated with looking at the changeable rather than the constant can cause instability in the research and yet, the present project rests on the assumption of fluidity.

Although accidental and changeable factors may be ignored, the differentiation between the accidental and the necessary, the changeable and the constant must rely on sound and dependable criteria. This in turn necessitates knowledge of the cultures under consideration with their different ethical theories, techniques of social control, and the values and attitudes which bind the systems together. Only as a result of an empirical survey could the changeable, irrelevant or accidental be determined. This is all part of the present comparative law venture.

GROWING OF THE TREES

It is worth noting that trees grow from a number of beginnings: seeds fall, such as from a chestnut, and a new tree grows; trees can be grown from cuttings, either directly planted to form a new tree or grafted on a tree of a different species; and lastly, new shoots may sprout from the roots of an old tree and grow into new trees. Surely legal systems can be found as examples for each of these possibilities.

In this attempt at realigning legal systems and placing them on their genealogical trees, we must look at transpositions, reciprocal influences and cross-fertilisation both horizontally and vertically. This is a very fruitful area

[41] See VGD Curran, 'Dealing in Difference: Comparative Law's Potential for Broadening Legal Perspective', (1998) 46 *American Journal of Comparative Law*, 657, and NV Demleitner, 'Challenge, Opportunity and Risk: An Era of Change in Comparative Law', (1998) 46 *American Journal of Comparative Law*, 647.

[42] See E Örücü, 'Unde Venit, Quo Tendit Comparative Law', in A Harding & E Örücü (eds) *Comparative Law in the 21st Century* (London, Kluwer Law International, 2002), pp 9–10.

of study, and the answers we seek lie here. Transpositions tell us much about the development of the law and allow us to understand cultural and legal navigation as well as the role of tuning in legal development, which give rise to the blends that legal systems are.

Many legal systems have been inspired by systems which are socio-culturally or legal culturally very different from their own, and legal rules often seem to be equally at home in very different locations; and 'whatever their historical origins may have been, rules of private law can survive without any close connection to any particular people, any particular period of time or any particular place.'[43]

The 'new i*us commune* seekers' in Europe are trying to integrate legal systems, but in fact are dealing with a legal world which includes differents, that is, for the time being, the UK and Ireland. In the common law world however, the 'unity of common law' is made up of similars as far as legal systems are concerned, though it is now generally accepted that this unity could be enhanced by diversity, and the Privy Council has somewhat loosened its hold on the commonwealth jurisdictions.[44] As already observed, the family trees approach is neither integrative nor contrastive, it is deconstructive and critical. The aim is to reconstruct a true map of legal systems of the world.[45]

For example, one should assess the consequences of the encounters within the European Union today as instances of reciprocal influence or cross-fertilisation, rather than only consider them as contamination of common law by civilian input into EC law. It is true that when English common law coexists with an uncodified jurisdiction, it can seep into that other but it seldom penetrates Codes as judges tend to adhere to the wording of a Code when deciding cases. According to 'convergence theories', English law can indeed live with codification of the law, of which there are historical examples. 'Divergence theories' however, are opposed to any involvement of the UK in any pan-European Code.[46]

Comparatists cannot ignore the usefulness of reciprocal influence, cross-fertilisation and pollination by claiming that legal cultures are specific to individual cultures and therefore such studies are fruitless, misleading and even dangerous. Today, within the European Union, either commonality is supposed, or on the contrary, diversity is sought, as legal systems and cultural

[43] A Watson, 'Legal Transplants and Law Reform' (1976) 92 *Law Quarterly Review*, 61 at p 79, and W Ewald, 'Comparative Jurisprudence (II) The Logic of legal Transplants (1995) 43 *American Journal of Comparative Law*, 489.

[44] See R Martin, 'Diverging Common Law—Invercargill goes to the Privy Council', (1997) 60 *Modern Law Review,* 94.

[45] The question still remains however, whether this approach could go far enough to embrace legal pluralism and all layers of law such as the global, international, regional, transnational, inter-communal, terrritorial state, sub-state and non-state, in the mapping. See W Twining, *Globalization and Legal Theory* (London, Butterworths, 2000), pp 136–41.

[46] P Legrand, 'Against a European Civil Code' (1997) 60 *Modern Law Review*, 44.

systems can indeed 'live apart together' If the function of comparative law is accepted as the building of bridges, placing legal systems on the branches of family trees can bring them into closer proximity within the boundaries of Europe and around the world. If legal systems can see themselves as part of one large world, part of a fertile forest rather than being divided into isolated families, the chances of 'living apart together' increases. The hope is that a healthy hybridity will ensue.

Legal systems are looking to each other for law reform. Are legal systems that are closely related to each other, legally, politically, socio-culturally and economically and that sit on the same branch of their family tree, the best systems to benefit from each others' experience? The legal systems of today, most of which are facing transition, need models which are socio-culturally and/or legal culturally diverse from their own. History tells us that when the encounter is between legal systems of diverse socio- and/or legal-cultures, the diverse elements co-exist side by side in the resultant legal system.[47] Usually it is a law or even a legal institution that moves from a foreign source into a domestic millieu. Sometimes, legal systems themselves shift their positions *en bloc*. At times, especially in global receptions, it is a whole legal culture that moves.[48]

There may be intermingling when there is no socio-cultural diversity but only a legal-cultural one, so that in time the diverse elements are blended, or one of the elements may become the dominant element owing to political factors, or again, from the very beginning one of the elements may be systematically erased by the use of authority. The outcome however, is often not a matter of choice but a matter of chance, or of necessity. For example, the Eastern European systems poised to join the European Union must somehow prepare themselves for change in 'the desired direction', this desire being not necessarily one of the bottom upwards but of the top downwards of the élite, or of outside forces. There are many new shoots developing on this family tree.

Some of the terms employed for analysis of such developments today, are 'seepage', 'contaminant', 'irritant', 'underlay', 'overlay', 'cross-fertilisation', 'incremental reception', 'competing systems', 'hyphenated' legal systems, layered law, 'chance', 'choice', 'prestige', 'efficiency', 'élite' and 'historical accident'. Each may be appropriate for the analysis of a specific move and for the explanation of a specific growth.

In the past many shoots sprouted on the family trees through impositions and colonial relationships. Indeed, the English common law has been likened by Lord Denning to an 'oak tree' which grows only on English soil,

[47] Örücü, above n 21.

[48] Note the Turkish experience between 1926–30, when secularism and westernisation were embraced through social reform legislation, which supported the large scale receptions of Codes from a number of civilian sources, as already mentioned.

and if this tree were to be planted elsewhere, it would need to be severely pruned. In his words:

> … the common law cannot be applied in a foreign land without considerable qualification just as with an English Oak, so with the English common law. You cannot transplant it to the African continent and expect it to retain the tough character which it has in England. It will flourish indeed but it needs careful tending. So with the common law. It has many principles of manifest justice and good sense which can be applied with advantage to peoples of every race and colour all the world over. But it also has many refinement, subtleties and technicalities which are not suited to other folk. These off-shoots must be cut away.[49]

Today is not a period of imposition; yet, neither is it one of voluntary reception. It is a time of imposed reception, a seemingly voluntary activity of import under circumstances where the exporters hold all the trumps. In this market, the exporter packages and labels his model as the one to be preferred over others. Such imposed receptions are not only to be seen in the Central and Eastern European States however. Within the context of European integration, the Continental civilian systems are trying to impose civilian type Codes on the English common law, and the English common law, the system of judge-made law on them. The understanding of codification as top-down centralist legalism has also led 'law and economics' scholars to propose the competition of legal systems in a free legal market as opposed to both codification, which is in effect unification, and direct harmonisation. The elements of choice and efficiency here remain the main criteria. Some advocates of the 'new *ius commune*', stressing the need for re-systematisation of the law and the development of a European legal doctrine, also claim that this could be done without a final synthesis and unification.[50] Whatever the means, the end result will be more transposition, more intertwining and more new shoots on the family trees.

Past receptions from Civil law and Roman law into English law have been called 'sporadic receptions' or 'injections', with 'civil law based reasoning filtering into common law'[51] ensuring that English law was constantly enriched. However, any rules based on Roman law or the later *ius commune* 'were immediately cut off from their roots', and 'assimilated into the specifically English framework, and given life outside their

[49] Lord Denning J in *Nyali Ltd v Attorney General* [1955] 1 All E R 646 at 653. This case and opinion is also quoted by C Mubirumusoke, in 'Application of the Received Law of Torts in East Africa and the Problem of Transplanting Legal Norms', in TW Bechtler (ed) *Law in a Social Context (Liber Amicorum Honouring Professor Lon L Fuller)* (Deventer, Kluwer, 1978), 131 at p 154.

[50] M van Hoecke & F Ost, 'Legal Doctrine in Crisis: Towards a European Legal Science' (1998) 18 *Legal Studies*, 197 at pp 211–15.

[51] DJ Ibbetson, A Reply to Professor Zimmermann', in TG Watkin (ed) The *Europeanisation of Law*, UKNCCL Series: 18 (London, UKNCCL, 1998), 224 at p 228.

original context'. The resultant new law 'did not remain in dialogue with the old law from which it derived'; and 'once the borrowings are cut off from their roots they cease to be part of the same culture' as they grow in the new soil.[52] Therefore, the influences were not systematic and the solutions did not remain the same. Nevertheless, these reflected on the growth of the tree. Today, European Law is regarded by many as an 'irritant' or a 'contaminant' of the common law. Again, the results will be in the growing of the family trees.

CONCLUSION

We can detect a pattern in the growth of family trees. A pattern is made up of parts. These may be stacked as layers. It is only possible to focus on one part or one group of parts at a time. One can then see the connecting pieces and the related groupings. If pieces continue to be grouped in the same manner, then there is a constant pattern; however, if the pieces are grouped in a different manner, a new pattern will emerge, as was suggested above: to look anew at what we have looked at before and to look at others we have never or seldom looked at; and to look at them all from different perspectives, trying to detect new patterns. Some new patterns might look familiar, some would be the old shapes presented from a different angle, and some others would be totally new. Every different grouping of the pieces however, must be regarded as temporary and fluid. This is a time for a fresh approach to the grouping of the legal systems and the creation of new patterns, a time of rethinking. It is submitted that we are looking at growing and intermingling family trees. Let us look at systems such as Malta, Thailand and Turkey and place them on the appropriate branches of the appropriate trees. At the same time let us look once again at well-studied legal systems such as the German, French, Italian and the Dutch horizontally and vertically from this new analytical standpoint.

Our main work now is therefore, to deconstruct the conventionally labeled pattern of legal systems and re-construct them with regard to parentage, relationships and the diverse fertilisers, grafting and pruning used in their development. It is only then that we can draw up family trees, leaving ample space for new and inevitable growths.

[52] Above 51, p 229. Here I would like to quote from A Watson, *Legal Transplants and European Private Law*, Ius Commune Lectures on European Private Law (2000 METRO, Institute for transnational legal research), p 14: 'I am a tomato grower. I have plastic trays each with 24 small containers filled with a soil mix. Into each container I place a tomato seed, which I proceed to water and fertilise. When the plants are about six centimeters tall, I sell them. A buyer takes one, pinches it out of its container, and plants it in his yard. The plant soon stretches out its roots into the surrounding, very different soil. The purchaser fertilises it with his own, different from mine, fertiliser. The tomato plant is in a very different ethos on which its future depends. Even the sun strikes it differently. The tomato plant may flourish or even wither. … Is the tomato plant the same plant as it was under my care?'

19

A Common Legal Language in Europe?[*]

ANNE LISE KJÆR

1. INTRODUCTION

IN THE CURRENT debate on European legal integration, it is sometimes asserted that for the integration of the national legal systems to succeed, it is necessary to develop a 'common legal language' in Europe.[1] The diversity of legal languages is an obstacle to integration, so the argument goes, and therefore the plurality must be eliminated. However, as the plurality of languages is a key characteristic of the European continent, a 'common legal language in Europe' would seem to be a contradiction in terms. This raises the issue of whether Europe can possibly develop a common legal language when it does not even have a common general language.

Before considering an answer to that question one will have to reflect on the meanings of 'language', 'legal language', and 'law' and to explore the relationship between them. As I shall try to explain, the notion of a 'common legal language' turns out to be at the same time meaningful and

* This chapter is a revised version of a paper which I delivered at the conference 'Epistemology and Methodology of Comparative Law in the Light of European Integration, Brussels, 24–26 October 2002'. A short version of the paper is planned for publication in Copenhagen Studies in Language 2003.

[1] In the programme announcing the conference 'Epistemology and Methodology of Comparative Law …' (see footnote above), the organisers invited papers concerning the question of the possibility and desirability of developing a common European legal language. The relevance of the topic is seen in the fact that several research groups in Europe are dealing with the task of developing—in some form—such a language. Cases in point are the so-called NICE-movement (Novum Ius Commune Europeanum), especially Christian von Bar's project on the Foundations for a European Civil Code (organised as a transnational Study Group on a European Civil Code) and the Principles of European Contract Law developed by the Lando Commission on European Contract Law. Relevant in this respect is also the 'integrative' comparative law project of Ugo Mattei and Mauro Bussani (The Trento project—a Common Core of European Private Law), and the casebook project initiated by Walter van Gerven (Casebooks for the Common Law of Europe).

meaningless, depending on the language theory and the legal theory that one employs.

First, the question at issue requires one to specify in what sense 'language' is used in the phrase 'common legal language'. As most words in the dictionary, 'language' is ambiguous. This is why I can meaningfully assert on the one hand, that a common legal language is neither desirable, nor possible, and that on the other hand, a common legal language is not only possible but also desirable, if European legal integration is to succeed. As I shall try to explain below, this is not a self-contradictory statement. It all depends on what one means by 'language'.

Secondly, one will have to make explicit what concept of law one employs when considering the possibility of European legal integration. The basic questions of legal sociology are essential in this respect: What is law and how does it work? More specifically, it is important to make clear whether law is to be seen as a self-contained system of rules and regulations—as the 'book-law' of legal professionals—or as the 'living law' of a society. Is the object of analysis the formal law of those members of society who perform specialised legal tasks (the internal legal culture) or is it rather the informal law of the general population (the external legal culture)?[2] In this chapter, I shall leave out the external view, ie considerations of how legal rules affect and are affected by society and by morals, values, and legal attitudes of the general population. My focus is on the legal professionals and the possibility of establishing a common understanding between lawyers from different national legal systems, not on the functioning of the external legal cultures of Europe.[3]

Thirdly, it is important to consider the relationship between language and law. It is commonly held that the language of law differs from most other sub-languages in one important respect: while especially the language of natural science is a universal language used by scientists across different societies and cultures, legal language is culture-bound and intertwined with one particular society and its legal system. It is seen as the collective memory of the legal actors belonging to the legal system in question. In past centuries, Latin used to play the role of a common legal language which was applied across the boundaries of local law, but in today's Europe there is no such legal *lingua franca*. It follows that lawyers belonging to different legal systems have no shared language. However, this way of describing legal language makes it difficult to account for the fact that lawyers from different legal systems actually do communicate with each other about legal matters.

[2] Lawrence M Friedman: *The Legal System. A Social Science Perspective*. (New York, Russell Sage Foundation, 1975) (p 223).

[3] I endorse the view that it is possible to analyse the two levels of legal culture separately, even if I acknowledge the fact that they are interconnected and agree with the sceptics of European legal integration that the functioning of the internal legal culture is affected by the external legal culture.

So, what language do lawyers speak when they communicate across legal systems? Unless it is true that legal actors can understand each other only if they belong to the same legal system, there must be a legal language other than that of system-bound terms and phrases. There must be a way out of the confines of the national legal language enabling a cross-cultural legal dialogue.

Finally, the meaning of 'common' in the phrase 'common legal language' has to be explored. As we have just seen, there is neither a common general language, nor a common legal language in Europe today, so the question arises whether it is possible at all for a language 'community' to evolve from the existing language 'plurality'. Or to put it differently, how can lawyers possibly get from the starting-point of disparate legal languages to the desired end-point of a common legal language?

In the following, I shall consider these topics in turn. At the end of my survey, I shall try to give an answer to the overall question: Is it possible to develop a common legal language in Europe?

Before I continue, I must make clear that I do not understand this question as referring specifically to the possibility of developing a European *private* law, although I know that the concept of a 'common legal language' has been used first and foremost in considerations concerning private law.[4] What I have to say in the following is meant to be a general survey of the relationship between language and law in the process of legal integration.

The following survey is undertaken in rather abstract terms, so some readers may miss practical exemplification. The topics considered are philosophical matters which I allow myself, nevertheless, to treat in a rather superficial manner, so other readers may miss philosophical depth. For both deficiencies I apologise in advance.

2. THE MEANING OF LANGUAGE

2.1. Structuralist and Pragmatic Theories

What is the meaning of 'language'?[5] A preliminary answer may be found by consulting a dictionary. In the Encyclopedia Britannica Online, eg, one finds a lengthy article on 'language', introduced by the following short definition:

> [language is] a system of conventional spoken or written symbols by means of which human beings, as members of a social group and participants in its culture, communicate.

[4] For references, see n 1.

[5] The following survey is a simplified and general description of the complex and multi-faceted history of language theory in linguistics and philosophy.

As one would expect, this definition represents a compromise between different language theories, covering two opposite views on the key function of language:

1. Language is a system of symbols.
2. Language is a means of communication.[6]

If language is seen primarily as a system of symbols, as in structuralist theories, the most important aspect of language is considered to be its capacity to represent entities in the world. Words name things; sentences are combinations of words and are either true or false statements of facts.[7] One contested point is the extent to which different languages objectively denote or subjectively shape entities in the world. Are languages simple mirrors of reality (realism, materialism), or do different languages represent different world-views (idealism, linguistic relativity thesis)?[8]

If, on the other hand, language is studied as a means of communication, as in pragmatic theories, the main concern is to analyse the interplay between communicators and the contexts in which language is used.[9] Words are not seen as having fixed meanings, independently of context and use, text producers and interpreters. As Fairclough puts it, 'words typically have various meanings, and meanings are typically "worded" in various ways.'[10]

[6] Essentially, the two theories of language are expressed in the work of Ludwig Wittgenstein, who in his late work (*Philosophical Investigations*) explicitly abandoned the semiotic view on language which he had taken in his early work (*Tractatus logico-philosophicus*) ('the meaning of words is what they stand for') and replaced it by a pragmatic theory ('the meaning of words is their use').

[7] The father of European structuralism was the Swiss linguist Ferdinand de Saussure who with his main work from 1916, *Cours de Linguisitque Générale*, achieved great influence on 20th century linguistic thought. The most important of the various schools of structural linguistics have included the Prague school, represented by Roman Jakobson, and the Copenhagen (or glossematic) school, centred around Louis Hjelmslev. The approach of JR Firth and his followers, sometimes referred to as the London school, may also be described appropriately as structural linguistics.

[8] The linguistic relativity thesis is usually attributed to the American anthropologists Edward Sapir and Benjamin Lee Whorf, but the idea of linguistic relativity dates back to the work of Wilhelm von Humboldt: *Ueber die Verschiedenheit des menschlichen Sprachbaus und ihren Einfluss auf die geistige Entwicklung des Menschengeschlechts* (Bonn, Dümmler [1836] 1968). See also Benjamin Lee Whorf: *Language, Thought and Reality. Selected Writings* (Cambridge Massachusetts, MIT Press, 1956). For further information see eg John J Gumperz and Stephen D Levinson (eds): *Rethinking Linguistic Relativity* (Cambridge University Press 1996).

[9] Pragmatic theories originate in the philosophy of language. The term 'pragmatics' was coined in 1938 by the philosopher Charles Morris for the relation of signs to their users and to the conditions of their use. Especially, the Speech Act Theory of J Austin *How to do things with words?,* (Oxford University Press, 1962) and J Searle *Speech Acts*, (Cambridge University Press, 1969) has had far-reaching influence on linguistic analysis. The seminal article 'Logic and Conversation' (1975) by HP Grice should also be mentioned here (see n 14 below).

[10] Norman Fairclough: *Discourse and Social Change.* (Cambridge, Polity Press [1992], 1996), p 185.

The encyclopaedia definition comprises a third dimension of language which cuts across the two language views mentioned, viz. the social role of language. First, language is seen as a system of *conventional* symbols, meaning that the connection between words and the entities that they stand for is essentially established by the speech community. Secondly, language is seen as a means of communication by which human beings, *as members of a social group and participants in its culture,* communicate. Hence, what is and can be communicated in language depends on the social group and culture to which the language users belong.

Even so, the role of language users is different in the two theories of language. In structuralist theories it is acknowledged that language is basically a social phenomenon, but the focus is on language as a *stable system* which is studied independently from context and use. In pragmatic theories, however, the analysis begins and ends with the premise that language is a facet of 'wider social and cultural processes'. Thus, the focus is on language as a *variable flow.* 'The meanings of words and the wording of meanings are matters which are socially variable and socially contested'.[11]

Furthermore, even if culture plays a part in both structuralist and pragmatic theories on language, the theories account for the relationship between language and culture in different ways. Structuralist theories see language as a mirror of culture, idealist theories contending that each individual language expresses the unique world-view of one particular culture. Pragmatic theories, on the other hand, see culture as part of the shifting contexts in which language users use language, contending that the relationship between the two is reciprocal so that language is shaped by culture and culture shaped by language. Thus, in structuralist theories, culture, like language, is seen as a stable system, while pragmatic theories see culture as a variable background of communication.

2.2. Hermeneutic and Cognitive Theories

I shall add another aspect of language which is not covered by the encyclopedia definition quoted above, but which is important for my argument in this chapter. What I have in mind may be indicated by the phrase

> *to speak the same language*

meaning

> *to be able to communicate easily with another person because you share similar opinions and experience.*[12]

[11] Norman Fairclough, above n 10 p 185.
[12] Definition quoted from *Oxford Advanced Learner's Dictionary*, 6th ed, (Oxford University Press, 2000).

Of course, in this phrase 'language' is used metaphorically, but even so, it illuminates a further aspect of language relating to its function as a means of communication. Thus, the concept of 'easy' communication is introduced.

'Easy communication' is no technical term, but suggests a hermeneutic dimension of language, extending the pragmatic view with the notion of understanding. The point is that people communicate easily, when they understand each other without great effort. Hence, language is not only a means by which a person communicates his thoughts to others, but also the means by which those other persons understand what he communicates. In Gadamer's words, 'language is the medium in which substantive understanding and agreement take place between two people'.[13]

The hermeneutic view on language does not represent a third category which can be differentiated strictly from the pragmatic theory outlined above. However, in the hermeneutic view the focus is not on the speaker's text production, but solely on the addressee's text interpretation. Therefore, I find it feasible to add the following definition of language to the ones already described:

3. Language is a means of *understanding*.

The process of understanding is easy, when people communicating 'share similar opinions and experience'. In that case there is no great gap between the speaker's communication and the recipient's understanding, because they draw on the same background knowledge in the process of conveying and interpreting the message in question. Thus, the recipient immediately understands what the speaker means without having to ask for explanations. Correspondingly, the speaker may presuppose that the recipient understands what he writes or says, even if he does not spell out all details.[14] Consequently, texts are normally 'underdetermined', as described in cognitive linguistics.[15] Not all that is said, is explicitly expressed, but has to be

[13] Hans-Georg Gadamer: *Truth and Method,* 2nd, revised edition [in English] (London, Sheed & Ward 1989), p 383. (German original: *Wahrheit und Methode. Grundzüge einer philosophischen Hermeneutik* (Tübingen, Mohr, 1960)).

[14] Cf Grice's conversational implicature of quantity: 'Make your contribution as informative as required (for the current purposes of the exchange).' HP Grice: 'Logic and Conversation', in: P Cole and J Morgan (eds): *Syntax and Semantics* (London, Academic Press, 1975) Vol 3, reprinted in Robert M Harnish: *Basic Topics in the Philosophy of Language,* (New York (etc), Harvester / Wheatsheaf, 1994), pp 57–73 (61).

[15] See eg PN Johnson-Laird: *Mental Models. Towards a Cognitive Science of Language, Inference, and Consciousness.* (Cambridge University Press 1983). Charles J Fillmore: 'Frames and the semantics of understanding'. In: *Quarderni di semantica* 2, 1985, pp 222–54. Gilles Fauconnier: *Mental Spaces: Aspects of meaning construction in natural language.* (Cambridge University Press, 1994) Roger C Schank, and Robert P Abelson: *Scripts, Plans, Goals and Understanding, An Inquiry into Human Knowledge Structures.* (Hillsdale NJ, Lawrence Erlbaum, 1977).

read between the lines. In other words, texts gain meaning in a complex interplay between the text, the writer, the reader and their knowledge of the world.

However, when a conversation is conducted between people belonging to different social groups and cultures, no immediate understanding is possible. So, the opposite of 'easy communication' as indicated by the phrase '*to speak the same language*', is 'hard communication', ie communication between people who *do not speak the same language* in the metaphorical sense of the word. In other words, language is not only a means of communication and understanding, but also a means of misunderstanding. To make this point clear, we may therefore add the following definition of language to the ones listed above:

4. Language is a means of *misunderstanding* between people belonging to different social groups or cultures.

In pragmatic theories concerned with intercultural communication, misunderstandings between people are systematically described.[16] Such misunderstandings may occur in communication between people who speak the same native language, ie in *intra-lingual* communication. Characteristically, intercultural communication is experienced in cross-generation, cross-gender, inter-social and in expert-lay communication. Understanding in those cases is disturbed not only by the lack of shared background knowledge, but also by the fact that the people in contact—even if they speak the same language—apply different codes within that language—sociolects and dialects.

But language used in *inter*-lingual communication makes understanding even harder. People who have to communicate across borders do not speak the same language in the literal sense of the word and, basically, people who speak different languages can neither communicate nor understand each other. Therefore, language is not only a means of communication, but also a means of non-communication between people belonging to different speech communities. This adds up to stating a final dimension of language, viz.:

5. Language is a means of non-communication between people belonging to different speech communities, or in other words: Language is a *barrier* for people who do not understand and speak it.

[16] There is a great variety of books concerned with intercultural or cross-cultural communication, see among many others Karlfried Knapp et al: *Analyzing Intercultural Communication*. (Berlin, New York, Amsterdam, Mouton de Gruyter, 1987), Anna Wierzbicka: *Cross-Cultural Pragmatics. The Semantics of Human Interaction*. (Berlin, New York, Mouton de Gruyter, 1991), Ronald Scollon and Suzanne Wong Scollon: *Intercultural Communication: A Discourse Approach*. (Oxford, Cambridge (Mass.), Blackwell 1995).

2.3. Language in European Legal Communication—Part One

If we return to the question at issue, we now see that the odds are heavily against a common legal language in Europe. European legal actors have different native languages and belong to different legal cultures. Therefore, communication between European lawyers is necessarily hindered by language barriers and is typically characterised by misunderstandings caused by differences in legal world-view and experience.

In my opinion, it is important always to keep these obstacles to European legal communication in mind. Fundamentally, Europe is a 'community that can't communicate.'[17]

However, this cannot be the end of the story, for European lawyers do actually communicate rather successfully with each other. The task then is to explain, how people belonging to different speech communities and legal cultures are able to communicate, in spite of the inherent difficulties. How can communication across language barriers and cultural differences succeed? Or to put it differently: What language do lawyers speak when they communicate across languages and legal systems?

At first sight, this question may seem simple. Belonging to different speech communities, European lawyers either speak English, the first foreign language of most Europeans today,[18] or they employ translators and interpreters to bridge the language gap between them. But a good command of English is no guarantee for successful legal communication. On the contrary, English is probably the most inadequate language to apply as a legal *lingua franca*, because legal English is the language of Common Law.[19] Likewise, the lack of immediate understanding between Europeans can be remedied by translation only imperfectly, because translation of legal texts is always unidirectional, transferring legal concepts of the source language legal system into another language (the target language).[20] An exchange of legal ideas independently of the concepts and conceptions of one particular

[17] See Sue Wright: 'A community that can communicate? The linguistic factor in European integration.' In: Dennis Smith and Sue Wright: *Whose Europe? The turn towards democracy.* (Oxford, Blackwell, 1999), pp 79–103.

[18] *Europeans and Languages. Eurobarometer 54 Special.* Report produced by INRA (Europe), European Coordination Office SA for The Education and Culture Directorate-General, February 2001.

[19] See the description of the problems connected with the use of English as a legal *lingua franca* in Martin Weston: 'The Role of Translation at the European Court of Human Rights.' In Franz Matscher, Herbert Petzold (eds): *Protecting Human Rights: The European Dimension. Studies in Honour of Gérard J Wiarda.* (Köln, Berlin, Bonn, München, Carl Heymanns, 1988), pp 679–89.

[20] Among many other relevant books on legal translation, see eg Susan Sarcevic: *New Approach to Legal Translation.* (The Hague, London, Boston, Kluwer, 1997). Gerard-René de Groot and Reiner Schulze (Hrsg.): *Recht und Übersetzen.* (Baden-Baden, Nomos 1999). Peter Sandrini (Hrsg.): *Übersetzen von Rechtstexten. Fachkommunikation im Spannungsfeld zwischen Rechtsordnung und Sprache.* (Tübingen, Narr, 1999).

legal system, therefore, involves translation without a source text and a target text, otherwise the Alpha and Omega of legal translation.[21] The point is that neither English nor legal translation can compensate for the lack of a neutral common ground for the trans-national legal communication in Europe. Legal languages are dependent on the legal systems and cultures to which they belong.

So a remaining is to consider the circumstances under which it is possible *to speak the same language across legal languages*. In order to get closer to an answer to this question we will have to consider the meaning of legal language in its various dimensions.

But before I turn to a description of the characteristics of legal language, I shall briefly comment on the meaning of 'law' in theories of comparative law and legal integration, especially with a view to determining the role of language and the possibility of 'easy communication'.

3. THE MEANING OF LAW: LEGAL SYSTEMS AND LEGAL CULTURES

Above, I have referred to 'law' either as legal system or as legal culture, without distinguishing clearly between the two notions. However, seeing 'law' in either of those ways has implications for the description of the role of language in law and for the assessment of the possibility of developing a common legal language across the laws of Europe.

Since the building of the modern nation-states and the great codifications of law in the nineteenth century, the common understanding of law has been that of a national legal system consisting of a coherent set of rules and concepts which are peculiar to that particular legal system and the nation state in question. Thus, legal systems are seen as entities with clear boundaries which can meaningfully be contrasted with other legal systems with different, and sometimes conflicting, rules, concepts, and ways of argumentation. On this view, communication across legal systems is difficult, but an understanding of the rules and concepts of foreign legal systems can be obtained through careful study and thorough explanation. The common ground is the function of legal systems. Even if the disparate legal systems function individually and independently, they are all designed to give

[21] Translation without a source text has been described in the work of Christina Schäffner, eg: 'Where is the Source Text?', in Wotjak, Gerd, and Heide Schmidt: *Modelle der Translation / Models of Translation. Festschrift für Albrecht Neubert.* (Frankfurt / Main, Vervuert Verlag, 1997), pp 193–211. See also Christina Schäffner and Beverly Adab: 'Translation as intercultural communication—Contact as conflict', in Snell-Hornby, Mary (et al) (eds: *Translation as Intercultural Communication. Selected Papers from the EST Congress—Prague 1995,* (Amsterdam/Philadelphia, John Benjamins, 1997), pp 325–37.

answers and solutions to the same kind of problems and the same kind of conflicts between people.[22]

In the current debate on legal integration, law is commonly seen not (only) as a system, but (also) as (an aspect of) culture.[23] Two opposite conceptions of legal culture can be identified.[24] Thus, some theorists see law as an almost mythological phenomenon, as a close companion to the culture of a particular society and its history. From this perspective, lawyers belonging to different legal cultures, even within Europe, basically cannot understand each other, because their ways of legal thinking, the *mentalitées* of the legal cultures in question, differ as much as do the societies of which they form a part. This makes cross-cultural legal communication practically impossible, at least if profound understanding is required. In particular, lawyers of common law and civil law countries do not 'speak the same language', which makes misunderstanding between them almost inevitable. When, eg, a French lawyer says *contrat*, this notion is radically different from the notion of *contract* in the mind of a common law lawyer. Superficially, the concepts are the same, but at the deep level of legal thinking, they form opposite approaches to contract formation.[25]

Other scholars endorse a broader view on legal culture. In their opinion, the legal systems of Europe belong to the same Western legal culture. European legal systems do differ, but the differences occur only on the surface

[22] Cf the functional theory of comparative law by Konrad Zweigert and Hein Kötz: *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts*. 3. Aufl (Tübingen, Mohr, 1996). The functional theory is implicitly or explicitly endorsed by most proponents of European legal integration.

[23] A somewhat different conception is that of tradition which I shall not consider any further here, cf H Patrick Glenn: *Legal Traditions of the World. Sustainable Diversity in Law.* (Oxford University Press, 2000).

[24] In this admittedly very broad outline, I consider theories of law dealing with the 'internal legal culture' of legal actors only, leaving out (sociological) theories concerned with the 'external legal culture' of the society and population in question. A more detailed exposition of the current debates on European legal integration (convergence and divergence) will reveal a greater variety of perspectives than outlined for the purposes of my argument in this chapter, see eg L Nottage: *Convergence, Divergence, and the Middle Way in Unifying or Harmonising Private Law,* EUI Working Papers, Law, No 2001/1 (Florence, European University Institute 2001), and Paul Beaumont et al: *Convergence and Divergence in European Public Law,* (Oxford—Portland Oregon, Hart 2002).

[25] See especially the work of Pierre Legrand, eg 'European Legal Systems Are Not Converging'. *International and Comparative Law Quarterly*, vol 45 (1996), pp 52–81, and his collection of papers on legal integration and culture: *Fragments on Law-as-Culture*. (Deventer, Tjeenk Willinkm, 1999). Other 'sceptical' approaches: Carol Harlow: 'Voices of Difference in a Plural Community', in Paul Beaumont et al: *Convergence and Divergence in European Public Law,* (Oxford—Portland Oregon, Hart Publishing 2002), pp 199–224. Bernhard S Jackson: 'Legal Visions of the New Europe: *ius gentium, ius commune,* European Law' in BS Jackson and D McGoldrick (eds): *Legal Visions of the New Europe*. (London, Dordrecht, Boston, Kluwer, 1993), pp 3–35. Geoffrey Samuel: *The Foundations of Legal Reasoning*. (Antwerp Maklu 1994). Gunther Teubner: 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergencies', *The Modern Law Review*, (1998), Vol 61 No 1, pp 11–32. Tony Weir: 'Die Sprachen des europäischen Rechts. Eine skeptische Betrachtung' *Zeitschrift für Europäisches Privatrecht*. 3/1995, pp 368–74.

level of analysis. An analysis of the deep level of law, however, reveals that legal principles and notions of justice are more or less the same in all European legal systems. Therefore, a common understanding between lawyers from different legal systems in Europe is comparatively easy to obtain; the *tertium comparationis* of common principles and common roots in Roman law and *ius commune*, makes communication across legal systems possible. Basically, therefore, lawyers throughout Europe do 'speak the same language'.[26]

In some interpretations of law, therefore, a common legal language cannot possibly emerge, because law is seen as a stable companion to one particular society, its history, and culture: Common European rules and common European text-books do not guarantee convergence of European legal systems, because different legal cultures react differently to a given set of rules, and legal actors belonging to different legal cultures understand and interpret the common texts incoherently. In other interpretations of law, however, the opposite position is defended: the fundamental understanding of law is identical in all European countries and, therefore, convergence of the legal systems is possible, as is the development of a common legal language.

In my opinion, none of these theories is convincing, because they leave out an analysis of the mechanisms at play in the process of legal integration. The proponents of legal integration fail to explain how it is possible to get from the starting point of disparate legal systems and differing and partly conflicting legal languages to the end point of a common legal language. The opponents, on the other hand, do not explain why the cross-cultural legal communication surrounding the common European rules and institutions can avoid changing the legal languages of the legal cultures in contact with one another.

As I argue below, I think that the truth lies between the extremes. Legal languages like legal systems are at the same time stable and flexible. Their relative stability impedes integration; their relative flexibility facilitates integration.

4. THE MEANING OF LEGAL LANGUAGE

Both in theories of language and translation and in comparative law, legal language is commonly regarded as a sub-system of a national language,

[26] This is probably the majority view among legal scholars concerned with European legal integration. See especially Mark van Hoecke / Mark Warrington: 'Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law', *International and Comparative Law Quarterly* Vol 47 (1998), pp 495–536, John Bell: 'English Law and French Law—Not so Different?', *Current Legal Problems* 1995, pp 63–102, and B Markesinis (ed): *The Gradual Convergence: Foreign Ideas, Foreign Influence, and European Law on the Eve of the 21st Century*, (Oxford, Clarendon Press, 1993).

consisting of legal terms and phrases and stable conventions for the formulation of legal texts. Moreover, the language of law is seen as a reflection of one particular legal system: Besides fulfilling specialised legal tasks, it functions as the collective memory of the lawyers of that system, storing, over many generations, the experience, habits, and world-views of the legal community in question.

This is the common understanding of legal language among comparative lawyers and translators. Furthermore, it is usually asserted that, because of the interdependence of language, law, and society, legal meanings and legal concepts cannot easily be transferred from one legal system to another and be understood by foreign lawyers.

In this conception of legal language, legal concepts have no absolute validity, but are seen as stable units of legal meaning, belonging to one particular legal system. Of course, the functioning of national legal systems contributes to shaping stable legal concepts, but, in my opinion, it is important to note that legal concepts are not forever fixed entities. They can and do change. As a change of national legal concepts is a prerequisite for legal integration across national boundaries, it is important to apply a theory of language which can account for the process of that change. The static view of legal language endorsed in theories of comparative law and legal translation, however, fails to do so. Hence, I advocate a more dynamic view which recognises the fact that, like general language, legal language is not only a stable system of symbols, but also a variable flow of discourse between legal actors.

If we take a closer look at the process of concept formation in a legal system, we may find the key to an understanding of how the meaning of legal concepts can change. I take as my starting point, the description of concept formation presented by Niklas Luhmann in his theory of legal systems.[27] As the question analysed in this paper requires one to reflect on how system-independent concept formation across legal systems takes place, and how understanding between legal actors belonging to different legal systems can be obtained, I supplement Luhmann's system-dependent description of concept formation by linguistic and social theories of discourse and language (Fairclough, Habermas, and Gadamer).

4.1. Language and Legal Concepts

As stated above, legal concepts are commonly regarded as stable units of meaning, belonging to one particular legal system. In Luhmann's theory of legal systems, legal concepts are described as products resulting from the communicative processes of the system. By seeing legal concepts in this way,

[27] Niklas Luhmann: *Das Recht der Gesellschaft*. (Frankfurt, Suhrkamp, 1993), paperback edition 1995.

Luhmann explains why legal concepts are at the same time stable and variable entities.[28]

Legal concepts are generated through the process of legal argumentation. They do not exist independently of that process as ready-made entities from which lawyers deduce their legal decisions, but are shaped and established gradually, by being applied again and again in many similar cases. Once the concepts have been established, however, they achieve relative stability. They get fixed names so that they may be recognised, and subsequently, those fixed names must be applied, whenever the concept in question is to be expressed.

Inherent in Luhmann's description of legal concepts is the storage of legal experience. Legal concepts are used in a never-ending process of legal argumentation and in constantly changing contexts of adjudication. Therefore, legal concepts are stores or containers of variable and developing legal thought. Their meaning cannot be specified by listing a finite number of conceptual features, but is constantly refined and adjusted in legal argumentation.

The paradox of legal concepts is that they are at the same time variable and stable. The stability of legal concepts and their dependency of a particular legal system is the key characteristic of legal language as a system of symbols. And as such, legal concepts make cross-border legal communication difficult. But as Luhmann adequately explains, legal concepts are not forever fixed and unchangeable. They not only *can* change, but constantly *do* change. It is the very nature of legal concepts to change when legal experience changes. Importantly, the change of legal concepts is brought about through legal argumentation—or as you might say alternatively—in legal discourse. This is a crucial point in the following argument.

Thus, Luhmann's theory of legal argumentation illuminates the multifaceted role of language in establishing, maintaining, and changing concepts. However, the weakness of Luhmann's theory is that it is confined to describing the regularities of concept formation in one legal system, thus making it difficult to account for concept formation across the boundaries of established legal systems. Furthermore, as the name indicates, 'system theory' is about *systems* and their functioning, whereas communication and understanding between the *actors* of systems are ignored. Hence, in the following, I supplement Luhmann's description of the functioning of legal concepts by the discourse theory of Fairclough.

4.2. Language and Legal Discourse

Legal language—like language in general—can be viewed both as a system of conventional symbols and as a means of communication for people

[28] The following survey is based on chapter 8 of Luhmann (1995), 'Juristische Argumentation', (above pp 338–406).

belonging to a particular social group and culture. When legal language is viewed as discourse, the focus is on its function as a means of communication. 'Discourse' indicates not only singular communicative events, but applies to communicative practice in a particular social group in general. Thus, when one analyses language from the perspective of discourse, one wants to stress the fact that language is never used in a social vacuum.

But 'discourse' is not a clear-cut concept. There are many different theories of discourse—both in social science and in linguistics.[29] I adhere to the interdisciplinary definition given in the critical discourse theory of Norman Fairclough and Ruth Wodak. They define discourse as language used in social practice and propose a three-dimensional concept of discourse, cp. figure 1 below:

> Any discursive 'event' (ie any instance of discourse) is seen as being simultaneously a piece of text, an instance of discursive practice and an instance of social practice.[30]

The concepts used require an explanation: 'Texts' are used to refer to any linguistic product, whether written or spoken. 'Discursive practice' means communicative interaction between writers and readers, speakers and addressees. And 'social practice' covers the institutional and organisational circumstances of the discursive event, its social context. The three layers of discourse may be analysed separately as in linguistics, but in the critical theory of discourse the focus is on their interplay.

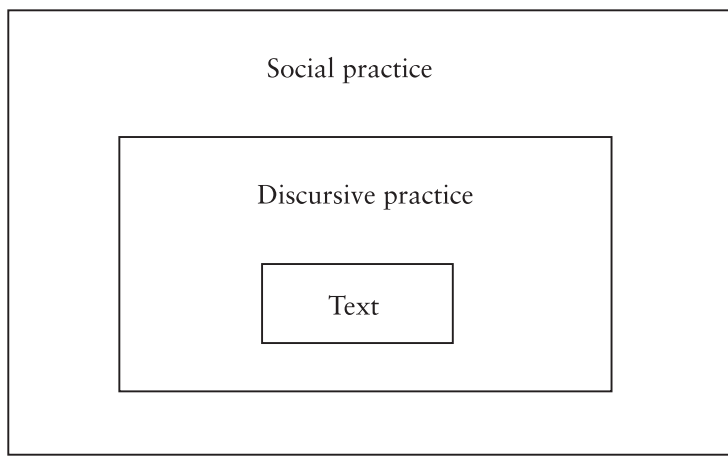

Figure 1

[29] For an introduction, see eg Teun v Dijk: *Discourse Studies. A Multidisciplinary Introduction*, Vol 1–2, (London Thousand Oaks, New Delhi 1997).
[30] Fairclough (1996), above n 10, p 4.

If the concepts are applied to legal discourse, we see that legal discourse likewise consists of three interdependent layers. Legal discourse is manifested in legal texts which are written and read by legal actors as part of the legal practice they perform (fig. 2).

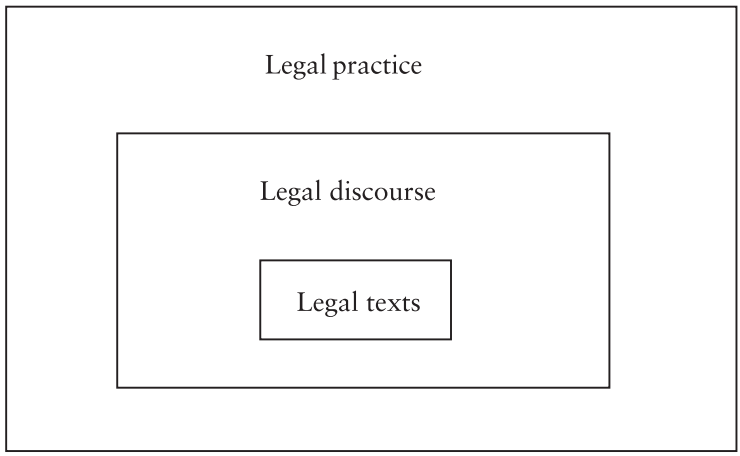

Figure 2

One further important point made in the critical theory of Norman Fairclough and Ruth Wodak is that discourse is socially constitutive as well as socially shaped:

> [Discourse] constitutes situations, objects of knowledge, and the social identities of and relationships between people and groups of people. It is constitutive both in the sense that it helps to sustain and reproduce the social status quo, and in the sense that it contributes to transforming it.[31]

In other words, discourse is dependent on the social context in which it is used; it is shaped by that context. What is said and what can be said is determined by the social embedding of discourse. But the social context is not a forever fixed and immutable entity; on the contrary, the social context is variable, and discourse contributes to changing it. Whenever language is used, what is said has an impact on the knowledge of people belonging to the social group in question, on their concepts and conceptions about the world.

So, if we apply Fairclough's definition of discourse to legal language, we may add that legal discourse is constituted by legal texts produced within

[31] Norman Fairclough and Ruth Wodak: 'Critical Discourse Analysis', in: Teun van Dijk: *Discourse as Social Interaction. Discursive Studies: A Multidisciplinary Introduction, Vol 2*, (London, Sage, 1997), p 258–84 (258).

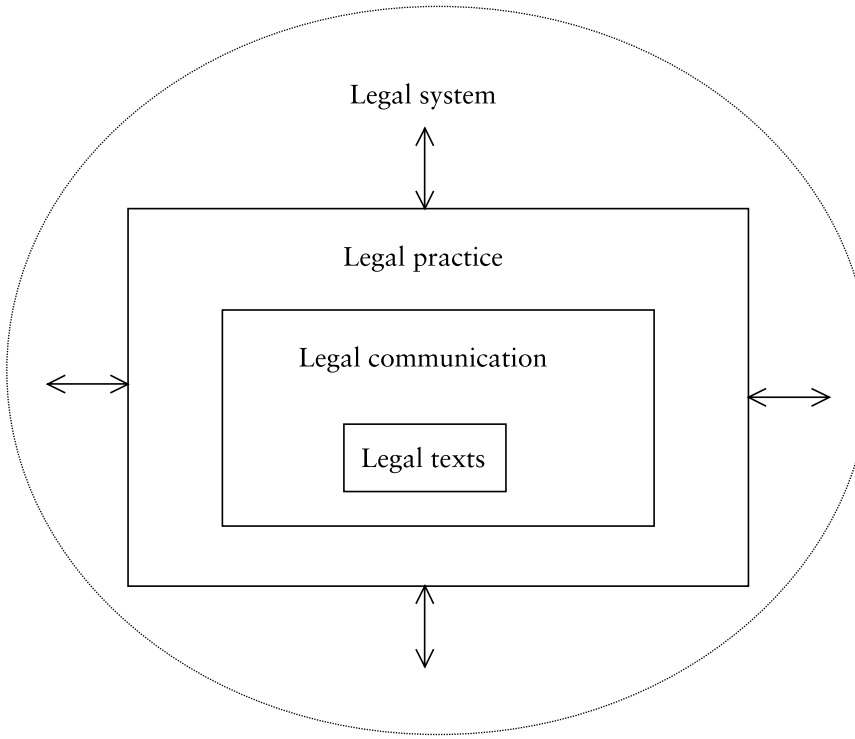

Figure 3

the framework of a legal system with the double function of sustaining and reproducing the system and of changing and transforming it, see fig. 3.

The double role of discourse as reproducer and transformer of legal systems thus parallels the double role of concepts in Luhmann's theory of legal argumentation. Basically, this double function of legal language explains how legal systems are able to respond to changes in their social and cultural context and to develop in accordance with the requirements of a changing world.

4.3. Language and Legal Change

This brings me to the crucial point of my argument. The legal systems of Europe differ as do European legal languages. But neither languages nor legal systems are unchangeable; on the contrary, it is their very nature constantly to change, and importantly, the changes are brought about in legal discourse. Indeed, legal discourse can also bring about a convergence of the national legal systems and their languages.

Figure 4

For the past centuries, the usual context of legal discourse was the nation state and the national legal system. With European legal integration, legal discourse is no longer confined to the national legal system, and legal discourse is increasingly a discourse transcending national boundaries, see fig. 4 above.

Legal texts are no longer produced solely to function within a national legal system. Within the framework of the European Union and the Council of Europe legal norms are set up which apply to all member states across linguistic and cultural barriers. This implies that conflicting legal practices, different legal languages and cultures are exposed to each other. And of course, the resulting inter-lingual and cross-cultural legal discourse is subject to the risks of misunderstanding common to all intercultural communication.

But the process initiated by the formulation of common European legal norms gives rise to a European legal discourse. The legal actors participating in that discourse have their roots in national legal systems, and their world-view is coloured by their national legal background. But gradually, I think, the national legal traditions will change along with the emerging

intercultural communication of legal actors, who in that way adapt themselves to the changing institutional context of law in Europe.

When legal discourse becomes international, when legal argumentation is no longer confined to the national legal system, when legal actors enter into an international interpretive community, the foundation is laid for a change in the meaning of national legal concepts reflecting what is experienced in an international, cross-cultural discourse on law.

But the question still remains to be answered, how legal actors from different legal systems, speaking different legal languages, can understand each other. Habermas' theory of communicative interaction and Gadamer's hermeneutic philosophy can help to explain how mutual understanding may be achieved in the cross-cultural discourse on law.

5. LANGUAGE IN EUROPEAN LEGAL COMMUNICATION—PART TWO

Now we are in a position to answer the question which I posed at the end of my considerations concerning the meaning of language: what language do lawyers speak when they communicate across their different legal languages? As mentioned above, they probably speak English or employ translators and interpreters, but, as we said, that is not the proper answer to the question. The main problem is how mutual understanding is achieved, in spite of the linguistic, legal and cultural differences of the communicators.

The key to an explanation of cross-cultural and interlingual communication lies in the fact that, as Gadamer states, 'language has its true being only in dialogue, in *coming to an understanding*' (p 446).[32] But '[h]ow can we possibly understand anything written in a foreign language if we are thus imprisoned in our own?', asks Gadamer (p 402), and he delivers an answer that dismisses the linguistic relativity thesis and the idea of untranslatability as 'specious arguments': 'The work of understanding and interpretation always remains meaningful. This shows the superior universality with which reason rises above the limitations of any given language' (p 402).

According to Gadamer, then, *reason,* as the universal human faculty of intuition by which one 'sees' reality, is the common language of people belonging to different speech communities. Human reason is the common ground which makes the effort of cross-cultural and inter-lingual understanding and interpretation worth-while. Indeed, our world-views are shaped by our native languages, but this does not mean that we are unable to understand the ways other languages have depicted the world. Thus, 'the fact that our experience of the world is bound to language does not imply

[32] The quotations all stem from the revised English version of Hans-Georg Gadamer's *Wahrheit und Methode* (above n 13).

an exclusiveness of perspectives' (p 448). Even if the French legal concept 'contrat' is radically different from the English concept 'contract', even if the two concepts at the deep level of legal thinking form opposite approaches to contract formation,[33] this does not mean that an English lawyer cannot understand the French concept and *vice versa,* or that lawyers from France and England would not be able to agree on a third interpretation of the concept.

But coming to an understanding across legal languages and legal systems is no easy process—it is 'hard communication' in the sense that I stated above. Thus, the verbal process whereby a conversation in two different languages is made possible through translation (or the use of a *lingua franca*) illustrates a situation where understanding is disrupted or impeded (p 384).

For an explanation of how disruptions and impediments in interlingual communication are overcome, Habermas' theory of communicative action is helpful.[34] The theory of communicative action ('kommunikatives Handeln') presupposes that language is used as

> ein Medium unverkürzter Verständigung [...], wobei sich Sprecher und Hörer [...] gleichzeitig auf etwas in der objektiven, sozialen und subjektiven Welt beziehen, um gemeinsame Situationsdefinitionen auszuhandeln.[35]

Importantly, speaker and recipient use language in order to *establish a common understanding* of things in the objective, social, and subjective world. Language use is not reproductive in the sense that it simply passes on cultural values and revitalise an already given consensus (p 142).

But the establishment of a common understanding can only be achieved if the actors base their interpretation on the same 'vorinterpretierten Lebenswelt' (p 142), ie the tacit suppositions about the world ('Hintergrundsannahmen') which form the point of departure of the communicative action. In cases where the life worlds of speaker and recipient are not identical or sufficiently alike, interpreters or translators must be inserted in order to bridge the gap of understanding. They do so by identifying and making explicit those elements of the life worlds which have disrupted the immediate understanding (p 204).

In the case of European legal communication, I believe that the presuppositions about law are fundamentally the same in all national legal systems. There is a common ground of legal principles, not only based on Roman law and *ius commune*, but also on a common Western legal culture,[36] which

[33] Pierre Legrand: 'How to Compare Now', *Legal Studies* (1996) 16, pp 232–42 (234).
[34] Jürgen Habermas: *Theorie des kommunikativen Handelns, Bde 1–2.* (Frankfurt/Main, Suhrkamp, 1981). Quotations in the text are derived from the paperback edition, (Frankfurt/Main, Suhrkamp, 1997).
[35] Habermas, above n 34, Bd. 1, p 142.
[36] On the concept of a Western legal culture, see van Hoecke / Warrington (1998), above n 26. The authors distinguish between four legal cultures in the world, African culture, Asian culture,

makes communication across the legal systems possible. Thus, a legal discourse across the language barriers and legal systems is possible, in which legal actors from different countries establish a common legal understanding.

6. THE MEANING OF 'COMMON LEGAL LANGUAGE'

I have now reached the final point of my presentation: The definition of the concept of a 'common legal language'. As I stated at the beginning, there is neither a common general language, nor a common legal language in Europe today, so the question arises whether it is possible at all for a language 'community' to evolve from the existing language 'plurality'.

In the call for papers to the conference 'Epistemology and Methodology of Comparative Law in the Light of European Integration, Brussels, 24–26 October 2002', the organisers indicate two possible senses of 'common legal language':

1. A common technical legal language, as it is currently developing within the European jurisdictions and other norm creating institutions, and/or
2. A legal meta-language which would be developed and used within an emerging European legal doctrine.

The question is, however, what is meant by common language. What is 'common'? Who has what in 'common'? It might be argued that the common legal texts produced within the framework of the European Union and the Council of Europe constitute a common legal language of Europe. I suppose this is what is meant by 'a common technical legal language'.

However, in my view, what *is* common, is not the *language* of those texts, but the *discourse* of the legal actors involved in framing them, commenting on them and applying them in legal theory and practice. In other words, the common legal texts do not by themselves produce a common legal language, but they create a basis for a legal discourse across the different legal cultures and different languages of Europe.

I do not see this European legal discourse as a legal meta-language, the second sense of common language indicated in the call for papers. For a language above languages does not exist. There is no neutral linguistic platform from which legal communicators can observe and comment on European law.

Islamic culture and a Western legal culture. See also Bell (1995), above n 26 at 64: 'We have common liberal democratic political values which are operated in capitalist, secular, pluralistic societies under the rule of law.'

However, while a *language above or across languages* is impossible, a *discourse across languages* is indeed possible. So, what is common, is not the *language* of the European legal actors, but their *discourse* about European law. Thus, the common legal texts of European law are not essential in their own right. The decisive thing is the common legal argumentation of an emerging cross-cultural and inter-lingual interpretive community. The contact and dialogue of legal actors, writing, reading and commenting on the same texts is what a common European legal discourse is about.

This discourse is institutionalised by the common law courts—the European Court of Justice and the European Court of Human Rights. But equally important is an emerging European legal doctrine.

In other words, a 'common legal language' in Europe is a misleading term for what is in fact increasingly common to the legal systems in today's Europe: a legal discourse as a complex interplay between common legal texts, common law courts and a cross-cultural legal doctrine.

7. CONCLUSION

My main point in this paper has been to stress the fact that for a proper understanding of the role of language in European legal integration one must distinguish between a static and a dynamic concept of language. Thus, on the one hand, I agree with the sceptics of European integration that the plurality of languages and legal cultures in Europe do form a barrier to integration, but on the other hand, I believe that this is not the full story. Language is not only a barrier to inter-lingual and cross-cultural understanding, but also the medium in which Europeans understand each other across languages and legal cultures. The interesting thing is that language plays the double role of hindering and facilitating integration. Language as a system of symbols, representing the collective memory of a speech community, is indeed a barrier to communication between people speaking different languages, but language is by nature also dialogue and conversation, and in the continuous dialogue between people from different speech communities and cultures a 'common understanding' and a 'common language'—in the metaphorical sense—may be obtained.

Hence mutual understanding between lawyers in Europe is not impossible, as some legal scholars contend, but I agree with the sceptics that the difficulties posed by linguistic and cultural plurality are often disregarded or played down unduly in theories of legal integration.

A common *legal discourse* emerges in the process of political and legal integration in Europe, but this is something different from a common *legal language*. If one says that the legal actors of Europe speak the same language, one asserts implicitly that their mutual understanding is unproblematic. What I say is that European legal actors take part in the same legal discourse,

but that their mutual understanding is subject to the difficulties involved in intercultural communication in general. By using the expression 'common legal language', one misleadingly conceals the intercultural and inter-lingual aspect of European legal communication.

Language as dialogue and conversation is essential for the success of European legal integration. Without the developing common legal discourse in Europe, there would be no European law. Convergence of European legal systems is possible to the extent that European lawyers understand each other in the intercultural and inter-lingual dialogue on European law. In this sense a common legal language in Europe is both possible and desirable.