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CiCLOPs

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OCCASIONAL PAPERS

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CENTER FOR INTERNATIONAL & COMPARATIVE LAW OCCASIONAL PAPERS

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PREFACE

CiCLOPs

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The mythical Cyclops was a one-eyed giant. That must have made for an impressive anatomy. And yet, the lack of perspective that came with it proved fatal against the wit of Ulysses and his men. The rest is mythology.

CiCLOPs, Duke Law's newly established Center for International & Comparative Law Occasional Papers series, is the exact opposite. CiCLOPs may look relatively small in print, but we hope it will provide multiple views on issues, and enough wit to withstand much criticism. And CiCLOPs avoids mythology in favor of analysis of real life issues and concerns in all aspects of international and comparative law.

As an occasional papers series, CiCLOPs does not compete with law reviews, or with paper series available on SSRN. Rather, CiCLOPs will provide an outlet for Duke-related scholarship on international or comparative law that would otherwise go unpublished or that are hard to find, but are too important to go unnoticed. Sometimes this will include presentations given at Duke, by visitors or by members of our own community. Sometimes it will contain papers or articles for which no better venue exists, or which exist in a form too preliminary to be submitted elsewhere but so substantial that they deserve visibility even at that stage. And sometimes we will republish papers or speeches because they deserve a wider audience and better accessibility.

All CiCLOPs issues will be freely available in PDF form on our website, at www.law.duke.edu/cicl/ciclops. Some issues will also be available in printed hardcopy form. If you are interested in hearing about new publications in the series, please send an e-mail to CICL@law.duke.edu, and we will include you in our list of subscribers to the CICL newsletter where new CiCLOPs issues are announced.

INTRODUCTION

The Herbert L. Bernstein Memorial Lecture At Duke University School of Law

The Bernstein lecture series celebrates the life's work of Professor Herbert L. Bernstein, a wonderful teacher, colleague and scholar at Duke Law School for 17 years before he passed away in 2001.

Born in Hamburg, Germany, Professor Bernstein had a harrowing boyhood during World War II. He was educated at the University of Hamburg, and eventually came to the United States in 1962 to study at the University of Michigan Law School. He then taught at the universities of Hamburg, Berkeley, and Southampton before coming to Duke in 1984. His fields of scholarship included comparative law and private international law.

Professor Bernstein was a much beloved professor at Duke Law. I did not have the pleasure of knowing him personally, but I have heard much about him from those who did. Words and phrases such as "respect," "warmth," "kindness," "commitment to justice," and "humor" recur. It is clear that he had a profound effect on all who were fortunate enough to come to know him.

The Bernstein Memorial Lecture is sustained by contributions from alumni and friends of Duke Law School, and by the Duke Law Center for International & Comparative Law, which has undertaken the compilation of this volume. This publication is but one of many ways in which the Center has cultivated, nurtured, and expanded Duke Law's international and comparative law program. Professor Bernstein would be proud.

—*David F. Levi*
Dean and Professor of Law
Duke University
May 2009

FOREWORD

CICLOPs Volume 1 The Bernstein Memorial Lecture The First Six Years

CICLOPs, the Center for International & Comparative Law Occasional Papers, could not be launched with a better issue than one dedicated to Duke Law's named lecture series in the field, the Annual Herbert L. Bernstein Memorial Lecture in Comparative Law.

Herbert Bernstein was Duke's much-beloved professor of comparative law. His early life is warmly described in a meticulously researched article by my colleague and friend Paul Haagen, published in a special issue of the *Duke Journal of Comparative & International Law* (2003) that was dedicated to Prof. Bernstein's memory and is available at www.law.duke.edu/bernsteinlecture/. The lecture series, established in Prof. Bernstein's honor after his sudden death in 2001, has drawn leading scholars from all around the world to speak at Duke Law School on comparative law. This first issue of CICLOPs contains the text of the first six lectures, some of them previously published in hard-to-access venues and some not at all. As such, it serves as a tribute not only to Herbert Bernstein, but also to Duke Law's vibrant and active comparative law community, which encompasses both numerous faculty members and also students pursuing Duke's JD/LLM degree in international and comparative law as well as other student groups.

The issue contains all lectures in the order in which they were delivered. The inaugural Bernstein lecture was given in 2002 by Hein Kötz, former director of the Max Planck Institute for Comparative and International Private Law in Hamburg, perhaps the leading institution worldwide in its field [*Civil Justice Systems in Europe and the United States*, pp. 1–16]. Hein Kötz takes on a pet theme of comparative law—the comparison of German and U.S. principles of civil procedure—and brings, in his hallmark elegant style not just a lucid assessment of the debate but also a number of useful insights. Perhaps the most important among these is one based in Kötz's long-standing emphasis on functional equivalence: Comparatists, in comparing German and U.S. court rules, are dealing with nonequivalent things: U.S. rules are made with big cases in mind, for which German civil procedure may

be inadequate. German rules by contrast are made for small cases, which in the U.S. would be dealt with not in ordinary courts but in small claims courts, with rules not so dissimilar to those in German civil procedure.

Christian Joerges, then of the European University Institute in Florence and now again a professor at Bremen University, gave the next lecture in 2003 [*Europeanization as Process: Thoughts on the Europeanization of Private Law*, pp. 17–40]. Prof. Joerges suggests an ambitious reconceptualization for private law in Europe, combining insights from European law, comparative law, and private international law or conflict of laws, in the tradition of Brainerd Currie, a leading figure of U.S. conflict of laws and a former Duke Law professor. A much-extended version of this lecture has been published by the Duke Journal of Comparative & International Law and is widely cited. In this issue, we republish a text that resembles more closely the original lecture as it was presented.

For the third Bernstein Lecture in 2004, we took our focus away from European law schools but not necessarily from Europe itself. The speaker was Chibli Mallat, a Jean Monnet Professor of Law at the University of St Joseph in Beirut, former candidate for the Lebanese presidency, now a professor at Utah Law School, and perhaps the world's leading expert on what he calls Middle Eastern Law [*Constitutions for the Twenty-First Century, Emerging Patterns: The EU, Iraq, Afghanistan...*, pp. 41–62]. Prof. Mallat provides a fascinating comparison of new constitutions in the 21st century that may at first sight look incomparable, namely those of Iraq, Afghanistan, and the European Union. He not only shows how comparison between them can provide exciting insights but also provides comparative constitutional law with mileposts, simplifiers, acid tests as tools, and with an outlook on emerging patterns that are valuable beyond just his own analysis.

The fourth Bernstein Lecture, in 2005, was given, perhaps untypically, by a U.S. scholar, but one of unusually broad and cosmopolitan erudition—Richard Buxbaum from Berkeley [*Comparative Law as a Bridge Between the Nation-State and the Global Economy: an Essay for Herbert Bernstein*, pp. 63–78]. Prof. Buxbaum offers nothing less than a reconceptualization of the field of comparative law itself, away from its focus on disinterested comparison between national legal systems, and towards acknowledgement of both the supranational nature of much contemporary law and a new emphasis on economic, as opposed to private or public, law. The lecture has not previously been published, so we are especially grateful to Prof. Buxbaum for updating it for publication in this issue and are sure that the comparative law community will join in these thanks.

In 2006, Duke Law was fortunate that Zhu Suli accepted the Dean's invitation to speak [*Political Parties in China's Judiciary*, pp. 79–110]. Prof. Zhu is Dean of Peking University Law School, China's most highly regarded law school, and a scholar of unusually extensive interest and expertise not only in Chinese but also in U.S. law and legal philosophy. His lecture begins as a response to a review of one of his books but soon turns into a fascinating suggestion that Western notions of judicial independence are inadequate for an analysis or even critique of Chinese law. Provocative for a Western audience, the lecture highlights a core theme in modern comparative law: the contingency and frequent Western bias of many of our frames of reference, and the difficulty (and promises) of intercultural comparison and critique. Jonathan Ocko, a professor of history at North Carolina State University and an adjunct professor at Duke Law School, adds an immensely helpful introduction.

Finally, 2007 saw a lecture by a close friend and collaborator of the late Prof. Bernstein: Joseph Lookofsky, an American graduate from New York University Law School who is now a professor at the University of Copenhagen [*Desperately Seeking Subsidiarity: Danish Private Law in the Scandinavian, European, and Global Context*, pp. 111–130]. Prof. Lookofsky provides an insight into Danish legal culture, but not as mere illustration. Rather, he views that culture as endangered by the Europeanization of law, and his view on that Europeanization from the perspective of a small country with a very peculiar identity, both national and Scandinavian, greatly enriches our standard pictures of Europe.

Viewed together, these lectures provide a glimpse of the richness of comparative law today and prove the high value that the field has at Duke. The six authors came from universities in six different countries, and where a topic occurs in more than one lecture—the constitutionalization of European law for example, or the direction of comparative law as a field—their views often differ. The variety of perspectives and viewpoints among these articles reflects quite effectively what may be the best of comparative law today. As compared to the lone perspective available to the mythological Cyclops, this variety bodes well for the future of CICLOPs.

In finishing, I thank Stephen Bornick, Associate Director of the Center for International & Comparative Law, and Jonathan White, a first-year student in Duke's JD/LLM program, for their editorial work on the individual papers. Susan Manning and Melinda Vaughn from Duke Law's communication department formatted the papers; I am grateful to them as well. I thank Neylân Gürel, program coordinator at the Center, for her work and her contributions, including especially the design of the CICLOPs cover.

I would also like to thank each of the copyright holders: Kluwer Law International, *Duke Journal of Comparative & International Law* and Peri Bearman, Wolhart Heinrichs, and Bernard G. Weiss for their consent to allow republication of these articles in CICLOPs. The articles and citations contained herein are unchanged from their respective original or published versions, with the exception of minor editing and formatting.

Each of the lectures can be viewed in its entirety at: <http://www.law.duke.edu/bernsteinlecture/archive/>.

—*Ralf Michaels*
Professor of Law and Director,
Center for International & Comparative Law 2007-2009
Duke University
May 2009

Civil Justice Systems in Europe and the United States*

Hein Kötz**

I. INTRODUCTION

Allow me first to say what an honor it is to be invited to present Duke's first Herbert L. Bernstein Memorial Lecture. Herbert's death at the Law School a little more than a year ago was a great shock not only to the Duke Law School community but also to the many friends he had in Germany. I knew him for nearly 40 years, and I am very grateful indeed for this opportunity to pay tribute to him and his contribution to the law and legal education.

When Dean Bartlett agreed to the topic of my lecture she must have realised that letting a foreign lawyer touch upon American civil procedure would be a hazardous affair. Not only is a foreign lawyer who ventures into this field bound sooner or later to fall into error, but also he will expect you to forgive him and kindly put him right when he does so. Not only is he apt to rush in where local angels fear to tread, but also courtesy may require you to call his views original and refreshing when they are heretical or bizarre. There is one countervailing argument supporting the choice of my subject, however, and that is that it was very dear to Herbert's heart. He and I discussed it on many occasions, and while we both felt that comparing the machinery of civil justice in the common law and the civil law was a most challenging and interesting undertaking, we also agreed that it was a subject fraught with greater risks of fundamental misunderstanding of foreign law than those which beset the comparative endeavours in substantive law.¹

* First Annual Herbert L. Bernstein Memorial Lecture in Comparative Law, Duke University School of Law, Sept. 10, 2002. Reprinted with permission from The Duke Journal of Comparative and International Law: CIVIL JUSTICE SYSTEMS IN EUROPE AND THE UNITED STATES, 13 DUKE JOURNAL OF COMPARATIVE & INTERNATIONAL LAW 61 (2003).

** Emeritus Director, Max Planck Institute for Comparative and International Private Law, former president of the Bucerius Law School. Professor Kötz delivered the inaugural Herbert L. Bernstein Memorial Lecture on September 10, 2002, at Duke University School of Law. A friend and colleague of Professor Bernstein, Professor Kötz is co-author of Konrad Zweigert & Hein Kötz, *Introduction To Comparative Law* (3rd ed. transl. Tony Weir 1998).

1. Herbert L. Bernstein, *Whose Advantage After All?: A Comment on the Comparison of Civil Justice Systems*, 21 U. Cal. Davis 587 (1988).

Our shared interest in the comparison of civil justice systems goes back to the early 1960s when both Herbert and I were graduate students at the University of Michigan Law School. All graduate students with a European Law background were given an introductory course on American Law. Procedure was an important subject of this course, and adversariness was held up to us as the hallmark of the American procedural system. The introductory course itself followed the adversary model in that we were asked to read Roscoe Pound's celebrated article, "Causes of Popular Dissatisfaction with the Administration of Justice," with its sharp attack on the excesses of the adversary system.² We were told that Jerome Frank had described the American mode of trials as being based on what he called the "fight theory", a theory which in his view "derives from the origin of trials as substitutes for private out-of-court brawls" and "frequently...blocks the uncovering of vital evidence or leads to a presentation of vital testimony in a way that distorts it."³ At the time, however, this had no great impact on us. We were enthralled to watch lawyer-dominated civil and criminal trials at the Ann Arbor Circuit Court on closed-circuit television in a viewing room at the law school. We also enjoyed the moot court cases with their colourful and dramatic confrontation between partisan student advocates, and any lingering doubts about the attractions of adversariness were dispelled by reading Earl Stanley Gardner, Raymond Chandler and Robert Traver's novel entitled *Anatomy of a Murder*.⁴

For those of us who remained in contact with American law, however, a gradual process of disenchantment set in. Like most readers of Robert Traver's novel we were delighted by the defendant's acquittal on the basis of a successful plea of impaired mental capacity. But the not-guilty verdict was based on facts supplied by the defendant only after his lawyer had impressed upon him what type of fact would constitute that defence. Can it be right to allow or even require a lawyer to arm his client for effective perjury? There were other questions we asked. It is all very well to say that cross-examination is, in the words of John Wigmore, "the greatest legal engine ever invented for the discovery of truth" and that it is a most effective weapon to test dishonest witnesses and ferret out the truth.⁵ But isn't it a weapon equally lethal to heroes and villains? There is no doubt that all procedural systems aim at an intelligent inquiry into all

2. Roscoe Pound, Causes of Popular Dissatisfaction with the Administration of Justice, 40 Am. L. Rev. 729 (1906).

3. See Jerome Frank, Courts on Trial: Myth and Reality, in *American Justice* 80–90 (1949).

4. Robert Traver, *Anatomy of a Murder* (1958).

5. John H. Wigmore, Evidence § 1387, at 29 (3d ed. 1940).

the practically available evidence in order to ascertain, as near as may be, the truth about the facts. But suppose a businessman were to decide whether or not to build a new plant: Would he think of obtaining the needed information by subjecting his informants to the experience of standing as a witness at a common law trial? Is there no more businesslike method to unearth the relevant facts?

II. CIVIL PROCEDURE IN GERMANY

It is indeed a routine business meeting an American lawyer will believe he is attending when he is led into a German courtroom.⁶ What is most likely to strike him is the fact that mainly the court conducts the interrogation of witnesses.⁷ It is the court that will ask for the witness's name, age, occupation, and residence.⁸ It is the court that will then invite the witness to narrate, without undue interruption, what he knows about the matter on which he has been called. After the witness has given his story in his or her own words the court will ask questions designed to test, clarify, and amplify it. It is then the turn of counsel for the parties to formulate pertinent questions. But in an ordinary case there is relatively little questioning by counsel for the parties, at least by common law standards. One reason is that the judge will normally have covered the ground. Another reason is that for counsel to examine at length after the court seemingly has exhausted the witness might appear to imply that the court does not know its business, which is a dubious tactic. There is no cross-examination in the sense of the common law, nor is there a full stenographic transcript of the testimony. Instead, the judge himself pauses from time to time to dictate a summary of what the witness has said so far.⁹ At the close of testimony the clerk will read back the dictated summary in full, and either witness or counsel may suggest improve-

6. For more detailed information in English on the German civil justice system, see the seminal study by Benjamin Kaplan, Arthur T. von Mehren & Rudolf Schaefer, *Phases of German Civil Procedure* (pts. 1 & 2), 71 *Harv. L. Rev.* 1193, 1443 (1958), now over 40 years old but fundamentally accurate. Comparative articles based on this study are Benjamin Kaplan, *Civil Procedure – Reflections on the Comparison of Systems*, 9 *Buff. L. Rev.* 409 (1960); William B. Fisch, *Recent Developments in West German Civil Procedure*, 6 *Hastings Int'l & Comp. L. Rev.* 221 (1983); Arthur T. von Mehren, *Some Comparative Reflections on First Instance Civil Procedure: Recent Reforms in German Civil Procedure and in the Federal Rules*, 63 *Notre Dame L. Rev.* 609 (1988). See also David J. Gerber, *Extraterritorial Discovery and the Conflict of Procedural Systems: Germany and the United States*, 34 *Am. J. Comp. L.* 745, 748–69 (1986).

7. Michael Bohlander, *The German Advantage Revisited: An Inside View of German Civil Procedure in The Nineties*, 13 *Tul. Eur. & Civ. L.F.* 25, 43 (1998).

8. Kaplan, von Mehren & Schaefer, *supra* note 6, at 1234–35.

9. John Langbein, *The German Advantage in Civil Procedure*, 52 *U. Chi. L. Rev.* 823, 828 (1985) [hereinafter *German Advantage*].

ments in the wording. If the exact phrasing of a particular part of the testimony is believed to be of critical importance, counsel may insist on having it set down verbatim in the minutes.

A similar system is used with respect to expert witnesses. Suppose a case requires an expert's evidence, for example an action for damages brought by a patient against his physician on the ground of the defendant's failure to use ordinary care in his treatment. In Germany, as indeed in most Continental countries, the expert will be selected and appointed by the court after consultation with the parties.¹⁰ It is the court that will conduct his examination, and it is the court that will advance the expert's fees eventually to be borne by the losing party.¹¹ In the common law it is up to the parties, or rather their lawyers, to find suitable experts who will then be examined and cross-examined in the same way as ordinary witnesses. I have served both as a court-appointed expert on foreign law in cases pending before a German court, and as party-selected expert witness on German law in litigation before the High Court in London, and I assure you that there are substantial differences between the two roles. As a court-appointed expert you are an ally and partner of the court. You assist the court to the best of your ability in reaching a correct result, and it is with the court that your duty of loyalty lies. What struck me most in my role as party-selected expert witness in the English cases was not the experience of being examined and cross-examined, but the difficulty to resist the subtle temptation to join your client's team, to take your client's side, to conceal doubts, to overstate the strong and downplay the weak aspects of his case and to dampen any scruples you might have by reminding yourself that the other side will select and instruct another expert witness and that, when the dust has settled, the truth will triumph.

The examination of witnesses in the Continental style may not be free from certain risks. One might say, for example, that the technique of inviting the witness to tell his story in narrative form and without undue interruption provides an incentive, in the interest of presenting a conclusive, logically coherent, and convincing story, to fill in gaps by half-truths or fiction. There is also a danger that the judge, in acting as chief-examiner of the witnesses, may sooner or later appear to favour one side over the other. By putting questions to the witness, in the words of Lord Denning, he "drops the mantle of the judge, and assumes the robe of an

10. *Id.* at 835–41.

11. For a detailed and accurate description of the process of selecting, instructing and examining experts in Germany, see *id.* Much of what follows on the characteristic features of German civil procedure is based on this brilliant article. See also Bohlander, *supra* note 7, at 41–43.

advocate.”¹² In general, however, a competent judge in questioning witnesses knows how to play his cards close to his chest. If he pursued one line of questioning with undue vigour or in some other way revealed his evaluation of the testimony this would at any rate have no influence on a jury as the sole trier of facts because there are no civil juries on the Continent, nor any even in the United Kingdom. As to counsel, they may ask follow-up questions as an antidote against unfair or incompetent questioning by the judge.¹³

On the other hand, under the Continental system there is no need, as in common law jurisdictions, to prepare the prospective witness for counsel’s questions during the examination-in-chief and cross-examination.¹⁴ Consequently, the “coaching” or “sandpapering” of witnesses is not a problem. Indeed, German lawyers will generally be reluctant to engage in extensive out-of-court contact with prospective witnesses.¹⁵ A canon of professional ethics promulgated by the German Bar Association in 1973 provided that out-of-court contact with witnesses was advisable only when special circumstances justified it and was at any rate limited to clarifying what the witness would be able to say.¹⁶ This rule was dropped when new provisions on professional ethics were enacted in 1996, probably because there seemed no need for it.¹⁷ After all, it is fairly clear to an attorney that the judge would take a dim view of the reliability of a witness who previously had been closeted for long periods with counsel.

Civil procedure in Germany and in other civil law jurisdictions differs from the American system by making the judge responsible for the selection of expert witnesses, for the examination-in-chief of both fact

12. *Jones v. National Coal Board*, [1957] 2 Q.B. 55, 63.

13. Bohlander, *supra* note 7, at 43.

14. Langbein, *German Advantage*, *supra* note 9, at 835–37.

15. Kaplan, von Mehren, Schaefer, *supra* note 6, at 1200–01.

16. Section 6, entitled Questioning and Advising of Witnesses, provides as follows: (1) The lawyer may question persons out of court who might be considered witnesses if this is necessary with a view to the obligation to provide for clarification of facts, advice or representation. (2) The lawyer may inform these persons as regards their rights and duties as well as give advice to them. (3) The lawyer is allowed to establish a record of such questioning and to have the person sign a declaration. Such a record may be used by the lawyer in order to confront the witness with these statements in a judicial or administrative proceeding. However, the lawyer may present the record itself only in exceptional cases to the court or the administrative agency, for example, in those cases where the witness is unable to testify in the pre-trial discovery stage or during the proceedings. [. . .] (5) In any event, the appearance of undue influence is to be avoided. *Grundsätze Des Anwaltlichen Standesrechts, Richtlinien Gemaess § 177 Absatz 2 Nr. 2 Bundesrechtsanwaltsordnung (Brao)*.

17. See new provisions of Brao available at <http://jurcom5juris.de/bundsrecht/brao/index.html>.

and expert witnesses, and for creating the record based on those examinations.¹⁸ The judge's conspicuous role in the actual taking of evidence, especially in the taking of witness testimony, has led common lawyers to label Continental civil procedure as "inquisitorial" or "non-adversarial". This is misleading because it conjures up the Spanish Inquisition, Kafka's Castle, and bureaucratic omnipotence and has indeed led an English judge to say, in comparing English and Continental procedure, that "our national experience found that justice is more likely to ensue from adversary than from inquisitorial procedures – Inquisition and Star Chamber were decisive, and knowledge of recent totalitarian methods has merely rammed the lesson home."¹⁹ In my view, however, this is not only misleading, but also downright wrong. All arguments generally praising the virtues of the adversarial system of the common law and contrasting them with the vices of the inquisitorial system ascribed to the civil law are misguided and, in Herbert Bernstein's words, "cannot advance, even by an inch, the comparative analysis of German and American civil procedure."²⁰

The truth is that both in the American and Continental civil justice systems, the power to establish the facts on which the judicial decision rests is reserved to the decision-makers, whether the trial judge or jury in the United States, or the court on the Continent.²¹ On the other hand, it is in both systems exclusively for the parties and their lawyers to identify the facts they think will support the claim or defence, to make the appropriate factual allegations, and to nominate the witnesses and the facts of which they allegedly have knowledge. In the United States, just as on the Continent, the civil courts must work with what they are given, and they must establish the factual basis of their judgments from the materials the parties supply, and no others. Facts not in dispute between the parties are beyond judicial scrutiny, nor can the judge do anything about a fact alleged by one party and not specifically challenged by the opponent. He must take that fact as established and if he believes that the facts presented by the parties are not true he has no power to unearth what he thinks might be the truth by introducing independent evidence. True, this does not apply to criminal procedure. In a criminal case the Continental judge may disregard the defendant's guilty plea or a confession or admission and introduce independent evidence, including witness testimony, to determine what is called the "material truth"

18. Langbein, *German Advantage*, *supra* note 9, at 835–36.

19. *D. v. National Society for the Prevention of Cruelty to Children*, [1978] A.C. 171, 231.

20. Bernstein, *supra* note 1, at 589–90.

21. von Mehren, *supra* note 21, at 609.

(*materielle Wahrheit*). In civil matters, however, the principle of “formal truth” (*formelle Wahrheit*) applies. “Formal truth” is what the court, to the best of its ability, believes to be true having regard to the evidence placed before it by the parties. The court’s task is to do, and be seen to be doing, justice between the parties; it is not to ascertain some independent truth. It often happens, from the imperfection of evidence, or the withholding of it, sometimes by the party in whose favour it would tell if presented, that an adjudication has to be made which is not, and is known not to be, the whole truth of the matter. Yet provided the decision has been in accordance with the available evidence and with the law, justice will have been fairly done.

It follows that in their own ways both the German and American systems are adversary systems of civil procedure.²² In both systems the lawyers advance partisan positions from first pleadings to final arguments. In both systems the parties and their lawyers investigate and identify in their briefs the facts they think will support their claims and defences. In both systems the court cannot go beyond the parties’ factual contentions nor can the court strike out on its own in the search for what it believes might be the real truth.

III. PROCEDURAL CONTRASTS IN COMPARATIVE PERSPECTIVE

To be sure, quite a few features of German civil procedure are in marked contrast to American practises. First there is the judge’s prominent role in the actual taking of witness testimony.²³ This should not be overrated, however, because the judge, even though he serves as the examiner-in-chief of the witnesses, is prohibited from inducing them to testify on facts other than those for which they were named. Another characteristic of German and indeed Continental civil procedure is that no party is allowed to call as many witnesses as he pleases. There is no rule requiring all of plaintiff’s witnesses to be heard before the defendant’s witnesses, nor is there a compulsion to take proof on all the apparently contested issues at one sitting or to call first the witnesses nominated by the party carrying the burden of proof.

What the parties can do and will do is to nominate witnesses in support of specific factual allegations.²⁴ It is then for the court to make an evidentiary order identifying the witnesses to be heard, describing with

22. Langbein, *German Advantage*, supra note 9, at 841–48.

23. *Id.* at 832–35.

24. Ronald J. Allen, Stefan Kock, Kurt Riecherberg & D. Toby Rosen, *The German Advantage in Civil Procedure: A Plea For More Details and Fewer Generalities in Comparative Scholarship*, 32 *NW. U. L. Rev.* 705, 720–21 (1988).

some precision the facts on which each witness is to be examined and fixing the order in which they are to be called. In making this evidentiary order the court will consult with the parties who will direct the court's attention to particularly cogent lines of inquiry. However, the final decision rests with the court whose discretion will be guided by a strict standard of relevance as well as by the principle that evidence is to be taken only to the extent and in the order most likely to result in a speedy disposal of the case.

If, for example, witnesses have been nominated for a factual contention, which the judge believes on legal grounds to be immaterial to the party's claim or defence, he will not allow the witness to be called. Nor will he order the examination of a witness in support of a factual allegation, which the judge finds is not really in dispute between the parties or which has not been specifically challenged by the opposition. If the court perceives that there is a matter that is likely to be determinative, it may confine the evidentiary order to that matter and await the results before issuing a further evidentiary order. Suppose that in a seller's action for the price the buyer's defence is, first, that no contract was formed; second, that the goods delivered were defective; and, third, that in any event the seller's claim is barred by the Statute of Limitations. In this situation it is within the judge's discretion to select the defence most likely to lead to a dismissal of the action, and to postpone consideration of the other defences.

In a brilliant, if controversial, article John Langbein characterized the German procedural system as one in which the gathering of the facts was entrusted to, and controlled by, the judge.²⁵ In his view, judicially dominated fact-gathering is the hallmark of the German system and constitutes the major "German advantage" as compared with the system prevailing in the United States. I am not sure whether it is wholly appropriate to describe the court's job as that of "gathering the facts". After all, it is the parties and their lawyers who will investigate the facts, discuss them with their clients, select what will be presented to the court, indicate means of proof, and thus "gather" the factual materials with which the court must work.²⁶ This is why the German system is an adversarial system. However, once the parties have supplied the factual materials and the time has come to investigate the truth of the parties' allegations, evaluate the evidence, and find the facts on which the decision is to be based, the German judge has fairly strong control over

25. Langbein, *German Advantage*, supra note 9.

26. Allen, Kock, Reichenberg & Rosen, supra note 24 at 722–26.

the procedure.²⁷ He may disregard proof offers, which, according to strict criteria of relevance, might safely be overlooked. Nor are there any binding rules on sequence, such as “plaintiff’s case before defendant’s case”. Instead the judge is encouraged to range over the entire case and concentrate the inquiry on those issues most likely to result in an expeditious disposal of the matter. While the court can only call witnesses nominated by the parties, it does exercise discretion as to the order and number of the witnesses and plays a vigorous role in acting as the examiner-in-chief of the witnesses.

John Langbein’s attack on American civil procedure and his praise for the German counterpart have stirred up a lively debate in this country.²⁸ Some critics accept that strengthening the court’s role in the evidentiary process would save time and money, reduce the wastefulness and complexity of pre-trial and trial procedure, and cut down on the distortions inherent in the system of partisan preparation and production of witnesses and experts.²⁹ They argue, nevertheless, that such a move would be incompatible with the traditional roles of lawyers and judges in this country and fly in the face of significant and ineradicable features of American legal culture.³⁰ On the one hand, John Langbein has rightly admonished us not “to allow the cry of ‘cultural differences’ to become the universal apologetic that permanently sheathes the status quo against criticism based upon comparative example.”³¹ On the other hand, cultural differences do explain something of why institutional and procedural differences arise in different legal systems and why transplanting legal institutions from one society to another may be more difficult in one case than in another. The important question is what weight to attach to this factor for present purposes. John Langbein’s answer is: “Not much.”³²

27. *Id.* at 727.

28. See Samuel R. Gross, *The American Advantage: The Value of Inefficient Litigation*, 85 *Mich. L. Rev.* 734 (1987); Allen, Kock, Reichenberg & Rosen, *supra* note 26. See also Langbein’s reply: John Langbein, *Trashing the German Advantage*, 82 *NW. U. L. Rev.* 763 (1988) and the rebuttal: Ronald Allen, *Idealization and Caricature in Comparative Scholarship*, 82 *NW. U. L. Rev.* 785 (1988). For a thoughtful critical reaction to Langbein’s article, see John C. Reitz, *Why We Probably Cannot Adopt the German Advantage in Civil Procedure*, 75 *Iowa L. Rev.* 987 (1990). I found this article most helpful for the following discussion, although perhaps not always in a direction that John Reitz would have preferred.

29. Gross, *supra* note 28, at 752–56.

30. Oscar G. Chase, *Legal Process and National Culture*, 5 *Cardozo J. Int’l & Comp. L.* 1, 7-9 (1997).

31. Langbein, *German Advantage*, *supra* note 9, at 855; see also John Langbein, *Cultural Chauvinism in Comparative Law*, 5 *Cardozo J. Int’l & Comp. L.* 41 (1997) [hereinafter *Cultural Chauvinism*].

32. Langbein, *Cultural Chauvinism*, *supra* note 31, at 48–49.

But this is surely a point on which reasonable people may differ. The possibility of transplanting legal institutions is indeed one of the most controversial topics of comparative law.³³ It is also a topic much ventilated these days in Europe. We are currently embarking in Europe on a process of unifying the contract law of the Member States.³⁴ Although work on a Uniform European Code of Contract Law has not yet received the official blessing of the European Commission, the academic debate on what is surely the largest current comparative law enterprise in Europe is intense. In this debate, a small but articulate minority holds the view that each of the European nations is the product of a unique legal, political, and social history and that each nation's social and political values and goals are so different that the unification of law in Europe, like the merger of the French, English and German languages, is a barren and pointless exercise and indeed a chimera.³⁵

I do not share this view. There is today what Oliver Wendell Holmes might have called a far-reaching free trade in legal ideas in all that relates to economic activity, trade and transport, banking, and insurance. In these fields, the possibility of transplanting legal institutions and indeed of unifying the law should not be ruled out at the start because of supposed cross-cultural differences. However, we are concerned here not with business-related fields of substantive law, but with procedure. There is much to be said for the view that all rules organizing constitutional, legislative, administrative, or judicial procedures are deeply rooted in a country's peculiar features of history, social structure, and political consensus and as such are more resistant to transplantation. "Procedural law is tough law," said Otto Kahn-Freund. Since "all that concerns the technique of legal practice is likely to resist change" he concluded that "comparative law has far greater utility in substantive law than in the law of procedure, and the attempt to use foreign models of judicial organization and procedure may lead to frustration and may thus be a misuse of the comparative method."³⁶

33. See, e.g., Alan Watson, *Legal Transplants: An Approach To Comparative Law* (2d ed. 1993); Alan Watson, *Legal Transplants and Law Reform*, 92 *Law Q. Rev.* 79 (1976). See also the debate between Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 *Mod. L. Rev.* 1 (1974) and Eric Stein, *Uses, Misuses—and Nonuses of Comparative Law*, 72 *NW. L. Rev.* 198 (1977).

34. See Law Reform Projects, *European Contract Law*, available at <http://www.jura.unifreiburg.de/ipr1/reform.html>.

35. See, e.g., Pierre Legrand, *Book Review*, 58 *Mod. L. Rev.* 262 (1995); Pierre Legrand, *European Legal Systems are Not Converging*, 45 *Int. & Comp. L. Q.* 52 (1996); Pierre Legrand, *Against a European Civil Code*, 60 *Mod. L. Rev.* 44 (1997).

36. Kahn-Freund, *supra* note 33, at 20.

Must we accept this as the last word on the matter? Another distinguished comparative lawyer and proceduralist, Arthur von Mehren, reached a different conclusion. While not challenging the view that a procedural system's general structure and principal features express society's social and political values and goals he nevertheless said that "very real differences between first-instance procedural arrangements in the United States, on the one hand, and in France and Germany, on the other, derive much less from differences in social or political values or in institutional, sociological, or psychological assumptions than from the institutional fact of the concentrated or discontinuous nature of the trial".³⁷

One salient characteristic of European civil procedure lies indeed in the fact that it is wholly unfamiliar with, and knows nothing of, the idea of a "trial" as a single, temporally continuous presentation in which all materials are made available to the adjudicator. Instead, proceedings in a civil action on the Continent may be described as a series of isolated conferences before the judge, some of which may last only a few minutes, in which written communications between the parties are exchanged and discussed, procedural rulings are made, evidence is introduced and testimony taken until the cause is finally ripe for adjudication.³⁸ Procedure in the common law jurisdictions, on the other hand, has been deeply influenced by the institution of the jury.³⁹ Since a jury cannot be convened, dismissed and recalled from time to time over an extended period, a common law trial must be staged as a concentrated courtroom drama, a continuous show, running steadily, once begun, toward its conclusion. This in turn entails a separate pre-trial process for the parties enabling them not only to gather the evidence that they may need at trial but also to prevent surprise by informing themselves of the details of all positions the opponent may advance when the controversy is ultimately presented to the court. This solution requires elaborate pre-trial interrogatory and discovery procedures because once the trial commences, there is no opportunity to go back, search for further information, and present it to the court at some later date.⁴⁰

Clearly, elaborate pre-trial probing of the arguments of fact and law on which the other party proposes to rely provides a solution to the surprise problem. However, this solution is not without its cost. First, it is intrinsically duplicative. Witnesses are prepared, examined, and cross-

37. Arthur von Mehren, *The Significance for Procedural Practice and Theory of the Concentrated Trial: Comparative Remarks*, in: 2 *Europäisches Rechtsdenken In Geschichte und Gegenwart, Festschrift Für Helmut Coing* 361, 362 (München 1982).

38. Langbein, *Cultural Chauvinism*, supra note 31, at 42-44.

39. Reitz, supra note 28.

examined during pre-trial, then prepared, examined, and cross-examined again at trial. Second, it tends to be overbroad. Only rarely can a litigator tell at the beginning precisely what issues and what facts will prove important in the end. Since the judge customarily has little contact with pre-trial investigation, he has no opportunity to signal what information he thinks relevant to his decision. As a result, litigators must strain to investigate and analyse everything that could possibly arise at trial. They tend to leave no stone unturned, provided, of course, as is often the case, that they can charge their fees by the stone. Because of their active role in the pre-trial phase, lawyers typically have a greater understanding of the case than does the judge when the controversy is presented at the trial. It follows that lawyers run the show at trial and that they frame the issues, question the witnesses, and stage and present even uncontroversial facts as if in a drama. Since the judge comes to the trial with little more understanding of the controversy than he can have from the complaint and other documents filed with the court, he is hardly in a position to act as the examiner-in-chief of the witnesses and to confine the scope of the evidentiary process to those avenues of inquiry he thinks are relevant or most likely to resolve the dispute.

It would seem therefore that the institution of the jury is the cause of the strict segmentation of American procedure into pre-trial and trial compartments, and that this segmentation in turn is the cause for the waste and duplication of lawyer-dominated pre-trial discovery procedures. Strengthening the court's control over the evidentiary process would then be practicable only if the United States followed the example of most, if not all, major common law jurisdictions and abolished the civil jury. In England, trial by jury has almost disappeared from civil litigation except where a person's reputation is at stake, for example where he sues for libel,⁴¹ and the civil jury has also withered to insignificance in Canada⁴² and Australia,⁴³ not because of dissatisfaction with its results, but because of the costs and inefficiencies imposed by it on the civil litigation process. Clearly, abandoning the civil jury or restricting its availability would be a most controversial matter in the United States. Not only is the right to trial by jury enshrined in the Seventh Amendment and in comparable state constitutional guarantees,

41. See generally Sally Lloyd-Bostock & Cheryl Thomas, *Decline of the "Little Parliament": Juries and Jury Reform in England and Wales*, 62 *Law & Contemp. Probs.* 7 (Spring 1999).

42. See William A. Bogart, *Guardian of Civil Rights . . . Medieval Relic: The Civil Jury in Canada*, 62 *Law & Contemp. Probs.* 305 (Spring 1999).

43. See Michael Tilbury & Harold Luntz, *Punitive Damages in Australian Law*, 17 *Loy. L.A. Int'l & Comp. L.J.* 769, 775–76 (1995).

there is also a substantial body of opinion that both the criminal and the civil jury are worthwhile bulwarks against biased, eccentric or incompetent trial judges and enable the public to take an active part in the administration of both civil and criminal justice.⁴⁴

I do not think, however, that the civil jury is the only or even major villain of the piece. True, it is because of the jury that the trial must be carried out as a single-episode courtroom drama, and it is because of the trial as a concentrated event that pre-trial discovery procedures are needed to handle the surprise problem. But it seems to me that discovery in the form practised today in the United States goes far beyond the mere prevention of courtroom ambush. Rather, discovery allows a party to search and indeed “fish” for information in opponent’s and non-parties’ hands under a very liberal standard of relevancy requiring only that the search be “reasonably calculated to lead to the discovery of admissible evidence.”⁴⁵ It has been said that it is possible and by no means rare in the United States for a plaintiff to *bring* a lawsuit in order to discover whether he might actually have one. Aggressive discovery in the American style is unknown not only in Continental procedure, but also in English procedure as well. Of course, all procedural systems must balance the importance of truth for the fact-finding process against the need to protect areas of business and personal privacy from unreasonable invasion. But not all systems will strike the same balance between the two goals. It is evident that the breadth of American discovery rules comes down more heavily on the side of privacy in civil litigation. Judge Rifkind had a point when he said that “[a] foreigner watching the discovery proceedings in a civil suit would never suspect that this country has a highly-prized tradition of privacy enshrined in the Fourth Amendment.”⁴⁶

Nonetheless, I think an argument can be made for American discovery methods despite the excesses to which they are prone. Consider the type of case in which full-dress discovery proceedings will normally take place. In many of those cases the lawsuit is not only a dispute between private individuals about private rights, but also a grievance about the operation of public policy or the vindication of the public interest. In his famous book *Democracy in America*, Alexis de Tocqueville noted that “scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial

44. *Id.* at 996-97.

45. See Fed. R. Civ. P. 26(b)(1).

46. Simon H. Rifkind, *Are We Asking Too Much of Our Courts?*, 70 F.R.D. 96, 107 (1976), quoted in Langbein, *German Advantage*, *supra* note 9, at 845.

question.”⁴⁷ This observation seems to have lost none of its pertinence today. If a European lawyer looks at the contemporary legal scene in the United States, he is impressed by the extent to which court litigation, rather than legislation and administrative action, is used as a means to cure defects in the structures and practises of important social institutions. Class actions are a good case in point.

By allowing plaintiffs to sue for the aggregated damages suffered by many other similarly situated individuals, the class action provides an effective means of vindicating the rights of groups of people who individually would not have the strength to bring their opponents into court. In this sense, class-action plaintiffs may be viewed as private attorneys-general advancing and protecting substantial public interests. The Supreme Court has described treble damages actions under section 4 of the Clayton Act as “a vital means of enforcing the antitrust policy of the United States”⁴⁸ and it is not the SEC, but the shareholders’ derivative suit, that the Supreme Court regarded as “the chief regulator of corporate management.”⁴⁹ What surprises the European observer about American product liability litigation is not the preconditions for liability, which are just as strict in Europe as in the United States; what he finds indeed astonishing is the stupendous volume of litigation, the size of awards made to successful claimants, and the fact that it is not uncommon for many thousands of claims to be bundled together and dealt with in a single trial. All developed legal systems must ensure the safety of products in the interest of the consumer. It would seem, however, that Americans, with their traditional mistrust of governmental authority, rely not so much on the initiative of administrators or public prosecutors, but rather on private litigation as the chief regulator of corporate action in the product safety field. If this analysis is correct, a strong case can be made for the view that to the extent to which private litigation serves the vindication of a public interest, the parties must be equipped with robust discovery procedures to ferret out the truth, even at the expense of business or personal privacy. Nor would it seem plausible to put the discovery tools in the hands of judges or parajudicial officials, if only because discovery conducted by a judge or magistrate would not be as thorough as discovery conducted by the parties’ lawyers.

Civil litigation as a means of vindicating the public interest is far less significant in Europe. Class actions for the recovery of damages

47. Alexis De Tocqueville, *Democracy In America* 280 (1945).

48. *Perma Life Mufflers Inc. v. Int’l Parts Corp.*, 392 U.S. 134, 139 (1968).

49. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 547–48 (1949).

suffered by hundreds or thousands of persons are unknown on the Continent. Derivative suits by shareholders, product liability cases and actions based on a violation of the antitrust law are not unusual, but have attained nowhere the dimension, vigour and force that would qualify them as significant checks on corporate behaviour.

It is much harder to argue the case for the American civil justice system where it deals with cases in which the lawsuit is merely a dispute between private individuals about private rights, as, for example, in an ordinary personal injury action. True, the vast majority of all civil matters in the United States do not result in a jury trial, and most are resolved by settlement.⁵⁰ In Germany, too, the great majority of personal injury claims are settled rather than resolved by court decision. However, in both systems the parties are bargaining in the shadow of the law, and the law is very different indeed. In the United States due to the cost and number of attorney hours spent on investigating the case and on pretrial motions, discovery, and trial, the economic pressure to settle is intense. Moreover, the outcome of an American jury trial is less predictable than that of a case tried by a German judge. Let me illustrate this by looking at one important area of the law in which the differences are indeed striking: the law relating to the assessment of damages for personal injuries. Legal doctrine in Germany and the United States does not differ greatly in most such cases. Far more significant are differences in the mode of trial. Because these cases are tried by a judge alone in Germany, and damages are assessed by judges, who give full and detailed reasons, the calculation of damages has become much more regularized, systematic and uniform in Germany while the range of awards in similar cases is very much larger in the American system of trial, almost entirely as a result of the use of juries. Accordingly, the probable range of damages is less predictable in the United States than in Germany. Unpredictability leads to uncertainty, and uncertainty increases the importance of good legal representation, which may be easily available to repeat players like insurance companies but raises concerns about access to justice for the poor and procedural equality of litigants with disparate economic resources.

IV. CONCLUSION

In conclusion I would like to emphasize that what is often overlooked in the literature on comparative civil procedure is that different procedural systems may focus on different categories of cases. The typical case at which the German system is aimed involves a comparatively small

50. See Marc Galanter & Mia Cahill, "Most Cases Settle": Judicial Promotion and Regulation of Settlements, 46 *Stan. L. Rev.* 1339 (1994).

amount of money, raises no major issue of public policy, and is merely a dispute between private parties about private rights. In such cases it obviously makes sense to give the judge a leading role in the examination of witnesses and wider powers over the evidentiary process, thereby reducing considerably the amount of lawyer effort and cost in exchange for a modest increase in effort and activity on the part of the judge. This is where I think the advantages and the strength of the European procedural systems lie. If there is a desire to reform American civil procedure so as to provide effective justice for the "little guy", either by making changes within the traditional system or by developing alternative methods of dispute resolution, then the Continental experience may well be a worthwhile object of study.

Europeanization as Process Thoughts on the Europeanization of Private Law*

Christian Joerges**

The present efforts in Europe to achieve more uniformity in private law and the debates on a European civil code need to be understood in a wider context. Europe is plagued by concerns over its problem-solving potential and its acceptance amongst citizens. The response is ambitious projects: Eastern Enlargement, a Constitution, a Code. The project of a European civil code is the least visible among the three—and yet specifically instructive. Europe has to learn how the openness of national markets can coexist with differences in legal cultures, differently shaped relations between state and society. In its multi-level system of governance none of the established legal disciplines can provide guidance for the denationalization and Europeanization of private law. The Europeanization process needs to be understood and organized as a process of discovery and learning. Only then can Europe make productive use of its diversity.

INTRODUCTION

European law is affecting more and more areas within national legal systems. The processes of change that it initiates are complex and diverse, to an extent that there are good reasons to concentrate in their analysis on the discipline one feels most at home with. Hence, constitutional lawyers observe and comment on the constitutionalization of Europe, administrative and commercial lawyers primarily on the emergence of complex European governance arrangements throughout the fields of regulatory politics. At the same time, an autonomous epistemic community is engaging in a discussion on the Europeanization of private law with a growing number of individual themes, *fora*, organisa-

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tions and publications. Leading in terms of literary productivity are German-speaking academics. The most recent habilitation thesis I am aware of was submitted in Munich. It looks beyond the traditional borders between legal sub-disciplines and focuses instead on the transformation of private law in the light of the integration process. It is 740 pages long (single spaced).¹ But its German speaking predecessors (there are around 10 of them), albeit more limited in scope, are not significantly shorter.²

This is no coincidence. A tradition of legal science that understands the systematic analysis of the law as its core commitment, will naturally feel challenged by the manifold impacts of the Europeanization process, and the less it becomes possible for legal science to comply with its own systematic expectation, the more its scepticism towards that process will be fostered. To pose the question in an ironically sounding, but nonetheless serious, form: should Europe be about to take suit, to proceed, against our law (bring the law to trial)?³ Taking the question seriously also means not to condemn Europe just because it does not correspond with our inherited notion of the law. The challenge flowing from the Europeanization process could be that it will force us to redefine the normative *proprium* of the law.

This, in fact, is the thesis of my contribution. It sets out to show, for one, that the Europeanization of private law should be seen as a process that triggers disintegration within national private law systems and affects their systematic consistency. But I also wish to demonstrate how that process manages to uncover productive and innovative opportunities. For this, as I suggest by way of conclusion below, it merits recognition: Europeanization must derive its legitimacy from the normative quality of the processes within which it takes place. There are three steps to my argument. The first is fundamental, in the literal sense; the legal disciplines instructing the Europeanization process assume each in their own way that legal systems are organized nationally; Europe on the other hand constitutes a post-national constellation; it is no longer an aggregation of nation States, but a multi-level system (part A). The second part examines three different patterns of juridifi-

1. Christoph Schmid, *Die Instrumentalisierung des Privatrechts durch die Europäische Union*, 2004.

2. Since Drexl, *Die wirtschaftliche Selbstbestimmung des Verbrauchers*, 1998.

3. The formulation can be found by Wiethölter, 'Ist unserem Recht der Prozeß zu machen?', in Honneth et al. (eds.), *Zwischenbetrachtungen im Prozeß der Aufklärung*, 1989, 794. I have previously thought to show, referring to the emergence of 'new modes of governance', that it should be addressed to the European process; see Joerges, 'Law, Economics and Politics in the Constitutionalisation of Europe,' 5 (2002-2003) *The Cambridge Yearbook of European Legal Studies*, 2004, 123.

cation, of *Recht-Fertigung* ('justification'), induced by Europe, to document the opportunities and risks borne by the Europeanization process—and to demonstrate why the process itself cannot but disappoint the dogmatic and systematic expectations of legal science (part B). In the final part, I will further elucidate the normative perspectives that can be associated with my title, 'Europeanization as Process' (part C).

A. THE CONTEST OF LEGAL DISCIPLINES AND THE MISERY OF METHODOLOGICAL NATIONALISM

Three legal disciplines are trying to unravel and understand the process of Europeanization: European law, private international law and comparative law. They all have different perspectives and introduce contesting criteria of law. How are we to resolve the contest between those legal disciplines⁴? Should European law Europeanize private law, replace national private laws with a European private law? Is it for comparative law to guide the quest for a suitable system of legal rules for Europe? But surely, it is private international law's vocation to instruct Europe as to how it can reconcile its legal differences, to combine the construction of a functioning European private law system and the respect for national legal traditions? None of them, it is my claim, can win the contest of the disciplines. None is equipped to deal with the Europeanization process.

To be sure, the intention is not to pass judgment on the capabilities or disabilities of entire legal subjects. My argument, which proposes the insolubility of the contest of legal disciplines, rather follows the specific tradition that underlies the statement, indicated above, that legal science should be prepared to acknowledge Europe's postnational constellation.⁵ To follow up on a concretisation of this term, first coined by Jurgen Habermas⁶ and analysed by the political scientist Michael Zürn: the individual legal disciplines must overcome their 'methodological nationalism,'⁷ their adherence in terms of concepts and method-

4. In his famous treatise in 1798, which this section's heading alludes to, Kant referred not only to the sub-disciplines of one faculty. Alluding to Kant's valuation of philosophy is justified: jurisprudence, much to the contrary of Kant's derisory remarks, cannot limit itself to a function that serves given authorities, but must become productive and make use of what Kant names 'reason.' See Joerges. "The Europeanisation of Private Law as a Rationalisation Process and as a Contest of Disciplines—An Analysis of the Directive on Unfair Terms in Consumer Contracts," 3 ERPL 3 (1995) 175.

5. Above, pre A.

6. "Die postnationale Konstellation und die Zukunft der Demokratie," in: Habermas, *Die postnationale Konstellation, Politische Essays*, 1998, 91.

7. Zürn, "Politik in der postnationalen Konstellation," in Landfried (ed.), *Politik in der entgrenzten Welt*, 2001, 181. Not only Zürn uses the term (see e.g. Beck, *Beyond Methodo-*

ologies to national shapes; these shapes are being eroded as a consequence of European integration together with ‘globalization’ (de-territorializing (*Entgrenzung*) and denationalising) processes. Again: I do not wish to pass judgment on the state of those disciplines; the intention is rather to highlight and reinforce the developments that are verifiably taking place within the law and that should also be reflected by legal science.

I. European Law

My claim, that legal science rather stubbornly adheres to national categories of thought, must sound surprising, if not strange, in relation to the discipline I discuss first, namely European law. Is not the European construction exactly the negation, the *Überwindung*, of the nation state? Is not the specific characteristic of European law precisely that, a claim to supranational validity⁸ without any need for Europe to become a state first? And could not maybe private law, even though it is a ‘late comer’ of the integration process, become somewhat of a test case for transnational state-free law, in particular when it would require no more of private law than to revise its own traditions?

A dominating and most instructive topic currently under discussion within legal science and legal policy concerns the case for—or rejection of—a European Civil Code. Numerous institutional and academic groupings have contributed to the debate on the codification project, in manifold ways.

The European Parliament (EP) in its resolutions of 1989 and 1994 pleaded for a European Civil Code.⁹ They did not have an immediate impact,¹⁰ but did help to keep the idea alive. By now, the EP has become more cautious, or at least more patient.¹¹ The Commission is more sibylline. In its Communication on contract law in 2001,¹² it presented four options and asked: Should the European private law be generated through a contest between legal orders? Should Europe draft *Restatements* following the American model? Should it ‘consolidate’ first what

logical Nationalism, Towards a New Critical Theory with a Cosmopolitan Intent, Constellations 10 (2003), 453), but I keep to Zürn’s interpretation sketched out at IV below.

8. ECR [1963], 24 f. Van Gend en Loos.

9. OJ C 158/1989, 400 and C 205/1994, 518.

10. Cf. Tilmann, ‘Eine Privatrechtskodifikation für die Europäische Gemeinschaft’, in Müller-Graff (ed.), *Gemeinsames Privatrecht in der Europäischen Gemeinschaft*, 1993, 485.

11. See the Decision of the European Parliament on the approximation of Member States’ civil and commercial law, [COM(2001) 398–C5-0471/2001–2001/2187(COS)] of 15 November 1001, A5-0384/2001.

12. Commission Communication on European Contract Law, COM (2001) 398 final, 11 July 2001.

it has accomplished in terms of existing elements of European private law? Or should Europe embark on further legislative measures? The Commission summarized responses to these questions in its Action Plan of 12 February 2003.¹³

The Commission carefully avoids taking a definitive position. But the project of a European Civil Code has had a mobilising effect throughout legal science.¹⁴ The most prominent academic writer and also one of the most ardent advocates in favour of a European code is Christian von Bar.¹⁵ Which of the arguments expressed in his views seem to suggest a position of methodological nationalism? Von Bar more than others emphasizes that legislation should draw on the authority of science and scholarly deliberation rather than politics. His views quite accurately reflect the self-understanding of German scholarly thought in the 19th century during the construction of the German Civil Code.¹⁶ The German Civil Code put into effect the uniformity of the German Reich and thus symbolizes the emergence of a German nation state. A European Civil Code could play a similar part, as contribution towards European state-building, supplementing the political constitution of Europe.

II. Comparative Law

The process of European integration has brought about a renaissance of comparative law. For long decades it was—in Germany and elsewhere—virtually self-evident that comparative research would focus on American law, and only on American law. In the meantime, the *Common Core* project alone attracts, year after year, a growing number of comparative lawyers from all over Europe and the rest of the world to Trento.¹⁷ Comparative case books are available.¹⁸ European universi-

13. Communication of the Commission and the European Parliament and the Council: A Coherent European Contract Law, Action Plan, OJ C 43/2003, 1.

14. See summary by Schmid. *Juristenzeitung*, 2001, 694, updated in his habilitation thesis (note 1), part 3, section 2; especially on the expert working groups on the Europeanization of private law, see: Riedl, *Vereinheitlichung des Privatrechts in Europa*, 2004.

15. See programmatically Von Bar, 'From Principles to Codification: Prospects for European Private Law,' *Columbia Journal of European Law* 9 (2002), 379.

16. See poignantly Jakobs, *Wissenschaft und Gesetzgebung im bürgerlichen Recht nach der Rechtsquellenlehre des 19. Jahrhunderts*, 1983, 160: the German Civil Code is '... a code of law, the sources of which can be found not in itself, but in the legal science that has created it; a code of law seeking to be dominated by, rather than to dominate, science...' (my translation); see for closer analysis Joerges, *Kritische Justiz*, 1987, 166.

17. Bussani/Mattei (eds.), *The Common Core of European Private Law, Essays on the Project*, 2002; on this and with a further impressive summary of the discipline's *status quo*, Gambaro, 'The Trento Theses,' *Global Jurist* 4 (2004), No. 1, Article 2.

18. Von Bar, *The Common European Law of Torts*, vol. I, 1998; Van Gerven/Lever/

ties have extended their intra-European comparative research with some enthusiasm, provoking not only quantitative but also qualitative improvements—a real renaissance.

Again, it would be adventurous to try to force what has become a rich and diverse theoretical debate into a uniform agenda. And just as is the case for European law, the claim that comparative law is pervaded by methodological nationalism may alienate the reader at first. But it holds true, in my view, as shall be demonstrated by turning to the views of two important exponents and opponents. Reinhard Zimmermann, on the one hand, reveals in his numerous works that the common European legal heritage, the *ius commune europaeum* continues to have a considerable impact in continental civil law systems and throughout the English (but not the American) common law. He seems to be sketching out the foundations of a position in favour of transnational and non-state private law.¹⁹ But in his theoretical approach, Zimmermann combines historical studies and practical work on law. His writings on legal history are meant to provide support to non-legislative codification movements. It comes as no surprise that the title of the first section of the Introduction to the Historical-Critical Commentary on the German Civil Code reads: ‘The European Codification Movement’.²⁰ The section reads further: ‘the codifications have not rendered learned jurists redundant, nor have they led to a permanent consolidation (or fossilisation) of private law. But they did facilitate, on the one hand, national fragmentation of legal traditions...on the other, the codifications ended the ‘second life’ of Roman law, the history of its direct practical application...’.²¹ The Europeanization of private law cannot and should not rewind the clock of history. But historical legal scholarship is trying to feed into it an awareness of its pan-European foundations—to boost the European codification project which would create and symbolise a uniform European legal space.

At the opposite end of the spectrum of comparative contributions is Pierre Legrand.²² His non-convergence thesis, his rigid opposition

Larouche/von Bar/Viney, *Cases, Materials and Text on National, Supranational and International Tort Law, Scope of Protection*, 1998.

19. See Zimmermann, *Archiv für die civilistische Praxis*, 193 (1993), 122–169; *idem*, Roman Law and European Legal Unity, in Hartkamp/Hesselink/Hondius/Joustra/Du Perron (eds.), *Towards a European Civil Code*, 2nd ed. 1998, 21; *idem*, ‘Savignys Vermächtnis,’ in Caroni/Dilcher (eds.), *Norm und Tradition, Welche Gerechtigkeit für die Rechtsgeschichte?*, 1998, 281.

20. Zimmermann, *Historisch-Kritischer Kommentar*, paras. 1 ff. before § 1 (2003).

21. My translation.

22. Poignantly, e.g.: ‘European Legal Systems are not Converging,’ *International and Comparative Law Quarterly*, 45 (1996), 52; ‘Against a European Civil Code,’ *Modern Law*

against functionalism in comparative law and against codification movements is based upon the assertion that common law and civil law cannot communicate because the law is a cultural phenomenon and European legal cultures have developed, quite simply, in an incompatible way. Both Zimmermann and Legrand loosen ties between law and the nation state. Yet, both remain themselves tied to a methodological nationalism. Zimmermann in that he seeks to follow the example of historical legal science in the codification movement, Legrand in that he deduces from the cultural features of common law and civil law their political autonomy.²³

III. Private International Law

European and Private International Law (PIL) lived separate lives for a long time, encouraged by a culture of non-communication where European lawyers were part of public law and PIL-lawyers part of private law. Thus, for a long time it went practically unnoticed that the European Court of Justice (ECJ) adjudicated constellations that had already been thoroughly thought through by PIL. Nowhere did overlaps receive greater attention and were discussed earlier than in Germany. Discussions can be separated into several stages: One phase, where PIL was recommended as an alternative to projects suggesting unification of law.²⁴ A second one, still ongoing, where European law—in particular its fundamental freedoms and the ban of discrimination, but also its provisions on mutual recognition of binding law—was and is used to correct PIL.²⁵ A third phase is approaching. This phase will see the choice-of-law methodology pulling away from its traditional home discipline and in particular from its orientation towards a geographical idea of justice. This is happening in two ways. For one, inconsistencies

Review 60 (1997), 44.

23. These are no more than cursory remarks. Hein Kötz, representing the leading—functionalist—school of comparative law, has always been sceptical towards the idea of codification, see his *Gemeineuropäisches Zivilrecht*, Festschrift Konrad Zweigert. 1981, 481; methodologically strict exponents of the common core project are agnostic in terms of legal policy: e.g. Bussani, *ibid.* (note 17), but also Mattei, 'Hard Code Now!', *Global Jurist Frontiers*, Vol. 2, No. 1 (2002), Art. 1. The *Gretchen* question, however, remains whether comparative law can give up its perception of autonomous legal systems. How can we conceptualise their interdependencies and the emergence of multi-level systems with interconnected competences?

24. See e.g. Kreuzer, 'Die Europäisierung des internationalen Privatrechts—Vorgaben des Gemeinschaftsrechts,' in: Müller-Graff, *Gemeinsames Privatrecht in der Europäischen Gemeinschaft*, 1993, 273.

25. See Grundmann, *Rebels Zeitschrift für ausländisches und internationales Privatrecht* 64 (2000), 457. Summary and analysis of current developments in Schmid (note 1), especially in part 3, section 1.

within and between national law²⁶ and European law²⁷ will be reconstructed as ‘collisions’ and conflicts arising from the institutionalization of different rationality criteria. Accordingly the idea that law could be set up as a stable, permanent and ‘uniform’ system will be done away with. Contributions describing the law of a multi-level system and in particular European law as a *Kollisionsrecht*, a ‘collision law’, increasingly demonstrate a thinking of law in constantly recurring collisions.²⁸ More on this will be said below.²⁹

IV. Interim Conclusion and Anticipation: the Misery of Methodological Nationalism in Europe’s Postnational Constellation

The claim that our categories of legal science and our individual disciplines attach themselves to the nation state is anything but exciting. Equally, it should not come as a surprise that legal science—in constitutional and administrative as well as private law—draws on national and federal examples. The connected question, however, whether—in legal sociological terms—it is possible to halt the evolution of law beyond the nation state, and—in legal theoretical terms—the debate surrounding the normative legitimacy of these developments, bear some potentially explosive issues.

The situation in the European Union inevitably requires a look, as indicated above, into the political science research on integration. For a long time, we have been reading that Europe is more than an international organization, but less than a federation.³⁰ To understand its posi-

26. Intellectually groundbreaking but little noticed: Wiethölter, *Begriffs- oder Interessenjurisprudenz—falsche Fronten im IPR und Wirtschaftsverfassungsrecht: Bemerkungen zur selbstgerechten Kollisionsnorm*, Festschrift Kegel, 1977, 223; analysis by Teubner. ‘Der Umgang mit den Rechtsparadoxien: Derrida, Luhmann, Wiethölter,’ in: Joerges/Teubner (eds.), *Rechtsverfassungsrecht, Recht-Fertigung zwischen Privatrechtsdogmatik und Gesellschaftstheorie*, 2003, 22.

27. See Joerges, ‘Legitimationsprobleme des europäischen Wirtschaftsrechts und der Vertrag von Maastricht,’ in: Brüggemeier (ed.), *Verfassungen für ein ziviles Europa*, 1994, 91.

28. Joerges, ‘The Impact of European Integration on Private Law: Reductionist Perceptions, True Conflicts and a New Constitutionalist Perspective,’ *European Law Journal* 3 (1997), 378; Furrer, *Zivilrecht im gemeinschaftsrechtlichen Kontext. Das Europäische Kollisionsrecht als Koordinierungsinstrument für die Einbindung des Zivilrechts in das europäische Wirtschaftsrecht*, 2002; Amstutz, *Zwischenwelten, Zur Emergenz einer interlegalen Rechtsmethodik im europäischen Privatrecht*, Joerges/Teubner, *ibid.* (note 26), 213; Vesting, *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 63 (2004), 41, 65 ff.; Schmid (*ibid.* note 1) part 3, section 1; Teubner/Fischer-Lescano, ‘Regime-Collision: How the Emergence of Private Governance Regimes Changes Global Legal Pluralism,’ *Michigan Journal of International Law*, 2004 (forthcoming).

29. Below B. II. and C. I.

30. W. Wallace, ‘Less than a Federation, More than a Regime: The Community as a Political System,’ in H. Wallace/W. Wallace (eds.), *Policy-Making in the European Commu-*

tion between these two poles as a 'multi-level systems sui generis' is somewhat of a dominating view in political science³¹ which is being further substantiated in respective studies. Before introducing the idea into legal science, it should be reconstructed in normative categories. But this is anything but easy. In his essay introducing the 'postnational constellation' as a term of art,³² Jürgen Habermas posed the crucial question whether there was a future for democracy. Democracy was institutionalised in (national) constitutional states.

Therefore, postnational constellations are highly ambivalent; they constitute not an achievement but rather a challenge. The thesis in which Michael Zürn diagnoses the misery of methodological nationalism³³ suggests that we cannot avoid the challenge, because our entry into the postnational constellation is not at our disposition. His diagnoses affect mostly the contextual conditions of political action:³⁴ The nation state is no longer in a position to define its political priorities autonomously (as sovereign), but instead is forced to coordinate them transnationally. Not only must their members (national citizens) recognise their political action; states have also become accountable to transnational bodies where their politics are being subjected to evaluation. To be sure, national governments continue to vehemently defend their fiscal powers. "Whilst resources remain (in most part) at national level, the formulation of politics has been internationalised and recognition transnationalized."³⁵

How will this type of multidimensional disaggregation of statehood affect the law? First of all, we should be prepared to find the transnational (European) level of politics confronting national law with a range of demands arising from the interconnectedness of nation states (in other words, the logic of integration of societal sub-systems), and from the project of integration and its institutionalised political telos manifested in the European Treaties. Neither the national nor the transnational dimension gives a firm halt; both are instead themselves in a state of contingent development. The thesis suggesting that we are and will be witnessing tensions between a functionalist logic of market integration institutionalised in the Treaties and a normative logic of justification, of *Recht-Fertigung*, institutionalised at national level, in

nity, 1983, 403.

31. Instructive are contributions to Jachtenfuchs/Kohler-Koch (eds.), *Europäische Integration*, 2nd ed., 2003.

32. Above note 6.

33. Above note 7.

34. *Ibid.*, 188-191.

35. My translation; *ibid.*, 188.

my view continues to have much persuasive force as a starting point and basis for approximation.³⁶ It implies: law has to learn how to accommodate disaggregated competences of action and the fact that in a European multi-level system the 'higher' level's competences are restricted to the fields enumerated in the Treaty, that Europe hence cannot form a hierarchical system but instead relies on a plethora of policy networks and on cooperative problem solving. Any attempt to illustrate or concretise these formulae is bound to fail the systematic expectations and traditional thought patterns.

B. EXEMPLA TRAHUNT: THREE PATTERNS OF EUROPEANIZATION OF PRIVATE LAW

'Less than a "system", but more than just a set of contingent case law'—thus the claim of the following analyses of the practice of Europeanization of private law. It would be unrealistic to accredit to the law the power to assert itself as a 'system' within the complex and conflict ridden territory of the European multi-level system. But any suggestion to break the law down into a string of individual cases would be equally far from reality. Three sets of examples are being introduced, exemplifying in turn some significant patterns of Europeanization of private law. Their 'exemplarity' is manifested particularly in the range of options they uncover for integration policy. In saying this, I implicitly suggest that these options include diverse, even opposite perspectives. I also assert that their contest will not come to a rest, that we should not expect any one pattern to acclaim a monopoly at any time in the future. Rather, each individually will be subjected to a range of experiences that in turn will provoke further learning processes. Here is not the place to advocate normative agnosticism. Having said that, it should be stressed that the law will have to be prepared to deal with colliding concepts of Europeanization.

1. Product Liability Law: on the Destitution of Orthodox Supranationalism

The European Community Product Liability Directive was adopted unanimously, under (the old version of) Article 100 TEC, on 25 July 1985.³⁷ This explains why it records product liability law so incompletely,³⁸ why it disappointed expectations especially of those who ex-

36. See Joerges/Brüggemeier, 'Europäisierung des Vertrags- und Haftungsrechts,' in: Müller-Graff (ed.), *Gemeinsames Privatrecht in der Europäischen Gemeinschaft*, 1993, 233.

37. OJ L 210/1985. 29.

38. Koch, *Zeitschrift für das gesamte Handels- und Wirtschaftsrecht* 152 (1988), 537.

pected it to be the flagship of European consumer protection law.³⁹ Intense debates surrounded the Directive's implementation. It was widely considered a marginal piece of legislation with little impact on the general law of obligations because Article 13 of the Directive evidently did not respect claims pursuant to other legal bases.⁴⁰ There was, at any rate, broad agreement that the Directive would preclude further advances in consumer protection law by establishing a set of conclusive minimum standards.

For a long time, these expectations appeared justifiable, until, in three relatively recent judgments of 25 April 2002,⁴¹ the ECJ shattered them quite dramatically. The Court recognised to the great surprise of most observers that the Directive's consumer protection provisions were not intended to introduce protective minimum standards, but rather to achieve 'complete harmonisation'. As a consequence, the Directive enjoys the standing of fully-fledged European law: it is supreme to national private law, takes precedence over subsequent national legislation and creates a duty for national courts to refer to the ECJ.

The three decisions just mentioned concern the French, the Greek and the Spanish implementation of the Directive. The Spanish case is particularly frightening.⁴² Mrs. Gonzalez Sanchez had to have a blood transfusion in the hospital run by the defendant institution (Medicina Asturiana SA). As a consequence of the transfusion, she was infected with the Hepatitis C virus. She based her action on the law by which Spain had transposed the Directive into Spanish law and, in addition, on the general liability provisions of Spanish civil law, and on the Spanish General Law for the Protection of Consumers and Users of 19 July 1984, under which the claimant had only to prove damage and a causal connection. Under the Product Liability Directive, implemented 10 years after the 1984 law,⁴³ she also had to prove that the hospital had produced the blood conserves, which she failed to show. Therefore, the success of her claim depended on the relationship between the three legal bases. Article 13 of the Directive provides that the Directive "shall not affect any rights which an injured person may have according to the

39. See Brüggemeier/Reich, *Wertpapier Mitteilungen* 1986, 149.

40. E.g. Brüggemeier, *Zeitschrift für das gesamte Handels- und Wirtschaftsrecht* 152 (1988), 511, 531.

41. Case C-52/00, ECR [2002] I-3827 *Commission v. France*; Case C-183/00, ECR [2002] I-3901 (Mari); *María Victoria González Sánchez v. Medicina Asturiana SA*; Case C-154/00, ECR [2002] I-3879 *Commission v. Greece*.

42. On the following, see analyses by Arbour, ELJ 10 (2004), 87 and Schmid (*ibid.*, note 1), especially part 2, section 4, chapter 5.

43. Case C-183/00 para. 7, 8.

rules of the law of contractual or non-contractual liability or a special liability system existing at the moment when this Directive is notified.” Does this mean, the Spanish court asked the ECJ, that the Directive could “be interpreted as precluding the restriction or limitation, as a result of transposition of the Directive, of rights granted to consumers under the legislation of the Member State?”⁴⁴ To the unversed reader, the question may sound rhetorical. But the Court responded: “Article 13 of the Directive cannot be interpreted as giving the Member States the possibility of maintaining a general system of product liability different from that provided for in the Directive.”⁴⁵

The provision that Article 13 does not affect claims on a different basis cannot “be relied on in such a case in order to justify the maintenance in force of national provisions affording greater protection than those of the Directive.”⁴⁶

In its analysis of the Community law provisions, the ECJ refers to Recital 1 in the preamble of the Directive, according to which “approximation is necessary because legislative divergences may distort competition and affect the movement of goods within the common market and entail a differing degree of protection of the consumer against damage caused by a defective product to his health or property.”⁴⁷ It had been necessary at the time to introduce this sentence, in order to ‘establish’ the Community’s (functional) legislative competence. Since then, the paragraph has become neither more empirically relevant, nor normatively more correct. Nevertheless, the Court’s judgment reaffirmed its value as a virtually teleological motivation for restricting Member States’ legislative autonomy.⁴⁸

European law, understood this way, does not contribute much to the Europeanization process. The preliminary rulings procedure has good institutional sense because it links the judiciary in Member States to the jurisdiction of the ECJ. But it can bear painful consequences for those who seek justice in a case that would not normally seem problematic.⁴⁹ After long years of litigation, Mrs. Sanchez finally knew whom she would have had to sue in order to enforce her rights. A result such as this one would be easier to accept, if we could see in the ECJ’s judg-

44. *Ibid.*, para. 13.

45. *Ibid.*, para. 30.

46. *Ibid.*, para. 33.

47. *Ibid.*, para. 3.

48. *Ibid.*, paras. 24, 25.

49. More generally Joerges, ‘The Bright and the Dark Side of the Consumer’s Access to Justice in the EU,’ *Global Jurist Topics* 1 (2001): No. 2, Article 1.

ment a constructive contribution to the development of product liability law. But this is hardly possible.⁵⁰

II. Company Law: Economic Freedom and Political Rights of European Citizens—and their Bars

The judgments in *Centros*,⁵¹ *Überseering*⁵² and *Inspire Art*⁵³ are part of a single complex which should be discussed in unity, but at this point I will focus on a particular aspect often shaded by a plethora of literary analysis. From the interplay between the economic freedoms, the legislative and the judiciary, emerges the right to hold the national sovereign to account for its legislation and to confront it with the legal rationality of its European neighbours—this to me is the normative significance of the *Centros* case law, but equally its practical weakness.⁵⁴

The judgment in *Centros* concerns the core of the European legal *acquis*, namely the freedoms of market citizens which apply directly and ought therefore to take primacy over national law. The decision was widely praised as a milestone in the realization of the market freedoms, as a contribution to the so-called negative integration and the opening up of regulatory competition; but it also has wider implications.

A Danish married couple, Marianne and Tony Bryde, wished to import wine into Denmark. For this they planned to set up a company, but did not want to pay the fee of the DK 200,000 (28,000 Euro) that Denmark required for the registration of companies. In May 1992 they founded a private Limited company in England, the now legendary *Centros Ltd.*, and set up a subsidiary in Copenhagen—for none of these steps did they need the money that a regular registration in Denmark would have required. Unsurprisingly, the Danish authorities refused registration. The Brydes went to court. Seven years later, the ECJ handed down the following judgment to the referring Danish Højesteret. It found, rightly, that:

It is contrary to Articles 52 and 58 of the Treaty for a Member State to refuse to register a branch of a company formed

50. See below C. III.

51. Case C-212/97, ECR [1999] I-1459 *Centros Ltd. v. Erhvervs- og Selskabsstyrelsen*.

52. Case C-208/00, ECR [2002] I-9919 *Überseering BV v. Nordic Construction Company Baumanagement GmbH (NCC)*.

53. Case C-167/01, *Kanter van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd*, U. of 30 September 2003.

54. See Joerges, 'Zur Legitimität der Europäisierung des Privatrechts. Überlegungen zu einem Recht-Fertigungs-Recht für das Mehrebenensystem der EU,' in Joerges/Teubner, *ibid.* (note 26), 183, 189–194.

in accordance with the law of another Member State in which it has its registered office but in which it conducts no business where the branch is intended to enable the company in question to carry on its entire business in the state in which that branch is to be created, while avoiding the need to form a company there, thus evading application of the rules governing the formation of companies which, in that state, are more restrictive as regards the paying up of a minimum share capital.⁵⁵

Did the Court permit the Brydes, in Gerhard Kegel's well phrased words,⁵⁶ to 'cock a snoot' at the law? Or, and this may be the case's most popular reading, was it the ECJ's intention to allow for a more efficient legal framework for company law in Europe?⁵⁷

Maybe the truth lies in the middle? What is so abusive, really, about setting up a company in another Member State with a seemingly more beneficial regulatory system? Should we not simply understand it—as the ECJ does—as the exercise of a right afforded to European citizens, a right which however will cede to legitimate regulatory concerns—foreclosing the concerns of those who warn against the superiority of economic against political reason. The ECJ did not push aside Denmark's right to enact compulsory provisions dealing with company law. It placed Denmark under pressure to justify why Danish registration fees would better serve the protection of creditors, which, according to the Danish government's presentation, was the object of the Danish legislation. The Court remained unconvinced, partly because foreign companies were allowed to set up branches in Denmark without having to pay a registration fee.

There are obvious parallels to the jurisdiction on Article 28 TEC, which since *Cassis de Dijon*, thus for the past 34 years, has repeatedly found that Community law must preserve and respect national autonomy (*'autonomieschonend'*), whilst national laws must pursue their legitimate regulatory interests in conformity with Community law (*'gemeinschaftsverträglich'*). In other words: Danish citizens have the right to test their national sovereign in a European court—the Brydes made use of their right. In case it is found to be in breach of European law, the Danish legislator is given the chance to amend its laws—and it

55. Sentence 1 of the tenor of the judgment, ECR [1999] I-1947.

56. In his editorial in *Zeitschrift für Europäisches Wirtschafts- und Steuerrecht* (8) 1999 ('Es ist was faul im Staate Dänemark und anderswo...').

57. See Eidenmüller, 'Wettbewerb der Gesellschaftsrechte in Europa,' ZIP 2002, 2233.

has done so.⁵⁸ The new regulation, justified by legitimate concerns of the Danish government to secure tax demands, may be called into question again. It remains to be seen—e.g. whether the Brydes are again prepared to invest 10 years to challenge existing Danish law.

Centros has not remained without consequences. The possibility that interested actors would try to test how far their new freedoms would reach and how much money they would save, was easily predictable yet little investigated.⁵⁹ Debate about the implications of *Centros* in terms of legal *systematique* was however, dense; it helps us in better understanding the two following decisions. In a reference for a preliminary ruling by the Federal High Court of 30 May 2002 (*Überseering*),⁶⁰ the ECJ was asked whether German law could prevent a Dutch plaintiff from suing for over 1,000,000 DM by, firstly, restricting in § 50 (1) of its *Zivilprozessordnung locus standi* to those legally competent (*rechtsfähig*) companies, and secondly, by prescribing that a company incorporated according to Dutch law could lose its legal capacity once it transferred its activities to Germany in a way which constitutes, according to German law, a transfer of its ‘seat’ or legal headquarters (*Verwaltungssitz*).⁶¹ In an internal market where freedom of establishment exists as a right, such legal principles seem downright incredible.⁶² In *Inspire Art*⁶³ the ECJ continued its line of reasoning, and established: the right of a company set up under English law to carry on business in the Netherlands should be respected in principle; only for ‘good’ reasons, not accounted for in European secondary legislation, may this fundamental freedom be restricted.

The *Centros* judgment found Denmark’s regulatory interests per se legitimate. In the follow-up decisions, there was no need for the

58. See Trefil, *Centros und die Niederlassungsfreiheit von Gesellschaften in Europa*, EUI Working Paper Law 2003/9, <http://www.iue.it/PUB/law03-9.pdf>, 31 ff., referring to www.retsinfo.dk and the doubts about the solidarity of the Danish ‘Sonderweg.’

59. Instructively Baudisch, ‘From Status to Contract? An American Perspective on Recent Developments in European Company Law,’ in Snyder (ed.), *The European Union and Governance*, 2003, 24, 44 ff., who considers a ‘race to the bottom’ unlikely, because of existing interests for businesses in their reputation.

60. German Federal Court, *BGH Europäische Zeitschrift für Wirtschaftsrecht* 2000, 412.

61. See para. 45 of the Opinion of Advocate-General Colomer on 4 December 2001 for Case C-208/00 *Überseering BV v. NCC GmbH*.

62. Eventually the representation made by the German government, that the plaintiff could have acted as a company without legal personality under German law (cited in AG Colomer’s Opinion at para. 55: see also Roth, *Praxis des Internationalen Privat- und Verfahrensrechts* 2003, 117, 123 f.), will not suffice; poignantly Schanze/Jüttner, *Die Akteingesellschaft* 2003, 30.

63. Case C-167/01, *U. v. 30.09.2003, Kamer van Koophandel v. Inspire Art Ltd.*, *Neue Juristische Wochenschrift* 2003, 3331.

Court to discuss the bars to the fundamental freedoms. But these questions have become increasingly pressing: how are the general reasons in favour of the 'seat' theory (*Sitztheorie*)—protection of creditors and of subsidiary companies; co-determination; avoidance of double taxation—to be accounted for in the future? Not by invoking the seat theory! In Europe's multi-level system, the latter is equally as obsolete as its counterpart, the 'incorporation' theory (*Gründungstheorie*). Both have no place in Europe's postnational constellation.⁶⁴ Their objectives must be expressed in different terms⁶⁵ and addressed in a way so as to conform with Community principles.⁶⁶

III. Altmark Trans: Public Services after Privatization

One of the most important characteristics of the Europeanization process is that it disconnects what is traditionally considered 'private law' from its regulatory context. This is one of the inevitably disintegrative effects of integration, legally rooted in one of the Community's core principles: the EU's competences are restricted to the fields enumerated in the Treaty. Amongst them we find practically the whole field of regulatory law, and the Community has used those competences extensively.⁶⁷ The real world, however, continuously brings up constellations where the demarcation of competences in the Treaty does not correspond with real existing and interconnected regulatory problem constellations. Typically, the European level is competent to regulate one aspect of a problem, whereas Member States remain competent to

64. Clearly Schanze/Jüttner, *Die Aktiengesellschaft* 2003, 681, 685.

65. Especially Schanze/Jüttner, *ibid.*, and Ulmer, *Juristenzeitung* 999, 662 and *Neue Juristische Wochenschrift* 2004, 1201 illustrate convincingly how this is possible.

66. The German co-determination rules are the most complicated, because they lack any functional equivalent elsewhere (see Dammann, 8 *Fordham J. Corp. & Fin. L.* 607). Co-determination may not be imposed on an undertaking simply because it uses its right to establishment—and vice versa: Community law may not dispense with an institution such as the German co-determination procedure, simply because it disturbs companies' freedom of establishment. It is instead left to initiate political processes through institutionalisation of existing tensions. An example, at first sight a little remote: the practices engaged by Microsoft in the US and in the EU are judged differently in either legal order. But where the EU, as was declared by the Commission on 24 March 2004, imposes its law in Europe, then it takes away de facto rights and freedoms Microsoft enjoys under US law. The EU can avail itself of a legal framework that does not leave these types of dilemmas to lie [with expected effects: see Sadowski/Junkes/Lindenthal, *Labour Co-determination and Corporate Governance in Germany*, in: Schalbach (ed.), *Corporate Governance, Essays in Honor of Horst Albach*, 2nd ed. 2003, 144].

67. Jacques Delors in a slightly outdated but much cited statement announced that 80 per cent of the economic law in Member States should be determined by the Community. Delors, 'Europa im Umbruch. Vom Binnenmarkt zur Europäischen Union.' in Kommission der EG (ed.), *Europäische Gespräche*, vol. 9. 1992, 12.

regulate another one. The term 'diagonal' is used to distinguish such constellations from, on the one hand, 'vertical' conflict resolutions where Community law trumps national law, and from 'horizontal' conflicts which arise from differences among the Member States' legal systems and which belong to the domain of PIL on the other.⁶⁸ The term 'diagonal conflicts' captures a structural characteristic of the European multi-level system. Neither the European level nor the national level is in a position to address a specific problem in its entirety: European and national actors are forced to coordinate.

Examples are legion, even though they do not always appear in the literature under the heads I have just indicated.⁶⁹ I restrict myself to one: The *Altmark Trans* judgment of 24 July 2003⁷⁰ illustrates the implications of the privatization⁷¹ of public services, induced by European law; these Europeanized so-called 'Services of General Interest' or '*Daseinsvorsorge*' are controversial because they meet with firmly embedded national regulatory traditions, expectations and interests. The regulations they affect are not as much intertwined with private law as they may be in constellations where national private law pursues regulatory goals that may collide with some goals of European regulatory law. However, privatization initiatives are a major concomitant of integration; they affect the realm of private law as they determine to what extent services can be brought by and in conformity with the market.

'*Daseinsvorsorge*' was brought under the auspices of public law on the basis that it affected basic human requirements in industrialised times. The German term was coined by no less than Karl Jaspers *before* 1933. The fact that Ernst Forsthoff in 1938 re-applied the term in the context of administrative law⁷² is no argument as such. In any case, it is correct to say that in the first place *Daseinsvorsorge* had to gain the social and democratic legitimacy used today in its defence. Those who acknowledge its value, e.g. the British social philosopher Steven Lukes, must fear the 'invasions of the market'⁷³ in Europe; those who find no

68. See also Schmid (note 1), part 3, section 1, sub-section 1, chapter 2.

69. But see Schmid (note 1), part 3, chapter 2.

70. Case C-280/00, *Altmark Trans GmbH v. Regierungspäsidium Magdeburg und Nahverkehrsgesellschaft Altmark GmbH*, nyr.

71. On this process see 'Communication on Services of General Interest in Europe' (COM (1996) 443 final of 11 September 1996), 'Report on Services of General Interest' (COM (2001) 598 final of 17 October 2001) and the 'Green Paper on Services of General Interest' (COM(2003) 270 final of 21 May 2003).

72. 'Daseinsvorsorge als Aufgabe der modernen Verwaltung,' *idem.*, *Die Verwaltung als Leistungsträger*, 1938.

73. Lukes, 'Invasions of the Market,' in Dworkin et al. (eds.), *From Liberal Values to Democratic Transition*, 2003. Lukes argues within the anglo-saxon tradition: 'As Marshall

place for it in a social welfare state, such as the expert committee to the German Federal Ministry of Commerce, would regard its protection by legal norms as an encroachment of ‘the citizens’ subjective rights, guaranteed by the Community, to unhampered participation in the cross-border transfer of goods and services’.⁷⁴

Altmark Trans concerned subsidies awarded to public transport undertakings in the Landkreis of Stendal in Germany. The case itself may seem insignificant, yet the ensuing questions are of fundamental importance: should availability of public transport be organised on the basis of social welfare and distributional justice or on the basis of efficiency? Is this an openly political question to be decided by the German Lander and communes, or a legal question for Community law to answer? The ECJ knew not to decide these questions definitively, but instead to design a legal framework which leaves room for political processes and decisions—and still protects European concerns. This is, it seems to me, the core message of the decision which also brought up difficult questions of law concerning the interplay between secondary Community law and the German public transport law (*Personenbeförderungsgesetz*) as amended in 1995. *Altmark Trans GmbH* and *Nahverkehrsgesellschaft mbH* both sought to organise public transport in the Landkreis of Stendal in Sachsen-Anhalt, one of the German Lander. *Altmark* had been licensed, and got the license renewed by the Regierungspräsidium, whereas the bid of *Nahverkehrsgesellschaft mbH* was rejected. The central question of law occupying the ECJ was: did the subsidies given to *Altmark Trans* after it had been granted the license to organise bus traffic in the Landkreis Stendal qualify as state aid within the meaning of Art. 87 TEC? If yes, then they would be subject to the Commission’s competences under the Treaty provisions on state aid.

The Court’s response sounds like old-fashioned legal formalism: following its own case law, the Court finds that an official act does not constitute state aid within the Treaty unless it includes an ‘advantage’ to the beneficiary undertaking. Advantages for the purpose of state aid exclude financial means provided by the state by way of compensation

argued, the first half of the twentieth century saw the acquisition by citizens of a range of basic services to which they could claim entitlement as citizens, services funded and provided by the state and thus excluded from the scope of the market. These are sometimes seen as constituents of ‘social citizenship’ but they can, equally, be seen as supplying the preconditions for core citizenship by enabling citizens to acquire and maintain the capacities needed for its equal exercise.’

74. My translation; see *Expert Committee to the German Federal Ministry of Commerce [Wissenschaftlicher Beirat beim Bundesministerium für Wirtschaft], ‘Daseinsvorsorge’ im europäischen Binnenmarkt*, 2002, 7.

for public service obligations taken on by the service provider. But the Court goes further, operationalizing its own distinction by four criteria:⁷⁵ (1) The recipient must be required to discharge clearly defined public service obligations; (2) The parameters of the calculated compensation must be established in advance in an objective and transparent manner; (3) The compensation must not exceed costs plus a reasonable profit; (4) Decisions are to be taken either after a public procurement procedure or the level of compensation is to be determined on the basis of an analysis of the costs of typical undertaking, well run and adequately provided with adequate means of transport.

These responses do bear some problems. They need to be further concretized and their implementation will be challenging. But they have high normative qualities: European law does not take a stand for or against the organisation of public services through national welfare states; it decides neither for nor against the market. Instead it puts justificatory pressure on national politics and forces those who organise public services to explain how they fulfil their social mandate. It 'constitutionalizes' the multi-level system so as to accommodate the decentralised exercise of formative (national) political freedom, whilst at the same time allowing for European concerns to afford market access to non-local suppliers. And if this were to prove a successful solution guaranteeing and manifesting some social sense in national practices, then it would be an achievement that so far has remained hardly conceivable in most integrated political systems⁷⁶—a 'procedural' conflict solution par excellence.

C. VERBA DOCENT: ON THE PROCEDURAL LEGITIMACY OF THE EUROPEANIZATION PROCESS

What I am now trying is to bring the abstract deliberations in the first part and the analyses of the second part into a synthesis. I will proceed in three steps. The first follows the understanding of Europe as a multi-level system, to demonstrate its implications for integration policy. Normative dependencies of political action become apparent in this process and are being re-conceptualised, in a second step, in legal categories. In a final step I will sketch out the legal constitution of the Europeanization process itself, which, it is my claim, must be designed procedurally, in order to overcome the impasses of European law and the methodological nationalism in comparative law and PIL.

75. Case C-280/00 (note 68), paras. 89–95.

76. See, Zürn/Joerges (eds.), *Governance and Law in Post-National Constellations. Compliance in Europe and Beyond*, 2005.

I. Farewell to Orthodox Supranationalism

Europe is no federation, but more than a regime. It is a heterarchically structured multi-level system. It must organise its political action in networks. Since the powers and resources for political action are located at various and relatively autonomous levels in the EU, the coping with functionally interwoven problem-constellations will depend on the communication between the various actors who are relatively autonomous in their various domains, but at the same time mutually dependent.⁷⁷ Jürgen Neyer formulated his thesis in a most concrete fashion, usually avoided by political scientists: the EU-specific conditions for political action favour a deliberative mode of communication that is bound by rules and principles and where arguments are accepted only if they are capable of universal application.⁷⁸ These considerations can help legal science to satisfy an undeniable need to afford its declarative statements some normative value. But they cannot substitute the argumentative construction of normative statements specific to law, and they leave room for additional argumentation. To translate Neyer's argument: the European legal framework is not designed merely to secure fundamental freedoms; but neither to create a new European state. The purpose of European law is instead to discipline the interactions necessary within the Community to act politically. It is to guide strategic action into a deliberative style of politics. It should leave behind 'vertical' ('orthodox') supranationalism and instead found its validity as law on the normative (deliberative) quality of the political processes that create it.⁷⁹ To which we may add:⁸⁰ No state in Europe can make or refrain from making decisions without causing 'extra-territorial' effects on its neighbours. Provocatively put, but brought to its logical conclusion, this means: nationally organised constitutional states are becoming unable to act democratically. They cannot include in the electoral processes, determining the democratic sovereign, all those who will be affected by their decisions. And vice versa: their citizens cannot influence the behaviour of those political actors who are

77. See above A. IV.

78. 'Discourse and Order in the EU. A Deliberative Approach to Multi-Level Governance,' *Journal of Common Market Studies* 41 (2003), 687; more detailed in his habilitation thesis, *Postnationale politische Herrschaft*, 2004.

79. See Joerges/Neyer, with Jürgen Neyer. 'From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology,' 3 (1997) *European Law Journal* 273; Joerges, 'Good Governance' in the European Internal Market: Two Competing Legal Conceptualisations of European Integration and their Synthesis,' in: von Bogdandy/Mavroides/Mény (eds.), *European Integration and International Co-ordination. Studies in Transnational Economic Law in Honour of Claus-Dieter Ehlermann*, 2002, 219.

80. See Joerges, 'The Impact,' *ibid.* (note 28).

taking the relevant decisions for them. It would thus seem legitimate for Europe to require its Member States to design their national laws with a view to accommodate Community law. It would also seem sensible to afford Member States' citizens legal rights that are truly European because they allow national citizens to compare their own laws with the laws and the experiences in other Member States.

II. European Law as Choice of Law and the Constitutionalization of Transnational Governance

The normative claims identified above of 'deliberative supranationalism' should not be portrayed as some remote wish list. They are well documented and somewhat canonised in real existing European law: Member States of the Union may not enforce their interests and their laws unboundedly. They are bound to respect European freedoms. They may not discriminate. They may only pursue 'legitimate' regulatory policies approved by the Community. They must coordinate in relation to what regulatory concerns they can follow, and design their national regulatory provisions in the most Community-friendly way. What is the meaning of all this, for the relationship between European and national law in general, and the Europeanization of private law in particular?

Two complementary patterns of legalisation, of *Verrechtlichung*, and responsibilities for the law, may be differentiated. All of the above principles and rules substantiating a 'deliberative supranationalism' affect how we deal with differences between laws. They impose a duty on Member States to take into consideration 'foreign' affairs and interests. To European law, they have assigned the task of making sure that national law is compatible with Community principles. In that sense, the law of the Community is a 'choice-of-law' (*Kollisionsrecht*). It does more than traditional PIL, in that its decision-making criteria are not there to identify the geographically closer or factually preferable law or decide between colliding interests in the application of the law. It does not work on the assumption that between equally involved national laws a choice should be made. Rather, it requires national laws to be made Community-compatible through innovation and modification, and the development and observance of principles and rules, in order to organise the differences between them. All these factors impose limits on national sovereignty. In addition, Union citizens are afforded rights that are directly applicable in their own as much as in foreign Member States—forcing a duty on the national legislator to justify its actions in a European forum.

Member States are being asked to make changes to their legal systems—changes that should in principle take place there, for them to effectively guarantee that Europe’s innovative impact will help national legal systems to evolve sensibly.⁸¹ However, this is but one side of the process. Building on just those measures that are promoting free trade and the Europeanization of our markets and rejecting the individual states’ interests and orientations, European transnational governance structures have developed and unfolded their own logic and significance.

This holds true for all domains of regulatory policy⁸²—including the traditional realm of ‘private law’, at least indirectly.⁸³ And in all those fields where private law instruments are being deployed for the organization of transnational activities, suitable arrangements are likely to establish themselves. Regulatory politics have seen an intense debate for some time on the question of how these new forms of transnational governance can be conceptualised legally (‘constitution-alized’). Discussions are equally intense in the area of competition policy after its ‘modernization’ in Regulation 1/2003.^{84 85} It is only a matter of time for those discussions to reach private law.

III. Juridifying the Europeanization Process

Private law cannot ignore the postnational constellation it finds itself placed in. It cannot pretend there is still a set of autonomous national legal systems. It can do equally little about the fact that Europe is not a state, and is not on its way to statehood. All it can do is try to bind political processes to legal principles and to influence law making in the European multi-level system. The literature on Europeanization of private law talks too little about these framework conditions. It is not obvious which legislative institution in Europe would be competent to write a Civil Code that could absorb the rich diversity of European legal traditions. It is not obvious how any such Code could keep pace with the evolutionary dynamic of regulatory politics. There are no signs of an expansion of the European judiciary, yet an expansion seems indis-

81. See the remarks in note 28 and also Deakin, ‘Regulatory Competition versus Harmonisation in European Company Law,’ *Cambridge Yearbook of European Legal Studies* 2 (1999), 231.

82. See Joerges, *Europarecht* 2002, 17.

83. See above B. III.

84. OJ L 2003/1 of 4 January 2003. See also: http://europa.eu.int/comm/competition/antitrust/legislation/procedural_rules/comments/

85. The Commission home page gives an impression: http://europa.eu.int/comm/competition/antitrust/legislation/procedural_rules/comments/

pensable, if the new law is to enjoy effective validity.⁸⁶ The *status quo* is anything but ideal. Europeanization takes place in an incremental and fragmented fashion. Citizens seeking to enforce their legal rights are being subjected to unacceptable burdens. Yet, over all we are facing an innovative process full of opportunities.

Typically, the most problematic amongst the case law constellations analysed in part two is the one that rigorously brings to bear the principles emerging from the formative period of European law. The ECJ 's thesis that the provisions of the Product Liability Directive have effected a 'complete harmonisation', undeniably ignores that if product liability law is to be applied sensibly, it should be placed in the particular context of elements of fault and liability, objective standards of negligence, product safety legislation and self-regulation (standardization and certification). It is hard to imagine how the ECJ could not have taken these circumstances into account, but equally difficult to see how its punctual intervention could contribute sensibly to the Europeanization of product liability and product safety law.

Things are different for company law. Here the ECJ pronounced clear and consistent orientation points in a way that is manageable for secondary Community law as well as national legal systems. The ECJ has conferred political rights on the 'market citizen', without affording either the market or market citizens law-making powers. The Court's findings on the privatisation of public services appears to me equally productive. Legal traditions, social expectations, political preferences, administrative know-how and market innovation—all these are very different between Brittany and Estonia, between Faroe Islands and Sicily. Europe seems destined to institute innovation and to encourage social learning. It is not Europe's job to subject the continent to a unitary regime.

The incrementalism of the Europeanization process is challenging but also full of opportunities. Europe is no polity in the way nation states are. It will have to live with its complex diversity illustrated in the case law above: primary law granting fundamental freedoms and basic rights; transnational governance arrangements in numerous

86. 'Kommt die Geschäftswelt nicht ganz gut zurecht?'—'but isn't the business world doing quite well?'—Ernst Steindorff asked more than a decade ago (see the report of the symposium 'Alternativen zur legislatorischen Rechtsvergleichung' by Oliver Remien in *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 56 (1992), 261 ff., 300 ff.), just to re-pose the question now (*Aufgaben künftiger europäischer Privatrechtssetzung angesichts deutscher Erfahrungen*, Festschrift Peter Ulmer 2003, 1393, 1407, note 63) and to add to its context: those who lobby for greater legislative ambit in Europe should also ask for a corresponding expansion of Europe's judiciary's powers which nobody will be eager to finance.

fields of regulatory politics; legislative and judicial interventions affecting only a section of the national legal systems and leading to irritation. This diversity creates by no means a comfortable situation. Maybe we will find that its complexity exceeds our learning capacities. But I am confident that it makes no sense simply to imagine a more simplistic legal landscape.

Constitutions for the 21st Century

Emerging Patterns—the EU, Iraq, Afghanistan...*

Chibli Mallat**

I. INTRODUCTION: CONSTITUTIONALISM'S INTERNATIONAL DRIVE

Amongst the furthest encompassing contemporary reflections on law stand the works of Paul Kahn. In a contribution to a Latin American/New England seminar on law and violence in 2003, he had this to say about the EU:

The political project of the EU, for example, is about displacing a sacrificial politics with a set of bureaucratic arrangements for the administration of markets and social-welfare. If the romantic element in Western politics has been in its attachment to sacrifice of the body, the EU project is just the opposite: it is politics as management of the well-being of the body. The bureaucrat in Brussels is the very opposite of the romantic politician. The longing to join the EU among the countries of Eastern Europe is not just about economics, but also about depoliticalization, i.e., about an emerging perception of sacrificial politics as a form of pathology. Indeed, the entire effort of the international human rights movement is rooted in this vision of well-being. No one, on this view, should die or suffer for politics.¹

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1. Paul W. Kahn, "Sacred Violence," SELA 2003, 13. SELA, acronym of Seminario en Latinoamérica de Teoría Constitucional y Democracia, brings together a group of leading academics mostly from Latin American and North American law schools, who meet usually

There are several strands in the Kahnian view which will appear elusive for those who have not followed his fertile search for the triangle love-law-religion, and the meanings relevant to the triangle for such issues as war and international relations, the body, or human rights. In a vision which tends to be overall bleak, the silver lining is a peculiar form of legal optimism, which is of significance to anyone interested in reform despite the less humane aspects of human beings.²

Here we need to bifurcate:

One bifurcation regards the EU and constitution-making, the other is Kantian, and regards constitutions and war.

Strong moments in constitution-making often result from traumas—sacrificial politics, amongst which the archetype stands as Abraham’s offer to sacrifice his son for God in order to save his people, religion and nation. The case of the EU, which is universally considered a triumph of Europe over its 20th Century most tragic traumas, two World Wars for the Europe of 6, the Cold War for Europe of the 25 to 30, is a living, acknowledged example, Afghanistan and Iraq another. Nothing defines trauma for Afghans and Iraqis more than war, internal and international, for over a quarter of a century, and their most lasting response, if war is to be transcended, will be a working constitution. Here stands the contribution of Kahn at its best: 21st century constitution-making conceived as a response to the failures of the 20th century, and a new prism—the love, religion, law triangle—to go beyond comparing the trite and the insignificant, or the incomparable, or the hard to compare.

This chapter follows a similar quest. Rather than looking at these three perforce unique constitutions simply through black-letter law, I shall try to look beyond the arrangements of the respective constitutional texts for the emerging patterns of constitution-making.

Before that, a brief word off the Kantian bifurcation in its leg which is not totally unrelated to the argument of this chapter—that there is a core common thematic constitutional horizon across the planet. That leg is the subject of a separate “work in progress.” As Kahn also says, “after Einstein, we are all Kantians,”³ and no person has

once a year under the auspices of the Yale Law School. SELA is animated by Professor Owen Fiss. I read here Depoliticization instead of Depoliticalization.

2. We find Kahn bleak on the intersection of psychology and law (*Law and Love: The Trials of King Lear*, New Haven, 2000) and international law (“Universal Jurisdiction and the Rule of Law,” in John Borneman ed., *The Case of Ariel Sharon Case and the Fate of Universal Jurisdiction*, Princeton 2004, 131–145); more positive on domestic law, *The Reign of Law: Marbury v. Madison and the Construction of America*, New Haven 1997; *Legitimacy and History: Self-Government in American Constitutional Theory*, New Haven 1992.

3. Kahn, “Sacred Violence,” 3.

written a more meaningful treatise on war, constitutional treatises and international law than Immanuel Kant. On the occasion the bicentenary of Kant's death, the Goethe-Institut has been particularly inspired in its depiction of the 2004 *Zeitgeist* through the poster which puts, on the one side, the 300+ wars that have befallen mankind since 1804, on the other the text of his *Treatise for a Perpetual Peace*.⁴ That dimension belongs to a separate work, in progress, on Kant's *TPP*, but it cannot be totally shorn from our present reflection, so much steeped in war those societies working out these constitutional texts, and so menacing to both domestic and international peace if they fail their promise. Should Iraq, Afghanistan and the EU roll their constitutions back, and the political trend seems to indicate that they have, much of the promise of peace will fall by the wayside.

In Europe, the new constitutional order was designed by Jean Monnet to prevent a repeat of World Wars I and II, both classic wars. A collapse of the Afghani and Iraqi theatres of violence in the so-called "war on terrorism," a *sui generis* development increasingly dubbed as the third or fourth world war, will have incalculable consequences first for the peoples of Iraq and Afghanistan, but also for the rest of the planet.⁵

So while that part of the Kantian bifurcation would appear at first glance to stand outside the pale of the present study, constitution as antidote to war suffuses it throughout: already the inside-outside image of constitutions is breaking at the seams. Traditionally, constitutions are eminently sovereign texts, made by people to rule themselves by themselves. This is no longer the case. The fiction of a self-organized Iraqi constitution, or of a self-organized Afghani constitution, might be naturally peddled by the Iraqi and Afghani governments, few believe their constitutional input and output isn't international. As for the European Union, even a fiction encompassing the 15 Member-States, or indeed the additional ten delegations from the enlarged continent who attended the Constitutional Convention, makes the effort by nature a particularly non-national one. More importantly, the international drive

4. All the major wars are listed on a poster published on the anniversary of Kant's double centenary's death in 2004 by the Goethe-Institut. Kant's famous treatise, *Zum Ewigen Frieden*, appeared first in 1795.

5. James Woolsey, CIA director during the first Clinton Administration, is to my knowledge at the origins of the description of the post-September 11 era as "fourth world war." For a robust legal debate on the contours of the new "war," see Bruce Ackerman, "The Emergency Constitution," 113 Yale L.J. 1029 (2004) and the forum devoted to the responses of David Cole, "The priority of morality: The Emergency Constitution's Blind Spot," 113 Yale L.J. 1753 (2004), and of Laurence Tribe and Patrick Gudridge, "The Anti-Emergency Constitution," 113 Yale L.J. 1801 (2004), together with the rejoinder of Ackerman, "This is Not a War," 113 Yale L.J. 1871 (2004).

of E.U. constitutionalism is now formally enshrined in the European Union's "proximity policy."

Proximity is not only about Turkey, the immediate next-door giant of the EU. The most intriguing, perhaps the most interesting article in the European Constitution in terms of emerging patterns—read here challenges—of the 21st century appears in Part I, Title VIII of the text,

Title VIII, The Union and its Neighbours

Article I-57:

The Union and its Neighbours

1. The Union shall develop a special relationship with neighbouring States, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation.⁶

Much has been built on this seemingly innocuous article, on different levels. On the political plane, a full and daring proximity policy was announced and followed through, from a European perspective, by the former head of the Commission, Professor Romano Prodi. This policy suggests including any willing neighbouring state in the EU system, except for the institutions. Short of voting and being represented in Brussels, "everything else" could be common, European.⁷ On the academic plane, I have tried to develop this concept as a solution to the Arab-Israeli problem by way of a Hegelian-style *Aufhebung* resting on the freedom of circulation and establishment through the new immense territory constituted by the EU + its Mediterranean neighbourhood.⁸ The EU as solution to the hundred-year conflict over Palestine is one striking illustration, following which the right to return for Palestinians would find its application in their freedom of movement over the new "EU" territory that includes Israel. For Israel, the fear of a destabilizing influx would be tempered by its opening up to a European space where part of its security would be naturally one shared with the EU.

6. EU Constitution, final draft as agreed in Dublin, June 2004 (Text widely available on the internet, hereinafter EU Constitution).

7. Romano Prodi, "L'Europe et la Méditerranée: venons en aux faits," Louvain-la-neuve, 26 Novembre 2002 ; Romano Prodi, "L'Europa più grande: una politica di vicinato come chiave di stabilità," ECSA conference, Bruxelles, 5-6 Décembre 2002, COM (203) 104, Bruxelles 11 Mars 2003. Mallat, "Des relations privilégiées entre l'Union et les pays voisins," ECSA 2002, 5 December 2002, forthcoming as EU Commission publication.

8. See Mallat, "George Weidenfeld's bright idea," *The Daily Star*, 16 July 2003; "L'UE entre déficit démocratique et Méditerranée en feu," *L'Orient-Le Jour*, 21 June 2004.

This is a long shot, a generation at least away. Still, if emerging patterns for the 21st century are to be sought, one can see how the EU has now internalized, in the revolutionary text of Art.I-57, that pattern of constitutional internationalization. While it sounds excessive to think of it in such grandiloquent terms as the chance of a peaceful Mediterranean, more specifically a solution to the Arab-Israeli conflict much in the manner that Europe has “solved” the Northern Ireland problem, one is staring in Art.57 the promise of a century, not just of a few years. And if the Good Friday Agreement marks a real turning point in Irish history conceived in its four-centuries long pattern of violence, it is undoubtedly the result of European integration. For it can hardly be conceived outside the framework of the concept of regionalization—and the hankering for a realization of subsidiarity across Europe and within its regions, the well-established as well as the contentious ones.⁹

II. SIMPLIFIERS: PERSISTENT MONTESQUIEUAN ISSUES

So much for constitutionalism’s international drive. Let us take a step back, and indulge in a few simplifiers. By simplifiers I mean those trusted mileposts which are the basics of constitutional making, and which any drafter needs to contemplate in accordance with a received vision which is essentially an eighteenth century legacy of political science/constitutionalism, more specifically a Montesquieuan one. This is the concept of separation of powers, or the checks and balances in American lore, coupled with the concept of federalism to accommodate regional disparities. Such vertical and horizontal division of powers is the stuff of any constitution-making, arguably since Plato and Aristotle,¹⁰ and goes along a number of classical questions from both sides of society. Seen from the top, how solid and impermeable are the boundaries between powers in the state? This, reduced to its simplest expression, raises the need to make a choice between a presidential and legislative constitution, and a choice between a federal system and a centralized one. What are the powers of federated states, and if there are no federated states, how is power devolved and exercised by regional entities? Seen from the bottom, what voting power does the citizen have, as individual and as member of a collectivity? What recourse does the individual have in case of infringement on his or her rights as enshrined in the text?

9. For some of the extensive treatments in this vein of Northern Ireland and Palestine, see e.g. the works of Gideon Gottlieb and Donald Horowitz.

10. Central reference to Plato’s *Republic* ix, Aristotle’s *Politics*, chapter 1, Cicero’s *De Republica*, chapters 1 and 2.

Now even simplifiers can make life complicated when comparisons are exercised in dual terms, let alone when three nascent constitutions are being compared. National systems of law, the first year law student learns quickly, are self-sufficient. In a fiction which is essential to understanding its realm, law operates outside history as well as outside geography. Legal history might explain much, but it works in a way irrelevant to the substance, or content, provided by a given law. Comparative law is an additional luxury: use of comparative law may be edifying, enlightening or enriching, even persuasive; it is never decisive. Yes, there are increasing exceptions in global law.¹¹ But legal history, as well as comparative law, remain luxuries. The law stands for what it disposes *hic et nunc*, not for how it came about, or what country it compares with beyond the realm of the jurisdiction in which it holds sway.

It therefore makes sense, from the vantage point of simplifiers, at the overall architectonics of our three constitutions, with each as a self-contained arrangement.

Afghanistan. Starting with the simplest, the Constitution of “the Islamic Republic of Afghanistan,” as defined in Article 1. Simplest because it has now been adopted (24 January 2004); the other two remain transient, either getting superseded by repeated amendments as in Iraq, or frozen, as for the EU after the rejection of the agreed text by a majority of the French and Dutch citizens. Simplest because it is an essentially presidential constitution, with a person—Hamid Karzai—in mind drawing the constitution and implementing it. Simplest because there is no federalism in the text. Simplest because, despite the international convulsions in the modern history of Afghanistan, the non-Afghani input, unlike for Iraq and the EU, is limited. Simplest, finally, because there does not seem to have been too much work behind it.¹² By contrast, the emergence of the Iranian Constitution in 1979 has left constitutional scholars a formidable trail of constituents’ minutes.¹³

11. Progress in comparative law within the US Supreme Court can be read in *Stanford v. Parker*, 266 F.3d 442 (6th Cir. 2001) cert. denied 71 USLW 3236 (S.Ct. 2002), decided on October 7, 2002 (execution of juvenile offenders) and in *Atkins v. Virginia*, No. 00-8452, decided on 20 June 2002. (execution of mentally retarded defenders). The trend is adumbrated and developed in Harold Koh, “Paying ‘Decent Respect’ to World Opinion on the Death Penalty,” 35 UC David L R 1085–1131, at 1104. Judith Resnik, “Law’s Migration: American Exceptionalism, Silent Dialogues, and Federalism’s Multiple Ports of Entry,” 115 Yale L.J. 1564 (2006).

12. The little available can be found in a report by the Secretariat of the Constitutional Commission of Afghanistan, ‘The Constitution-making Process,’ 10 March 2003. Henceforth reference to “Afghani Constitution,” text available as pdf in English, Pashtu and Dari on the internet, e.g. on <http://www.loc.gov/law/guide/afghanistan.html>.

13. They can be found in two series of official documents, of three and four volumes respectively, entitled *Surat-e mashruh-e muzakarat-e shura-ye majles-e barrasi-ye niha'i-ye*

Composed of a preamble and one hundred and sixty articles, and divided into twelve neat chapters, the Afghani Constitution was written in Pashtu and Dari, two of the several languages recognized by Article 16.¹⁴ Following a familiar and didactic terrain, the Constitution presents the main attributes of the State of Afghanistan in the Preamble and first chapter—flag, languages, religion, economic traits and state responsibility for citizens' welfare, education, place in the international order—followed by the citizens' fundamental rights (chapter 2). The organs of the state cover chapters 3 to 8: presidency, government, national assembly, Loya Jirga, judiciary, administrative divisions. "Special dispositions" are enshrined in the last four chapters, including the state of emergency and the amendment process. Most significant in terms of separation of powers is the establishment of Afghanistan as a centralized presidential republic, where the head of the executive is elected directly by popular suffrage if he or she gets over 50 percent of the vote. The two candidates with the highest vote in the first turn, as in France, fight it out in a second turn.¹⁵ "No one can be elected as president for more than two terms."¹⁶

The president is extremely powerful under the Constitution, as he heads the Cabinet—there is no Prime Minister. The list of presidential prerogatives is long and wide-ranging, to which should be added the prerogatives of a cabinet which cannot be brought down by Parliament by a vote of confidence, with the exception of individual ministers. The president is even entitled to name some of the members of the Upper House (the Elders' House). Parliament under the Constitution is composed of two houses, to which should be added the Loya Jirga, originally a congregation of tribal leaders in which the Constitution vests some historical mantle of sovereignty.¹⁷ In reality, the Loya Jirga consists of all the parliamentarians, to which are added provincial and district council heads, and the members of government. The Loya Jirga is supposed to deal with the supreme interests of the country, but it is again the president who is entitled to convene it. Presumably, it can in some cases meet of its own

qanun-e asasi-ye jumhuri-ye islami-ye iran (Tehran 1985-89) and *Surat-e mashruh-e muzakarat-e shura-ye baznegari-ye qanun-e asasi-ye jumhuri-ye islami-ye iran* (Tehran 1990).

14. Afghani Constitution, Art.16: "Pashtu and Dari (which is a variation of Persian) are the official languages of the state."

15. Afghani Constitution, Art.61.

16. Afghani Constitution, Art. 62.

17. Afghani Constitution, Art.110, Loya Jirga as historical "manifestation of the people of Afghanistan," see the classic work of the late Louis Dupree (d. 1989), *Afghanistan*, Princeton 1980.

accord, since it is also entitled to pass judgment on the president in case he dramatically fails his duties, such as committing crimes against humanity.¹⁸

Loya Jirga and “crimes against humanity,” a phrase which appears in several articles of the Afghan constitution, provides the comparative lawyer with the most original concepts in the text. The bottom line is about centralized presidential power, where the battle will be fought for the foreseeable future, for Afghanistan as well as for Iraq, and, to an extent which we need to dwell also upon, in the European Union. The place of the president as chief executive rallying the country is the more important locus of constitutional attention since the Afghani and Iraqi experience, despite sharing common “international” inputs, underline the difficult of agreeing on the place of the head of the executive branch under a Montesquieuan scheme of things. In Afghanistan, as the text stands, the president trumps the rest of the Constitutional arrangements, be they central or federal. This may be unwise, especially since the incumbent owes his position to “being the smallest common denominator” picked by the UN.¹⁹ The battle for executive power will continue to define constitution-making in the 21st century, as it has from time immemorial. This is a certainty. Whether it is wise is a different matter.

Iraq. In Iraq, the battle for the presidency has taken another shape, despite a similar international input, including the same UN envoy. It played itself out differently, and the idiosyncrasies of history got the upper hand on planning.²⁰

Unfortunate Iraqis, trying to find some peace after thirty five years of solid dictatorship, including the longest Middle East war in 20th century history, and two or three invasions, that is their invasion of others, and others invading them, plus a twelve year sanctions regime followed by occupation: in the midst of which mayhem they put together a “wonderful new Constitution.”²¹ It is true that the Iraqis, who forge

18. Afghani Constitution, Arts. 110 to 115.

19. As explained by the UN mediator Lakhdar Brahimi, who supported Hamid Karzai's nomination on the basis that his name appeared on all the lists requested from the various leaders and lawlords of Afghanistan.

20. For some of these highly unusual circumstances, Mallat, “Malgré tout, une leçon de démocratie à Bagdad,” *L'Orient-le Jour*, 2 June 2004.

21. The description of the Constitution as “wonderful” is owed to the editors of the *New York Times* who propped up the comment I submitted into excessive enthusiasm, “East Meets West, at Least on Paper,” *New York Times*, 11 March 2004. Here I discuss what became known in English as the Transitional Administrative Law, TAL (*Qanun idarat al-dawlat*, literally the law for the governance of the country, agreed on March 1, 2004 by the Iraqi Governing Council, and published by the Coalition Provisional Authority on 8 March as “Law of Administration for the State of Iraq for the transitional period.”) The TAL, which preceded the “final” Constitution of 2005, exhibits similar trends. The “final” Constitution of 2005 mentions that it needs to be completed, and so its finality is relative even on its own accord.

ahead with a Constitution against the odds, deserve a burst of enthusiastic kudos. But one should perhaps remain reserved on such elusive matters for fear of ridicule—getting “mugged by reality” is a fashionable term.

In the midst of so much violence, how did they do it in Iraq? They, here, are a hapless though talented duo: Iraqi-“international” (chiefly American). One must realize what constitution-writing means in Iraq 2004, and it means a lot of English, not only because a U.N. Security Resolution had consecrated a governor of Iraq who is solely American-English speaking, and so wields the ultimate signature upon any text Iraqis may want to turn into law, but more fundamentally because the legal and judicial body politic of Iraq is simply inexistent. It is, unfortunately, as tragic as it sounds: so destructive of any judicial independence has the rule of the former Iraqi dictator been that Iraqi jurists who remained in Iraq simply lost confidence in their job and themselves. Not that there are no talents, dedication or competence: chapters of judicial and legal resistance in the Iraqi dictatorship are yet to be written. Polyglottism (especially Western. . .) was a mark of treason for dark, fascist Arabism in the heyday of the long Baathist night.²² The systematic destruction of Iraqi legal culture, its lawyers, judges and law schools, meant that constitution drafting was left to those coming from the outside. There simply aren’t so many people capable of writing up a constitution in English words which are also Arabic, and occasionally, Kurdish.

So hail to the two drafters, and their advisors. Friendship being involved here on both the drafting side and the advising side, all shall remain nameless. The result is what matters for the purpose of the present chapter, and that result is a longish text, with a didactic effort (62 articles in nine parts). The Transitional Administrative Law self-erased when the elections planned for January 2005 resulted in a Parliament which was tasked with writing the ultimate text and putting it to the vote. Meanwhile, some constitutional landmarks have been posted for Iraq. While buffeted by barbaric violence on a scale which knows few such precedents on the planet, the process moved decisively forward in textual terms.

Three matters draw the TAL reader’s attention: the first is the place reserved for women, who were to constitute a quarter of Parliament. The second is the open reference to federalism. The third is the care given to

22. Conversation with the late Hani Fukaiki, May 2002, in Kurdish Iraq, who, as a former active member of the Baath leadership, explained to me how knowledge of a Western language was suspicious and frowned upon as a sure mark of “treason.”

the protection of the individual's right. All three remained in the 2005 Constitution.

If Iraq wished to remain at the forefront of Middle East (ME) democracy—a position which it will continue to pretend to, despite it being rocked by violence, both in terms of the freedoms it carries, and the fact that those in power owe it neither to dynasty, nor to the ME-dominant self-extension of presidential mandate—then Iraqi society needs to protect those two achievements, women representation and federalism. This will not be easy. As for the judicial protection of the person's basic rights, it will come only after Iraqi society overcomes the violence that plagues it, and finds a way to stand on its two feet without foreign armies dictating the terms of social peace.

Much of this commentary is arguably hypothetical, but the morass of Iraqi politics should not mask the forest for the trees. In Iraq, constitutionalism has forged ahead in the most delicate of all arrangements, that is the attempt for a constitution to be inclusive of two dominant and competing national identities—Kurdish and Arab—and two dominant and competing religious sects, Shi'i and Sunni Islam. Even under the most elaborate constitutional schemes, which Donald Horowitz has dissected in many different approaches over three decades of scholarly attention to “discrete and insular minorities” across the world,²³ one would find it difficult to draw a model near enough accommodating the Iraqi socio-historical set-up. Nor have the Iraqi constituents succeeded yet in convincing their people, and the world at large, that they are out of the woods of overwhelming sectarianism in the individual politician's political expression.

The European Union. The Constitution finally agreed upon by the European Council (of heads of states) meeting in Dublin in June 2004 stands outside any recognizable model in the field: This for obvious reasons owing to the history of European integration. But it also stands out for technical reasons obtaining from its fissiparous genesis: the Constitution makes no sense for the reader outside the accumulation of texts since the six European communities came together on the so-called common market in Rome in 1957. This accumulation of treaties, and of legislative, judicial and administrative acts, is known as “acquis communautaire.”

In any appreciation of constitution-making, it would not be appropriate to mark solely progress. There also are setbacks. One certain failure in the EU text concerns its style. However hard the constituents tried to make the text of the Constitution palatable to the

23. See e.g. Horowitz, *The Deadly Ethnic Riot*, Berkeley 2001.

educated but non-specialist reader, this effort was a failure. Even Valéry Giscard d'Estaing, the head of the Convention which drafted the text, discourages the reader from dealing with Part III of the text, which is the longest and most detailed.²⁴ The *Economist* rightly ran a cover page when the European constitutional project was disclosed suggesting to “bin it.”²⁵ Could it have been otherwise?

It is true that one distinguished former Minister of Justice in France did write in 2002 a model constitution which had the advantage of being short and more palatable, including actually most of the provisions which found their way to the text.²⁶ It was possible to do better. But there is no point in trying to rewrite history, and there are already a number of reader-friendly editions and short commentaries, of which the introductions of Giscard and a *Que Sais-Je* by Professor Christian Philip stand their ground in terms of clarity and comprehensiveness.²⁷ One problem is the type of “consolidator Treaty” which integrates previous texts as so many layers, and the mechanisms in the Convention which, for sake of including the largest number of proposals, fails to devote a stylistic effort which could have brought together the text in the US-concise manner of 1787. It is true also that the US constitution is a unique text in the excellence of its constitutional style, hardly matched elsewhere on the planet.

The EU Constitution consists of four parts, and a number of protocols of which two are important. Starting with the end, a brief Fourth Part deals with amendments and transitional measures. A Third Part consolidates all previous treaties and is therefore the longest and most verbose. A Second Part integrates the bill of rights known as “the European Union Charter for Fundamental Rights,” which had been approved in Nice four years earlier. The First Part is the most novel one, on which I shall mostly dwell to discern meaningful trends in 21st Century constitution making.

Let me suggest, for the sake of argument, an extreme critical line that flows from the universally acknowledged “democratic deficit” in Europe. Managing the 27-nation-strong E.U. by 2009 does create in and

24. Valéry Giscard d'Estaing, “Introduction à la lecture du projet de constitution pour l'Europe,” *La Constitution pour l'Europe*, Paris 2003, 75: “Je ne pense pas qu'il y ait lieu pour vous, lecteur, d'entreprendre la lecture en continu de cette troisième partie.” (Hereinafter, Giscard, 'Introduction'.)

25. *The Economist*, 19 June 2003.

26. Robert Badinter, *Une Constitution Européenne*, Paris 2002.

27. Giscard, “Introduction,” Christian Philip, *La Constitution Européenne*, Paris 2004 (Hereinafter Philip, *La Constitution Européenne*) The literature on the draft treaty known as the European Constitution is extensive. Most interesting are the minutes of the debates during the Convention, especially specialists' reports, available on the EU convention site.

by itself problems which have been dealt with in the EU constitution as it could best: the creation of enhanced cooperation, which allows a group of EU countries to go forward with integration without being hampered by slow or reluctant member states. The Euro system is the most successful application of that principle, which does not include Britain and Sweden. Already the EU operates on a system of *géométrie variable*, and this is fine as long as it does not burst at the seams. Even bursting at the seams has already been envisaged, and happily dealt with, when Austria found itself in the throes of a government dominated by racist extremism. From that emerged a “freezing out” procedure, which has worked well to temper extremism within Austria, without the EU exploding altogether under the shock. Of course, should one country turn so undemocratic as to threaten not only being frozen out of the EU, but also engaging in military hostilities against it, the issue would become grave to say the least; but even a major country or two turning in this nasty way at the same time would not unravel the system, and that scenario might even be a privileged way to consolidate it. More immediate is the risk that new countries bring in their weak democratic system of deliberation, as is the case of Rumania or the Republics of former Yugoslavia. But the remarkable democratic strides of Turkey to bring its legal system, both in terms of its books and, more importantly, in the application of its laws, up to EU standards, are testimony to the immense leverage at the disposal of the EU for smaller countries. Indeed the annual reports that the Commission prepares on Turkish alignment with EU legal and economic standards may be one of the most innovative tools for the spread of democracy, human rights and the rule of law across the world since the collapse of the Soviet system.²⁸

No, the problem of EU democratic deficit does not lie in its expansion, and one can argue the exact opposite, namely that the world EU-fashion, and more specifically the Middle East EU-fashion, is a unique opportunity allowed by the emergence of a unified Europe.²⁹ No, the problem of the EU democratic deficit has been building up since the Treaty of Rome, and that problem is constitutional, more specifically one of separation of powers. In eighteen months of deliberation, the E.U. Constitutional Convention simply failed to address it successfully.

This problem is eminently Montesquieuan, and results from the vesting of legislative and executive powers in a strange EU mixture of a triangle Council-Commission-Parliament, in which the two first institu-

28. Commission reports on Turkey since 1999, available on the EU Commission's site.

29. Original reflection in Robert Fossaert, chapter entitled “Le Monde façon Europe,” in his *Le Monde au 21^{ème} siècle: une Théorie des Systèmes Mondiaux*, Paris 1991.

tions are dominant. Those who are elected “Europeanly,” that is the E.U. MPs, represent at best a fifth wheel in the carriage, as the French motto has it. You can take most of the EU Parliament away, the maximum lost is a faint forum for deliberation, and an even fainter one in terms of legislation. While the legislative process has been time and again redrawn at the margins in order to enhance its powers, any person familiar with the institutional working of the EU knows that Parliament is a place for occasional protest, possibly elaborate and meandering “comitology,” not a power that anyone seriously takes into account.

Now the Council, being composed of governments who are representative of their people, is indispensable. It is indispensable because it does represent the people within the Member States, and brings into the federal European model the voice of the constituent peoples. The Council is also indispensable because even if it does not contribute a federal voice, one can hardly imagine how laws enacted by the Union could be binding within each country, in that ever wider field of European competence, if implementation were not carried by the Council’s governments at home.

How about the Commission? The Commission has real power. *This is the problem*, since the Commission has no popular legitimacy, and its members are appointed by the Council to play a *European* role. To make matters worse, the Constitution has managed to establish a number of new high positions, including a would-be president for the Council who fights, over terms of preeminence, with the president of the Commission, much as the High Representative for the Common Foreign Policy and Security has already fought it out with the Commissioner in charge of foreign affairs; this is a sorry sight indeed. The result, inevitably, is more muddle, and with poor legitimacy at that for the new bicephalous institutions. None of these positions will be filled by direct popular vote.

No, the only serious step to bring democracy to Europe would have been to scrap the Commission and to give Parliament a real legislative role. One would still remain in the throes of the federal problem, but the democratic deficit would have been tackled head on, in a way that would have made it finally meaningful to vote for a European MP. It is now alas mostly a waste of time, and the electors are far savvier than the institutional cooks of Europe give them credit for. They simply do not bother to vote for Parliament, nor do they show the slightest interest in what it does.

To underline further the democratic deficit in the EU version of separation of powers, an “error” in the text is telling: no doubt attentive

to the subdued role of Parliament, the constituents entrusted EU MPs, as the text goes, with “electing” the president of the Commission.³⁰

This is further detailed under Article I-27, on the President of the European Commission:

1. Taking into account the elections to the European Parliament, and after having held the appropriate consultations, the European Council, deciding by qualified majority, shall propose to the European Parliament a candidate for the President of the Commission. This candidate shall be *elected* by the European Parliament by a majority of its members. If he or she does not obtain the required majority, the European Council, acting by a qualified majority, shall within one month propose a new candidate who shall be *elected* by the European Parliament, following the same procedure.³¹

A strange concept for an election indeed, in which there is no contest. Behind the awkward wording stands a battle for legitimacy on the European level for the head of the executive, be s/he the president of the Council or the president of the Commission. “Which president?” is a good question. One can imagine the confusion about the presidency, much in the way the confusion over who is Mr. Foreign Policy today, the Commissioner in charge, or the Council’s High Representative. Or indeed the president of the Commission. Maybe the ruse of the constituents was deliberate, and some comments suggest that an ideal situation, which was purposefully left open by the Convention, forced the bicephalous anomaly of two presidents, a president of the Council and a president of the Commission, so that they end up being one and the same by the inevitable process of their redundancy.³² Nothing bars such a possibility in the text. The problem remains. Both positions result from a choice exercised by the Council, not by an election between competing candidates.

So back to basics of the democratic deficit: the Constituents were unable to see boldly enough into the strange system of separation of powers they were perpetuating since the Treaty of Rome. They tinkered with it, by establishing a president of the Council who would conceivably stay in his or her position five years, instead of the current rotation of six

30. EU Constitution, “Article I-20: The European Parliament: 1. The European Parliament ... shall *elect* the President of the Commission.” Emphasis added.

31. Emphasis added.

32. Philip, *La Constitution Européenne*, 92–93.

months which was made impossible by the enlargement. They also tinkered with the presidency of the Commission by suggesting that the person in charge would be elected by Parliament, whereas the candidate—only one—is nominated by the Council.

This leaves little democratic legitimacy in the choice of both executive and legislative powers in Europe, if indeed we mean by legitimacy the direct *election* of their EU leaders by the people of Europe. Both the presidents of the Council and of the Commission are nominated by the Council. In the case of the Council's president, the parliamentary representatives of European voters have no say. In the case of the Commission's president, parliamentary function is at best perfunctory, despite the constitutional language intimating his "election" by Parliament. And to top it all, Parliament does not legislate.

III. ACID TESTS AND EMERGING PATTERNS

In this search for emerging patterns in 21st century constitutionalism, I would like to introduce another concept which has been of assistance in writing on family and gender issues: acid test.³³ Acid is a metaphor which conjures up for different people and different cultures so many different images. One image, at least in my western-life generation, is that of a powerful mind distorter which clouds one's miserable life with a worldly vision induced by hallucinogenic drugs. For Iraqis emerging from 35 years of dictatorship, acid is a far more material reality as the most harrowing method of torture used by the former regime—said to be a specialty of the elder Hussein son—which consists in lowering the victim on a pulley into a basin of acid, first the toes, and drawing back the pulley up and down repeatedly. One shudders at the image, and we should leave it at that. What the small *Oxford English Dictionary* says about "acid tests" is that they are "severe and conclusive." In an Iraqi context, one has no doubt they are conclusive. In all cases, acid tests are certainly severe, the more severe as they include faith-based, and for all intents and purposes, "irrational" convictions imbued with religions that have competed with each other at least since God became word.

Let me pursue comparatively three such acid tests which I have found to be at the heart of 21st century constitutionalism, forming is a number of legal-constitutional fields which bring people literally up in arms: religion, federalism, two areas that did not constitute such a contentious arena of constitutionalism in the 20th century, and to which is added the perennial issue of who is to be master: the presidency.

33. Mallat, "The Search For Equality in Middle Eastern Family Law," *al-Abhath* (American University of Beirut), 48-49, 2000-2001, 7-63.

Religion. Maybe the most trying of all acid tests is the place of religion in the constitution.

The “law and religion complex” operates as acid test not merely in an Eastern, Muslim context. It was, and continues to be, a central point of disagreement in European constitution making. For those who have followed that particular aspect of the debate, suffice to see the discrepancy between the German and French texts in the translation of the Preamble to the Charter of Fundamental Rights in Nice in 2000, a discrepancy which is, in constitution-writing, unprecedented. While the French text acknowledges the “spiritual” tradition in Europe, the German version renders it “religious.”

The European constituents eventually succeeded in preventing that acid test from blocking the whole process. Thanks to the Irish ironically, they finally produced a version which leaned towards the French disposition. Much to the dislike and vocal protests of the Vatican, they declared the *cultural* heritage of the peoples of Europe in common, skipping the mention of Christianity, religion and spirituality altogether.

Now how does one deal with such a difficult test, the religion of the land in a constitution? Of tons of ink spilled on matters constitutional, one would venture this is the issue of unique portent in the United States as well as in Europe and the Mideast, bringing religious affiliation in the domestic context from born-again Bible belts to international “clashes of civilisations” defined religiously. The concern is not about to abate.

To make some progress in the shape of religion in 21st century constitutionalism, a literary detour into the quasi-universal law of individual psychology, much in the vein of Sigmund Freud’s Oedipus Complex, may help: it is acknowledged that adolescence generally, if not a later age, raises a form of religious libido in each and every individual on earth. Of that experience two literary expressions are particularly telling. The first is by Bertolt Brecht, whose alluring though not likeable character, Mr. K., was once asked about whether there was a God:

Einer fragte Herrn K. ob es einen Gott gäbe. Herr K. sagte: “Ich rate dir, nachzudenken, ob dein Verhalten je nach der Antwort auf diese Frage sich ändern wuerde. Würde es sich nicht ändern, dann können wir die Frage fallenlassen. Würde es sich ändern, dann kann ich dir wenigstens nich soweit behilflich sein, dass ich dir sage, du hast dich schon entschieden: Du brauchst einen Gott.”³⁴

34. “Die Frage, ob einen Gott gibt (on the question whether there is a God),” in Bertolt Brecht, *Kalendergeschichte, Geschichte vom Herrn Keuner*, Brecht *Werke*, V, Suhrkamp

That adolescent part of the argument fits well with a rigid view of separation between church and state, and can be comforted with all kinds of citations, including from the most canonic sources, to wit the words of Christ to the effect of keeping to Caesar what is Caesar's, or the lapidary injunction in the Qur'an about "no compulsion in religion." As one makes his peace with God or religion on this basis, acknowledging in the process that there is more to it than Brechtian need or Qur'anic rejection of state force to deal with one's professed faith, another citation sticks in mind, that of the Levantine poet admonishing his children about the penumbra of dignity that religion brings to the believers, "*wa la tata'assabu abadan li-dinin, fa kullu ta'assubin yushqi wa yurdi/ likullin dinuhu wa likulli dinin masunu karamatin ta'ba al-ta'addi.*"³⁵

This is more subtle than Brecht, because of the consideration of one's religion as shield, and not as sword, to borrow a distinction from English contract law.³⁶ The positive use of religion to shape the state is one thing, the defence of religion against aggression and other such humiliations is another. In our respective constitutions, this is generally the position adopted by the constituents: the state, or group of states in the EU, is not so much neutral about religion, which is the classical position of a rigid doctrine of separation between state and religion, as it acknowledges a heritage which in the case of Europe includes churches receiving constitutional recognition—and eventually tax relief and subsidies;³⁷ and in the case of Iraq and Afghanistan, a role for Islam which is not militant. Islam is to be perceived as shield, and not as sword.³⁸

The formulation in both the Iraqi and Afghani constitutions is alluring. In the first case, "No amendment to this Law may be made to affect Islam."³⁹ Article 7 of the Iraqi TAL is equally protective:

1997, original written ca 1929–30, 218 ("One asked Mr. K. whether there was a God. Mr. K. answered: 'I advise you to reflect first on whether your behaviour would change depending on the answer to that question. If it doesn't change, then we can leave the question behind. If it does, then I can at least tell you that you have already decided: you need a God.'")

35. Chibli Mallat ("Poet of the Cedars," d.1961), *Diwan* (collected Poems), Beirut, 1952, vol. 2, 521: "Never follow a religion fanatically, all fanaticism brings misery and death/ to each his religion, and to each religion a penumbra of dignity that dislikes being attacked (and in a variation *ta'ba al-tahaddi*, that dislikes being challenged)."

36. Lord Denning, in *Central London Property Trust Ltd. v. High Trees House Ltd.* [1947] K.B. 130.

37. Article I-52 of the EU constitutional project: "Status of churches and non-confessional organizations. 1. The Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States."

38. Expressed in Art. 17, Afghani Constitution as the duty of the state to "organise and improve mosques, madrasas and religious centres."

39. Afghani Constitution, Art.3.

Islam is the official religion of the State and is to be considered a source of legislation. No law that contradicts the universally agreed tenets of Islam, the principles of democracy, or the rights cited in Chapter Two of this Law [i.e. the bill of rights] may be enacted during the transitional period. This Law respects the Islamic identity of the majority of the Iraqi people and guarantees the full religious rights of all individuals to freedom of religious belief and practice.

In Afghanistan, the more specific formulation of compatibility between Islam and law is similar: “No law can be contrary to the sacred religion of Islam and the values of this Constitution.” In comparative Middle Eastern constitutionalism, where the acid test has generally taken the form of Islamic law being considered “the” in opposition to “a” source for the Constitution, this novel formulation upholds a conception of religion as *shield* in ways that shift the terrain of the debate onto areas which may relieve the test from some of its acid severity.

This is not the end of the matter, however, as the law and religion complex in modern constitutionalism must be perceived increasingly, in 21st century constitutionalism, on a far more elusive register: namely the absence of religion—as religious affiliation—in the constitution. The problem is no longer whether Islam is “state” religion or not, but how collectivities which identify themselves on the basis of religious affiliation can stand ignored by the constitutional set-up. I had several occasions over the past years to discuss this vexing issue in modern constitutionalism, so I will not pursue it further here, except to note that even the EU, secular as it may pretend to be, was unable to escape some form of recognition for established churches.⁴⁰

Federalism. Directly related to the issue of collective identification to a given religious denomination is the problem of sectarianism, or communitarianism as Indian constitutionalists call it. This is an issue which conjures up an eminently *federal* mirror.

Federalism acts as an additional acid test in 21st century constitutionalism, albeit in a muffled way: of the three constitutions, only the Iraqi TAL mentions the word, and it may well be the most courageous. In Afghanistan, one will also not find the word federal in the Constitution, but there is mention of peoples, tribes and “men” in various

40. Above n. 38. See also my “Du fait religieux dans les institutions,” in Mallat ed., *L’Union Européenne et le Moyen-Orient: Etat des Lieux*, Beirut 2004, 83-95.

articles.⁴¹ Valéry Giscard d'Estaing explains in his Preface how the word "communitarian" came to replace the word "federal" in Article I.1 of the Constitution,⁴² bringing an end to the heated debate between European federalists and European sovereignists among the constituents. A more "federalist" form of government than the European one it is hard to conceive, and the refusal for the constituents to get drawn by the word indicates areas of "irrationality" getting into the public discourse in ways typical of acid tests, as English and French national forms of *the Anti-Federalist* get pitted against mostly German and more recent Spanish adhesion to the concept as a perfectly acceptable one constitutionally.

Even a perfunctory approach of EU, Iraqi and Afghani constitution-making shows that all these issues are very much alive. Indeed the "F" word is as much of a hot potato in Europe as it is in Afghanistan or Iraq, and federalism could indeed represent a line of approach which brings together the inchoate world of 21st century constitutionalism: buckets of ink have also been spilled over European federalism,⁴³ and those of political inspiration are not the most interesting. It might have proved expedient for the constituents to have finally avoided the word in their would-be founding text, for they knew they were all practicing federalism like Molière's character speaking in prose without knowing it.

In Iraq, the battle for the inclusion of the word is far from over: I have often opined to Iraqi colleagues that constant resort to *sui generis* categories may not be useful (in this case the use of the concept of *wilayat* under Ottoman fashion to avoid using the Arabic *fidirali*). The advocacy has even found its way to Security Council Resolution 1546, which included the word in part upon my insistence with the Iraqi foreign minister. This has a story, and the jury is out on whether it is preferable to practice federalism à la Molière, or whether some more courage would not be amiss for the enrichment of the debate and its integrity.⁴⁴

Presidency. Lest we lose our bearings, constitutions are about who is to be master. Put in less crude terms, 21st century constitutionalism

41. Afghani Constitution, Introduction paragraph 5, "*aqvam wa mardum*," Art. 6, "*aqvam va qaba'el*."

42. Giscard, Introduction, 34: "Aussi, dans le texte que j'ai préparé pour le Praesidium, ai-je substitué l'expression 'sur le mode fédéral' la formule 'sur le mode communautaire.'"

43. Most heated was the celebrated debate in 2001–2002 between German foreign minister Joschka Fischer (EU as federation), president Jacques Chirac and his foreign minister Dominique de Villepin (EU as assembly or confederation of nations), and former president of the EU Commission Jacques Delors (EU as people's federation *sui generis*).

44. On my intervention with Iraqi foreign minister Hoshyar Zibari for the inclusion of federalism in Security Council Resolution 1546 (8 June 2004), see the account in "2004, le Moyen-Orient en quête de non-violence: Un parcours personnel," published in Mallat, *Presidential papers*, Beirut 2005.

does not escape the battle about leadership and its democratic credentials since the dawn of history. Here appears the most muddled pattern in the present comparative exercise: in Afghanistan, the tailoring of the constitutional text to fit a particular person is simply wrong, and the sacrifice of real checks and balances to presidential power, one can alas confidently predict, is a recipe for trouble to come. In Iraq, matters are still in a situation of flux, owing to the duality of President-Prime Minister in the Transitional Administrative Law (and in the 2005 “final” Constitution), but also to the real test of federalism as it is wont to develop—or get smothered by authoritarianism and/or chaos, both equally capable of marking the death of constitutionalism in the country for another generation. In the EU, the gross emptying of the concept of election with regard to the choice of the president of the Commission is indicative of a major problem yet to be solved.

So what does this tell us about that long-standing acid test, the headship of executive power?

The president as leader voted in directly by the people underlies the central problem of constitutional theory, which is couched, perhaps even papered over since Montesquieu, as a natural result of a doctrine of separation of powers. The Montesquieuan scheme has arguably always been in crisis, and its difficult birth remains upon us, as troubling in the 21st century as it was in the second half of the 18th.⁴⁵ Separation of powers, in that description, is a way to say that society cannot vote in its parliament under universal suffrage, and vote in its president also in universal suffrage, without having to explain why there should be two bodies so elected. The solution was a functional one, based on the idea that the first legislates, and the second executes. Power becomes therefore segmented functionally, but such segmentation is a human construct which divides up power in a disturbing and incoherent manner: for what does it mean issuing a law, as opposed to executing it?

Federal arrangements are more convincing, because they point to a horizontal way in the division of powers which is based on a tangible division of territory and land. Horizontal devolution of power is more coherent than the functional division of powers between a parliament that enacts laws, a president/PM which applies them, and the judiciary which arbitrates conflicts arising from that application. Federalism as a

45. This is developed in Mallat, “Droit comparé au 18^{ème} siècle: Influences françaises sur la common law,” *Revue Historique de Droit Français et Etranger*, 3/1994, 383-400 (arguing that Montesquieu and Lord Mansfield understood separation of powers in a manner profoundly different from the way it became operational).

successful constitutional arrangement, a comparative reading of the three constitutions suggests, has far more credentials than the domestic functional division of powers extant in 21st century constitutionalism. While the Montesquieuian scheme lags behind, there is no decidedly convincing route out of the conundrum, which is illustrated in the three questions by the absence of a convincing mechanism that resolves it.

EPILOGUE

The federal order; Religion's proactive challenge to constitutionalism; the confusion in the tripartite separation of powers underlying the role of the presidency and its legitimacy; these are three problem areas which define the shape of things constitutional in the 21st century. Beyond the natural disparity in the respective traditions and conditions of emergence of the three constitutions, it may be helpful to end on the special form of internationalism which seems to mark 21st century constitutionalism.

One needs to reflect, in a planet that no longer recognizes the domain of internal affairs as a self-contained one, on the mechanisms which may ensure that domestic problems do not spill over regionally and internationally. Even more positively, the question of constitutions as model can no longer be avoided: the world after Europe, in the fashion adumbrated by the so-called proximity policy of Art.I-57 is a case in point, but there is little doubt that success in Afghanistan and/or in Iraq will make constitutional standards affect an immense area, reaching into India through Pakistan and Kashmir, and across the Middle East and North, including Palestine-Israel.

There is no harm putting the matter into the first leg of the Kantian bifurcation that the chapter opened onto, with the contrasting vantage points drawn from Kant's *Treatise on Perpetual Peace*: its failure on the ground since 1795, and its continuous success in the battle of ideas in ways that compel us to rediscover the Treatise again and again at key junctures in human history—the French-Atlantic Revolution, which saw its birth, the failed attempts in the Congress of Vienna to go beyond the Westphalian paradigm of sovereign nation-states, through the collapse of the Wilson vision in Versailles, and the shortcomings of the UN in the wake of World War II.

The constitutions just examined constitute, through their birth and potential projections beyond their borders, an attempt to include Kant's cosmopolitan law into their frame. This is halting and timid, but the pattern is there for the discerning, whether in terms of federalism for Iraq, a unique novelty in the Middle East (and Europe), crimes of

war as a constitutional category in Afghanistan, or transnational projections of the EU, both federal and international.

I would like to conclude on yet another horizon, which conjures up, in converging ways two millennia apart, Aristotle and Paul Kahn. At its simplest, the issue is one of “man”—less so woman, and this in itself is telling—“as a political animal”: “The entire effort of the international human rights movement is rooted in this vision of well-being. No one, on this view, should die or suffer for politics.” One could read this in the most exciting acknowledgement of the Preamble to the interim Iraqi constitution: the people of Iraq, it says, “reject violence and coercion in all their forms, and particularly when used as instruments of governance.” One can also hear it plainly in a more relative, but potentially more “applicable” utterance interspersed, in a manner which seems novel in constitution-writing, in the repeated references throughout the Afghani text to the scourge of “crimes against humanity.” In both Iraq and Afghanistan, societies which have been bled white through three decades of continuing horror, are showing the way to others, even to Europe, where the constituents remain behind in terms of the crucial task of preventing crimes against humanity from remaining unpunished.⁴⁶

This points to the meta-conclusion of our emerging patterns, which is the next horizon of constitutionalism. How can human beings structure their domestic and international world to make politics redundant? Depoliticisation, I would like to conclude, is the ultimate horizon of comparative constitutionalism, that moment in history when it matters little what politics and politicians say, because they have become by-and-large irrelevant to the happiness of the citizen. But this is better left to constitution-making in the 22nd century.

46. Mallat, “Des relations privilégiées,” supra n. 8, section discussing transnational justice.

Comparative Law as a Bridge Between the Nation-State and the Global Economy

An Essay for Herbert Bernstein*

Richard M. Buxbaum**

I. INTRODUCTION: COMPARATIVE LAW IN A TRANSNATIONAL ECONOMY

What should, what might be the role of comparative law as the regionalization and globalization of many segments of formerly national economies proceed? I hope to propound and weave together three strands of my approach to that question.¹ The first has to do with the fact that while organized economic life increasingly is transnational, much law bearing on the economy still is national law. I say “much law” but the second strand, not surprisingly, has to do with the recognition that much national law, as indeed it has begun to do, must move up one step. This second strand—and second step—concerns the increasing federalization or regionalization of previously national law, as well as the inevitable and perhaps even legitimate lag of that process behind the regionalization and, at least in its financial aspects, the globalization of organized economic life. The third strand bears on the characterization of that part of the law—be it national, regional, or even global—that focuses on the economy; that is, it bears on the slippery notion of “economic law”, an ill-defined concept straddling private law and public law. For reasons that arise from that exploration, I also propose a mission for comparative law that I label the “coordination” mission, which in my view promises a

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1. Right away I violate one of Herbert Bernstein’s central injunctions: “Innumerable comparatists have felt the urge to marvel over...our discipline. My plea...is: Resist [the urge]. What we need much more than such soul-searching is hard-nosed comparative work on clearly defined specific institutions or subject-matter areas.” Book Review, 40 Am. J. Comp. L. 261 (1992). On the other hand, even he yielded to the temptation once, if only in the form of a review essay: Herbert Bernstein, “Rechtsstile und Rechtshonoratioren,” 34 *RebelsZ* 443 (1970).

more fruitful role for comparative law in this contemporaneous context than do earlier missions as understood by the first generations of modern comparative-law scholars.

Given both Herbert Bernstein's and my experiences, the legal regimes I am comparing are, not surprisingly, the US and European Community/Union regimes. That, however, only becomes relevant as we move to the second-mentioned strand, that of the possible federalization or regionalization of national law, since it is there that the differences between the two "federal" (in quotation marks) hierarchies—those of the United States and those of the European Union—become relevant. Let me foreshadow the significance of this difference to the not-yet-defined coordination mission of comparative law: what is important here is that the horizontal coordination of national law within the EC is more important as a mission than is the shrinking need for a similar coordination mission among the states of the American Union.

II. PRIVATE LAW AND ECONOMIC LAW IN THE EUROPEAN COMMUNITY

All of this suggests that my presentation will be more about the European than the American scene. Therefore, let me begin with some brief comments about the situation in the European Community (EC),² because there one can see the third strand more clearly; namely, how the struggles over the definition of "economic law" matter more there than how they matter—though they do—in the United States. Specifically, the relatively recent European focus on "private law" (as distinguished from "public law") arose and has flourished because the heavily top-down harmonization of laws considered essential to the establishment of a genuine Internal Common Market had to move into other spheres than governmental regulation of business—and that of course problematized the distinction between the two sub-disciplines of law, as the very concept of "economic law," straddling them, suggests.

A. The Focus on European Private Law

The origins and motivations of the current focus on a European core of private law are mixed and hard to disentangle. Whether the relatively new energy pulsing on the private-law side stems from a defensive strategy against the unsystematic incursions of EC directives and regulations into the national legal regimes, whether it stems from the related effort of the European Court of Justice to provide a modicum of systematic order

2. I refer to "European Community" rather than "European Union" because my focus on economic law suggests the traditional pre-Maastricht division of powers rather than those new federal powers added by the additional pillars associated with the "European Union."

to its interpretative jurisprudence, or whether it stems from the responses of legal scholarship to the various Decisions and Action Plans of the organs of the EC,³ beginning with the 1989 Decision of the European Parliament to support research into the harmonization of the member states' private law and culminating for now in the Commission's Action Program of 2004:⁴ whatever its origins, the result is clear. The decades-long monopoly of public-law scholarship in the European Community is over. European Private Law has been on the agenda for over a decade now, and has developed a dynamic of its own that transcends the various reasons for its original appearance.

The mission of the proponents of this expansion or incursion also has varied and evolved. At one end of the spectrum lie efforts to integrate those new federal regulations that adhere to the classic codes like barnacles without being integrated into them.⁵ The notorious Products Liability Directive is the classic example.⁶ At the other end lie the ambitious efforts to develop, if not an entire European Civil Code, at least major elements of one. The so-called Lando Principles of European Contract Law is an oft-cited example of this ambition.⁷ A different mission is that of developing principles of adjudication that permit a greater integration of varying national code provisions through interpretative techniques, an approach

3. Good examples of this literature include *An Academic Green Paper on European Contract Law* (Stefan Grundmann & Jules Stuyck eds., 2002) and *The Harmonisation of European Contract Law: Implications for European Private Laws, Business and Legal Practice* (Stefan Vogenauer & Stephen Weatherill eds., 2006).

4. Commission, "European contract law and the revision of the acquis: the way forward," COM (2004) 651 final, October 11, 2004; Communication of July 11, 2001, COM (2001) final, OJ C255 of Sep 13, 2001; Action Plan of [Feb. 2] 2003, COM (2003) final, OJ C 63, of 15 March 2003.

5. This criticism is a major theme of Karl Riesenhuber, *System und Prinzipien des Europäischen Vertragsrechts* (2003).

6. *Supra* n. 2. The various directives pertaining to consumer protection, in particular the Unfair Contract Terms Directive (No. 93/13 EEC, in OJ 1993 L95/29), also have given rise to system-breach criticism—in this case further conflated with disagreement over the values of "weaker-party" protection. As to the former see, e.g., Geraint Howells & Thomas Wilhelmsson, *EC Consumer Law Aldershot 1997*, 19ff, esp. 22; to the latter, Peter Hommelhoff, *Verbraucherschutz im System des deutschen und europäischen Privatrecht* (Heidelberg 1996) is instructive.

7. *The Principles of European Contract Law* (Ole Lando & John Beale, eds., Dordrecht 1995). An important if contested additional program is that launched through the Commission's Action Plan of 2003 for a "Common Frame of Reference" in the field of contract law that would identify the commonalities of national systemic and linguistic usage as an aid to courts, legislators, and the private bar. See most recently the Commission's Communication of October 11, 2004, "European Contract Law and the Revision of the Acquis: The Way Forward," COM (2004) 651 final; and the sympathetic explanation of this project in "Uniform Terminology for European Contract Law (Gianmaria Ajani & Martin Ebers, eds., Karlsruhe 2005).

found already in 1991 in the Symposium of the Hamburg Max-Planck-Institute on “Alternatives to Legislative Unification of Law.”⁸

B. The Challenge from Economic Law

For some time in the 1990s, the effort to position this unification of private law in a contemporary version of the *usus modernus pandectarum*, an effort associated above all with Reinhard Zimmermann and the *Zeitschrift für europäisches Privatrecht* he co-founded, claimed much attention.⁹ It was always challenged, however, by another and older movement that insists on the centrality of economic law as the legitimate and perhaps (though this may be only my view) limiting basis of any unification of private law the European Community should strive for. This focus, which hews more closely to the still largely economic functions and legitimation of the EC, even in this day of the new pillars of defense, security, environment, justice, etc., is not a narrow one. Rather, it is what its proponents in the 1970s titled it: a challenge to the very concept of private law.¹⁰ And this tension, the challenge modern economic law poses for private law, is my subject today.¹¹

Like Herbert Bernstein, it is a European subject; but, also like him, it illuminates the historic tension between the (apparently) resolutely un-systematic Anglo-American conception of law and the (apparently) resolutely systematic conception of law associated with the Civilian legal families. This tension is apparent in the very label “economic law.”¹² It is unfamiliar to the US academy, and the very notion that it is a challenge to private law perplexes us, if only because the label “private law” itself is not a significant feature of US legal discourse.¹³ No teacher of Corporation Law, for example, would worry whether it was a private-law subject and therefore consider omitting treatment of civil litigation under Rule 10b5; and definitely we would not be concerned about the contours of such an

8. “Alternativen zur legislatorischen Rechtsvereinheitlichung,” 55 *RabelsZ* 215 (1992).

9. He describes this approach in Reinhard Zimmermann, *Roman Law, Contemporary Law, European Law: The Civilian Tradition Today* (Oxford 2001).

10. Heinz-Dieter Assmann, Gert Brüggemeier, Dieter Hart & Christian Joerges, *Wirtschaftsrecht als Kritik des Privatrechts* (1980).

11. As it was for a previous Bernstein Lecture: Christian Joerges, “The Challenges of Europeanization in the Realm of Private Law: A Plea for a New Legal Discipline,” 14 *Duke J. of Comp. & Int’l L.* 149 (2004).

12. A digression: In my first year of teaching in 1961, the Italian scholar, Rodolfo de Nova, was a visitor at Berkeley. He told me of having met Chief Justice Charles Evans Hughes in the mid-1920s, while a young visiting scholar at Yale. In response to Hughes’ gracious question of what he was doing, de Nova told him he was studying the US legal system. Hughes responded in turn and apparently without irony: “My goodness; I didn’t realize we had a system.”

13. For the “public-private law” distinction, see n. 40 below.

amorphous and pervasive notion as “economic law” in the context of deciding where to place its components in our curricular divisions. If anything, we have the opposite problem: the dominance of the economic analysis of law across the curriculum is so advanced that, like Voltaire’s Monsieur Jordain, we all speak economic law without knowing it.¹⁴

Given this situation, namely, that legislating and ruling about matters concerning the economy are a far larger part of the legislative and judicial tasks of the past century than they were during the *laissez-faire* era,¹⁵ and given the further fact that the competencies delegated to the federal level of the European Union are precisely these economic matters, it seems to me that the role of Comparative Law in moving any legal agenda along deserves a new look. The notion that economic law is a challenge to private law has a largely European or Civilian flavor about it. But the notion that economic law is a challenge to traditional understandings about the competencies of units of a federal system is as much an American notion as it is a European one. After all, it was Justice, then Professor, Felix Frankfurter who said of the Dormant Commerce Clause that so far as the states were concerned, in the absence of federal action *laissez-faire* was the only permissible regulator.¹⁶

III. THE VERTICAL DIVISION OF POWERS

This brings me to the second strand of this presentation; namely, to a comparative (i.e., EC-US) look at the classic division of powers. Any argument that national law needs to remain relevant at a time when the transnational economy in facilitative terms increasingly demands, and in regulatory or redistributive terms increasingly should be required, to accept a transnational legal order has to begin there. Why national law nonetheless should remain relevant, however, will be the final element of this discussion.

A. Coordination—the Third Function of Comparative Law

The term I have elsewhere used to highlight this function of comparative law is that of “coordination.”¹⁷ It joins, and supplements, the two

14. Another digression: The “it” in that sentence bears two meanings. Many of us, myself included, often speak of economic law in this analytical sense without knowing what we are talking about.

15. Its proportional importance during the age of mercantilism is another matter.

16. Felix Frankfurter, *The Commerce Clause Under Marshall, Taney and Waite* (Chapel Hill 1937) 65f.

17. Richard M. Buxbaum, “Die Rechtsvergleichung zwischen nationalem Staat und internationaler Wirtschaft,” 60 *RabelsZ* 201 (1996). The similarity of that title with the present one is no coincidence, even though the present paper expands the inquiry into dimensions

traditional functions of comparative law as these have been accepted in academic discourse for now almost two centuries; namely, the instrumental function of identifying “other” law that might be considered, via appropriate adaptation,¹⁸ for one’s own legal order and the visionary or legal-cultural function of showing the path towards a universal legal order. The historian of comparative law might associate Mittermaier with the former,¹⁹ Wigmore²⁰ and Kohler²¹ with the latter function.

Coordination implies a horizontal function; specifically, that of the adaptation of a state’s laws to those of another formally equal state. It suggests a cooperation of equals within a system that is either hierarchical in the sense of federal-state structures or networked as a web of formally equal sovereigns in a structure without a more or less authoritative center. In comparative terms, this issue of coordination of course is much more salient for the European Community/Union than for the United States. Despite the 10th Amendment and the sputtering states’ rights discourse, the legal orders of our states exist at the sufferance of the national legal order as authoritatively interpreted, in constitutional terms, by our Supreme Court. “Puppy federalism” is Edward Rubin’s term for this arrangement,²² and an apt term it is, given the powerful preemptive role of the Supremacy Clause, especially in economic law. What little horizontally developed uniformity our states have seemed to achieve voluntarily through this coordination function was only voluntary in the sense that they acceded to the requirements of the market in preference to what otherwise would surely have been imposed as national law; the Uniform Laws headed by the Uniform Commercial Code and the Model Laws headed by the Model Business Corporation

not considered more than a decade ago.

18. These transplantation problems of course are a favorite subject of comparatists, but they are not for today.

19. The *Kritische Zeitschrift fuer Rechtswissenschaft und Gesetzgebung des Auslandes*, which Mittermaier co-founded in 1829, in its title [Critical Journal for Legal Science and Foreign Legislation] and in his foreword to the first issue, “Ueber den Zweck dieser Zeitschrift” [Concerning the Purpose of this Journal], id. at 1, suggests his—and this—“practical” approach. A recent appreciation of this approach is that of Heinz Mohnhaupt, “Rechtsvergleichung in Mittermaiers ‘Zeitschrift fuer Rechtswissenschaft und Gesetzgebung des Auslandes,’” in *Juristische Zeitschriften* (Michael Stolleis, ed., Frankfurt 1999) 282.

20. On Wigmore’s similar aims, see Annelise Riles, “Encountering Amateurism,” in *Rethinking the Masters of Comparative Law* (Annelise Riles, ed., Oxford 2001) 94.

21. Josef Kohler, who wrote on almost everything, is noted for his aim at universality and the evolution of a world law through the study of comparative law. See, e.g., his *Das Recht als Kulturerscheinung* (Würzburg 1885). For an appreciation see, e.g., Günter Spendel, *Josef Kohler. Bild eines Universaljuristen* (Heidelberg 1983).

22. Edward L. Rubin, “Puppy Federalism and the Blessings of America”, 574 *Annals of Am. Acad. Of Pol. & Soc. Sci.* 37 (2001).

Act illustrate the point.²³ To put it another way: what some states enacted as obstacles to the inevitable and inevitably legitimate corporate form of economic activity may not have been removable via the Privileges and Immunities Clause but were rendered irrelevant by way of the Commerce Clause.²⁴ The European Community is not yet at that stage, and its Supremacy Clause has not yet been lowered to room height. The concept of limited delegated powers still is taken relatively seriously, and one of the principal reasons for that constraint bears directly on the coordination concept I am proposing as a function of comparative law. That reason is the so-called “democratic deficit,”²⁵ the fact that the one body directly elected by the peoples of the member states, the European Parliament, to this day is not yet a parliament in the classic sense. Despite the increase in its role of co-legislator, the legislative initiative of the EC remains with the Commission, an organ whose members are appointed by the executive branches of the national governments represented in the EC’s Council of Ministers.

In this framework of significantly attenuated lines of democratic legitimation via the aggregate of national electorates, in which at least two tiers of government lie between any given national polity and the EU’s principal legislative bodies, unification or harmonization of law from the top down suffers two potentially negative consequences. In comparative terms, only one of these also weighs on top-down unification via national legislation in the US, and even that one weighs more heavily on the European law-making mission than it does on ours. Let me describe these so that these abstract concepts gain some context.

B. The Remaining Relevance of National Law

The first consequence, the one common to both regions in kind if not in degree, concerns the benefits of experimentation and flexibility. The near consensus on the benefits of regulatory competition,²⁶ or at least on using the states as laboratories, is applied today to challenge much national or centralized legislation. In the United States, that is more of an academic than a practical argument, in part for the reasons just

23. The uniformity dictated by the quasi-constitutionalized Internal Affairs Doctrine in corporation law, leading to the squatter sovereignty of Delaware, is a variant on this theme.

24. See Richard M. Buxbaum and Klaus J. Hopt, *Legal Harmonization and the Business Enterprise* (Berlin 1988) 36ff.

25. Works on this subject are legion; for a recent entrant providing the variations on this theme, see *Transnational Governance and Constitutionalism* (Christian Joerges, Inger-Johanne Sand & Gunther Teubner, eds., Oxford 2004).

26. For a respectful critical view of its role for legal scholarship, see Eva-Maria Kiesinger, *Wettbewerb der Privatrechtsordnung im Europäischen Binnenmarkt* (Tübingen 2002).

mentioned. The essential uniformity of US economic law, based on the essential unity of the US economy, has narrowed the field of application in which that desideratum has much purchase;²⁷ and, to repeat Frankfurter's axiom, that competition in any event can only be a race for the bottom in a non-pejorative sense, that is, it can only be a race to provide market-supporting facilitative law.

The European Union situation does vary in degree if not in kind from that obtaining in the United States. The EC member states' laws, reflecting its member states' less complete economic unity, evidence a higher degree of differentiation. Regulatory variation—not only regulatory competition—will have more bite there, and, given the less rigorous application of the EU version of the Dormant Commerce Clause, be less controllable. In this situation, the attraction of top-down unification, demanded now both by the market and the more regulation-oriented member states, will be harder to resist.²⁸ As a result, a somewhat peculiar situation will arise, indeed already has arisen. Market pressures push for positive central legislation, but that is a less desirable solution than the solution the proponents of regulatory competition envisage. Even for those, like myself, who are less convinced of the unalloyed benefits of this beneficent version of the race for the bottom, there is a concern with some of the more practical consequences of top-down unification in the European context. The legislative process is clumsier than in the United States, the formal structure of directives with their need for national adoption and concretization paradoxically leaves significant room for resistance at the national level, and the flexibility needed for adaptation to changed circumstances is less than optimal.²⁹

The second consequence of top-down unification or harmonization, the already mentioned democratic deficit, is unique to the EU, and may be the more significant. The coordination of lawmaking among sovereign states of equal formal status, and with an identical need to adapt to the realities of an economic system that more and more tran-

27. Justice Brandeis' famous comment in dissent in *New State Ice Co. v. Liebmann*, 285 US 262 (1932) is less regnant today. Consider the battles California had to fight to gain some autonomy over regulation of automobile emission standards.

28. Whether the battle over control of the Delaware phenomenon of mobile corporations, provoked by the European Court of Justice's use of the Treaty's Establishment Clause in the *Centros*, *Überseering*, and *Inspire Art* cases is an invigoration of a type of Dormant Commerce Clause jurisprudence or only the beginning of a new round of centralized regulation permitting only a limited range of variation, or of both, is not yet determinable. See Richard M. Buxbaum, "Private International Law and Regulatory Competition in Comparative Perspective," *RabelsZ* (forthcoming 2009).

29. Buxbaum & Hopt, *supra* n. 24 at 242f.

scends their particular boundaries, offers a better chance of eliminating this politically volatile deficit than does top-down harmonization. It also provides a further benefit; namely, the power inherent in such a coordinated state network to control the race to the bottom faced by states standing in isolated and non-communicative competition with one another. While that sounds like a cartel of states, and thus antithetical to the very notion of regulatory competition, it is, in terms of accommodating a “decent”³⁰ level of regulation and perhaps of redistributive policies, a virtuous cartel.

This can profitably be compared with the current effort of the political organs of the EC to achieve a similar goal by combining the principle of subsidiarity with the principle of minimum common standards. Absent minimum standards, the so-called *Cassis de Dijon* principle,³¹ mandating full faith and credit to the laws of the home state of a legal person whose behavior is sought to be controlled, leads to the market-driven facilitative law we associate with this race to the bottom. To control this drift, the concept of minimum common standards is superimposed on the subsidiarity concept, much as the new mandatory minimum standards of the Sarbanes-Oxley Act are superimposed on state corporation law in certain sensitive fields. Here, too, however, some of the concerns just discussed remain relevant. While minimum common standards are a coarser mesh than fully centralized law-making, they, by definition, cannot avoid ossification and inflexibility over time, and of course they also still suffer some of the problems of the described democratic deficit.

To end this introduction to the coordination mission, one additional insight, blindingly obvious, nonetheless is worth making. Market pressure for bottom-up harmonization essentially is little more than pressure for uniform measures facilitative of transactions. To the extent policy disputes exist as to the outer boundaries of facilitation, the “market” solution taken in isolation only represents the net power of the winners of those debates; that is, usually, the private sector providers of the goods, services, and investments at issue, and among them the net power of the more organized participants (for example, banks

30. I put this in quotes to avoid having to define it.

31. *Rewe-Zentral v. Bundesmonopolverwaltung für Branntwein* [*Cassis de Dijon*], [1979] ECR 649. The application of this mutual-recognition principle, mitigated by the mentioned possibility of uniform minimum standards, was made a keystone of Community legislative policy through *The White Paper Completing the Internal Market*, Com. (85) 310 (June 1985) and has found significant application in the free-movement-of-capital and financial-services sectors. See the brief overview in George A. Bermann, Roger J. Goebel, William J. Davey & Eleanor M. Fox, *Cases and Materials on European Union Law* (2d ed. St. Paul 2002) at 1175 f., 1186 f., 1194 f.

over merchants). Plenty of examples come to mind: the battle over shrinkwrap licenses in the failed UCC effort to create an Article 2A; the internecine battles over priorities in creditors' remedies; the battle over labor codetermination; the battles—and they are constant—over appropriate capital market legislation. Market failure, in this context, is a political standoff between the proponents of discordant policies; market success represents the lack of politically significant policy objections to facilitative norms.

IV. THE COORDINATION OF ECONOMIC LAWS

A. The Challenges of Economic Law for Comparative Law

Before this coordination mission, with its asserted benefits, can be meaningfully applied, its necessary attributes need to be specified, a requirement that returns us to the particular concept of economic law and its mix of facilitative and regulatory elements. Three assumptions about the addressees of economic law introduce this brief discussion. First, in the present era, the transnational economy is built upon the privately (not state) owned business firm, a firm that is hierarchically organized and plans its activities even if they have to exist within a more or less unplanned economy. Second, in the short run, trade and investment is largely, though of course not totally, concentrated at the next level above the national economy, the regional economy of blocs, rather than immediately at the fully global level. Third, regional legal regimes, preeminent in the EC, of course, with widely different levels of the vertical division of powers will exist but only partially shadow the level of regional economic integration.

Following on these assumptions, the central elements of economic law (and thus of its coordination) can be better understood. Two elements stand out. First, despite the tendency to think of the harmonization of private law, the essential core of comparative law will move more than previously towards public law.³² That is in part, of course, due to the simple definitional assumption that economic law is more than private law. It also, however, is due to the fact that any single state's effort to legislate about cross-border economic matters in which other states also have a legislative interest needs to consider that legislation's prescriptive reach across its borders, which by definition means to step beyond the private-law realm since that incursion may meet other policy bases than those

32. For a full review of the current state of that definitional problem and its contexts, see Nils Jansen & Ralf Michaels, "Private Law Beyond the State: Comparative Perceptions and Historical Observations," 71 *RabelsZ* 345 (2007).

supporting the home state's laws. And as regional legal regimes follow in the path of regional or global economic regimes, these regional law-making bodies will have to engage even more fully in these coordination efforts. Since they have no higher hierarchy to speak of, they are condemned to follow this path to "doing" comparative law if they are to engage in the process at all. Here even more than on the purely inter-state level, issues of policy analyses and of the appropriate reach of prescriptive jurisdiction will be essential.

Second, the significance of economic and other social-science elements underlying or influencing law-making in any given state increases as the substantive differences between different economic or other policy judgments of other states increase. This impels comparative law practice to be deepened and contextualized through what one might call comparative social science practice. Put another way, the cryptotypes that Rodolfo Sacco has explored so fruitfully in his study of Legal Formants concern not only the hidden forms that support legal doctrines but also the hidden forms that support the social-science or policy judgments underlying those doctrines.³³ The uncovering of these cryptotypes thus is inescapably a function, a social-science function, of comparative law. Its importance cannot be underestimated. At the domestic level, the various ideological, political, and economic conflicts that underlie all law-making can be left more or less unarticulated, embedded as they are in the historically contingent path of the particular polity. At the inter-state level, however, they need to be articulated—to be translated and made transparent—if transnational facilitation and regulation of economic activity and economic actors are to be successfully coordinated. A small example from the extensive debate about the contestable convergence of national capital market laws comes to mind: assumptions about the coming victory of the US model of this type of regulation³⁴—informational transparency and adequacy in lieu of substantive regulation—rest on more or less articulated assumptions about the depth and liquidity of the American capital markets; i.e.,

33. Rodolfo Sacco, "Legal Formants: A Dynamic Approach to Comparative Law," 39 *Am. J. Comp. L.* 1, 343 (1991). For earlier insights into that issue, both connected with the institute with which Herbert Bernstein was long connected, see Andreas Heldrich, "Sozialwissenschaftliche Aspekte der Rechtsvergleichung," 34 *RabelsZ* 427 (1970); and, early in his career, Ulrich Drobnig, "Rechtsvergleichung und Rechtssociologie," 18 *RabelsZ* 295 (1953), esp. at 304.

34. An aggressive version of this argument is that of Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 *Georgetown L. J.* 439 (2001), reprinted in *Convergence and Persistence in Corporate Governance* (Jeffrey Gordon and Mark Roe, eds., Cambridge 2004).

on cryptotypes.³⁵ Without clarity about the power of these cryptotypes in determining the doctrines and laws, no convergence or transplantation effort would make much sense.

B. Don't Talk About It—Do It

So the question is fairly posed: can the process of comparative law provide this network of states with the benefits of politically legitimate and economically responsible law-making that can meet an increasingly globalized system of economic actors—on its own terms, so to speak—while escaping these two pitfalls of lack of adaptability and lack of democratic accountability? With this question I return to Herbert Bernstein's injunction: don't talk so much about what comparative law is; start doing it. My case study, a foolhardy term for the following few remarks, of whether "doing it" is possible is a project that has been under way for over a decade now, the Trento 'Common Core' Project of European Private Law.³⁶ This project is based, in turn, on the approach the late Rudolf Schlesinger took when in the 1950s he developed the subject of comparative law in terms of its practical utility for the legal profession, judiciary, and legislature;³⁷ in other words, following the instrumental mission of the subject.³⁸ Both began at the bottom, with close study of the law on the books and the law in action in specific fields; Schlesinger's on contract law, the Trento Project on private law *tout court*. The former's approach was perhaps too microscopic; in any event, given its limited resources it essentially exhausted itself with a definitive, if too narrow, study of the formation of contracts. The Trento Project has had the resources to support a larger ambition, as its title, "The Common Core of European Private Law," suggests.

The most recent substantive study produced by the Project, Eva-Maria Kieninger's thorough report on European national law governing non-possessory security interests in moveables, provides my example.³⁹

35. For recent scholarship recognizing these issues in the field of corporate and capital-markets law, see John Coffee, "Racing Towards the Top?: The Impact of Cross-Listings and Stock Market Competition on International Corporate Governance," 102 *Colum. L. Rev.* 1757 (2002) and Ronald Gilson, "Globalizing Corporate Governance: Convergence of Form or Function?," 49 *Am. J. Comp. L.* 329 (2001).

36. For a description see Mauro Bussani & Ugo Mattei, *Making European Law: Essays on the "Common Core" Project* (Trento 2000).

37. *Formation of Contracts: A Study of the Common Core of Legal Systems* (Rudolf B. Schlesinger, gen. ed., Dobbs Ferry 1968).

38. In this he followed his bent towards the practical-analytical; but his larger mission, a reflection of his personal history, was an idealistic one closer aligned to the "universal-law" mission, if never ostentatiously trumpeted as such.

39. *Security Rights in Moveable Property in European Private Law* (E.-M. Kieninger, ed.,

First of all, it is a classic example of the awkwardness of fitting economic law into the standard private-public dichotomy.⁴⁰ Creditor-debtor law, including this sub-set, is a subject that only exists inside two very powerful bookends of classical public law—between the consumer protection bookend and the insolvency bookend.⁴¹ In that sense, it reveals exactly the challenge and the potential success in seeing comparative law work as a work of coordination; after all, for policy reasons stemming from different national views of these bookends, the actual doctrines almost inevitably differ—will have to differ—no matter how strongly market forces seek maximum facilitative framing of these credit devices in the applicable law. Consider only the listing of the issues Kieninger identifies as representing continuing substantially divergent positions: the publicity requirement for the creation of non-possessory proprietary rights; the derogation by contract of mandatory rules of property law such as the retention of title approach to the security interest in newly manufactured goods; lease forfeiture in the event of the lessee's insolvency; the assignability of security interests and the related issue of the notification of the debtor or the public; the validity of floating charges that cover all, even after-acquired property, of the debtor; above all, perhaps, the variously mandatory or less-than-

with the assistance of M. Graziadei, Cambridge 2004). Note that this subject is categorized as private law in traditional terms, thus implicitly questioning my offhand characterizations in the immediately preceding text.

40. This is—finally—the place at which to look at the contestable private/public law distinction in comparative terms. Early assumptions about its dichotomous nature and its variously located roots in Roman, Westphalian or 19th century soil have been discredited; see in lieu of other citations the thorough study of Martin Bullinger, *Öffentliches Recht und Privatrecht* (Stuttgart 1968). Putting aside its remaining power as a means of cartelizing the internal distribution of teaching and research chairs, it survived into the 20th century in one shorthand form: public law is that whose substantive expression either includes the state as a party or the role of state's institutions in any law's enforcement, i.e., constitutional and administrative law in the former case, civil procedure and bankruptcy law in the latter. In the United States, the only possible dichotomous classification would have to be an indirect one: if the substantive law is enforceable privately (i.e., through contractually authorized arbitration), it is private law; if not, it is public.

But that shorthand classification no longer works, for the same reason that the Civilian distinction no longer works. In the first two-thirds of the last century, the state's increasing engagement in providing social goods and curbing private power "publicized" much formerly private law and diminished the value of the Civilian distinction. In the last third, the state's increasing disengagement from both the provision of social goods and the regulation of economic life diminished the value of the American version of the distinction (almost all "public law" is arbitrable today).

41. "Classical" in the American sense—consumer protection once was non-arbitrable. It was not classical in the Civilian sense, since consumer protection did not fit within the formal definition of public law (see the preceding footnote). But consumer protection is, in both systems, a policy limit on the freedom of contract; and in that sense it will display national variation as national policy responses to the issue vary.

mandatory rules of private international law when the goods in question cross borders; and more.

Transparent communication of individual states' doctrines and underlying policies among themselves, as equals, is what the coordination mission of comparative law is about. Its advantages over top-down harmonization lie, first of all, in the inherent flexibility of the preferred approach. An example taken from the Kieninger volume: Finnish law apparently permits the secured creditor to obtain only 50% of the value of the property covered by a floating (or "enterprise") charge in the case of the debtor's insolvency—a rule that itself is a good example of how the typical conflict between institutional lenders and trade creditors arguing over the body of the commercial debtor produces ad-hoc legislative compromises. Putting aside the actual fact that the EC Council of Ministers did not wish to force a reconciliation of numerous such differences by forcing a common compromise down the throats of recalcitrant Member States,⁴² the choice between a top-down solution and a coordinated interstate one seems to me to lie with the latter. A directive or regulation "curing" (again in quotes) one or even a series of random variations simply lays one patchwork over another, compared with the preservation of domestic-level systemic and political harmony that results when any given country is persuaded by this exercise in comparative law to coordinate its laws with its fellows through smoothing out its own lumps and bumps. Those bumps may be simply the contingent result of historical accident; they may be the remnants of local political bargains now rendered obsolete by changing circumstances, including of course the development of the common internal market itself; or they may be needed even today in the context of today's political bargains. In the last case only, a separate calculation may have to be made whether the local aberration indeed distorts internal-market conditions to an extent justifying federal intervention; but in all other cases, coordinating local responses within this network frame seems to me a far sounder way to expend scholarly and policy-making energy than to move immediately towards imposed unification. Unification may in the end be the preferred solution, but not on an *a priori* basis.

This may, of course, strike some as simply "bargaining in the shadow of the ruler," much as we have semi-coerced market-driven harmonization or unification in what otherwise seems like open and voluntary bottom-up harmonization.⁴³ That objection, however, is not at

42. Kieninger, at 22ff.

43. The semi-coercive role of the pseudo-constitutional conflicts norm that the law of the state of incorporation governs the internal affairs of the corporation is a homely domestic ex-

all relevant if coordination of law in a system without a hierarchy is at issue, and only marginally relevant if the hierarchy is not yet omnipotent, as in the EC, rather than all-powerful as in the US. And the objection does not touch at all on the two pitfall points I have raised, those of flexibility and democratic legitimation, which the state-based coordination approach largely avoids. Within the context of the world we live in, a multi-storied economy living in a number of one-story state houses, a new look at the missions of comparative law is appropriate. Mine, I hope, is one such look that may open some new approaches to our work.

The coordination mission of comparative law I have suggested is specifically relevant to economic law and I do not know whether it can be readily applied to those fields of the law that the economic world of System graciously permits the *Lebenswelt*, the world of non-instrumental actors like families and friends, to govern.⁴⁴ The private-law norms of that life-world also have their overarching policy frame, even if it derives more from what once was unabashedly called “organic life.” What is clear is that the private-law norms of the world of the instrumental actors never have been only that. To the extent the Trento Project belies its self-professed “private law” core, to that extent it will be a success and remain, for now, my prime example of the comparative advantage of the coordination mission of comparative law.

V. CONCLUSION

I suspect that Herbert Bernstein would have been happier had my examples come from that *Lebenswelt*; after all, family law was one of his favorite subjects, and the theme of the *Habilitation* he abandoned in order to come to the new world. But it was not his only interest, as his doctoral dissertation on workers’ compensation⁴⁵ and his study of the effects of East German nationalization decrees on the extraterritorial life of those nationalized companies⁴⁶ demonstrate. Indeed, even his family-law project was not without its public-law overlay, since it analyzed the impact of constitutional equal-protection and non-discrimination doctrines on traditional private international law treatment of foreign marriages and local divorces.⁴⁷ Herbert Bernstein was a widely read, broadly inter-

ample, as already suggested.

44. This distinction, derived from the phenomenological literature, is fruitfully used in our context in Jürgen Habermas, “Law as Medium and Law as Institution,” in *Dilemmas of Law in the Welfare State* (Gunther Teubner ed., Berlin 1985) at 203.

45. Herbert Bernstein, *Schadensausgleich bei Arbeitsunfällen* (Karlsruhe 1963).

46. Herbert Bernstein, Corporate Identity in International Business: The Zeiss Controversy, 20 Am. J. Comp. L. 299 (1972).

47. Herbert Bernstein, “Ein Kollisionsrecht für die Verfassung,” 19 Neue Juristische Wo-

ested, humane and engaged person, and given that range I hope this tribute would have been acceptable to him, a dear colleague and friend.

chenschrift 2273 (1965). Left incomplete, it was aptly characterized as a “drumroll without symphony” in the review essay of Franz Gamillscheg, “Gleichberechtigung der Frau und Reform des Internationalen Eherechts, 33 *RabelsZ* 654 (1969), at 701f.

Foreword*

Political Parties in China's Judiciary

Jonathan K. Ocko**

To have Zhu Suli, Dean of Peking University Law School, deliver the Fifth Annual Herbert Bernstein Memorial Lecture in International and Comparative Law on November 2, 2006, was especially apt. His address not only commemorated Professor Bernstein, it also commemorated the twentieth anniversary of Professor Bernstein's first foray into Chinese law at the 1986 Law and Contemporary Problems Conference on "The Emerging Framework of Chinese Civil Law."¹ Moreover, Zhu's lecture touched on one of the central issues raised at that conference; namely, the extent to which German and other foreign models had influence on and were of value to China. At the conference, and in a later essay, the late Tong Rou, a law professor at People's University Law School and one of the drafters of the *General Principles of Civil Law*, acknowledged that he and his colleagues had not created the civil law anew. However, stressing the singularly Chinese nature of the document and its reflection of the particular Chinese experience, he emphatically resisted analyses, Bernstein's among them, that he perceived as over-emphasizing foreign influence. To understand the distinctive national character of the law, argued Tong, one had to consider "broadly the social structure, all political economic phenomena, and the entire legal system."² In his lecture, Zhu Suli echoes Tong Rou's concerns. Zhu welcomes comparative analysis of Chinese contemporary law, but he sees it as having value and cogency only in so far as the comparatist first grasps the realities of China and remembers that no comparative framework is intellectually neutral.

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1. *The Emerging Framework of Chinese Civil Law*, 52 Law & Contemp. Prob. (Jonathan K. Ocko sp. ed., Spring-Summer 1989). Herbert Bernstein, *The PRC's General Principles From A German Perspective*, 52 Law & Contemp. Prob. 117 (Spring-Summer 1989).

2. Jonathan K. Ocko, Preface, *The Emerging Framework of Chinese Civil Law*, 52 Law & Contemp. Prob. 1, 12 (Spring-Summer 1989).

Zhu Suli's scholarly writings are substantial and wide-ranging, contributing to the literature on rule of law, law and public policy, legal sociology, law and society, and legal education. Though largely in Chinese, they are indirectly accessible in English through an analytical summary of his work by Hong Kong University law professor Albert Chen³ and a review of his recent monograph, *Sending Law to the Countryside: Research on China's Basic Level Judicial System*⁴ by New York University law professor Frank Upham.⁵ Accordingly, rather than reprise still another account of Zhu's work, I will restrict my comments to several brief observations.

First, Zhu Suli is not simply one of Peking University (Beida) Law School's more distinguished alumni; he is also one of its proudest and most loyal alums. Zhu's decanal remarks to incoming and graduating Beida law students demonstrate his deep, emotional attachment to Beida Law School and his passionate feelings about the role that it and its students can and should play in China's evolving legal system.⁶ Yet he tempers his prideful affection for both his school and his students with reminders that this well-known brand stands for nothing by itself. Beida law students must give it meaning and substance by being individually accomplished and committed to the social responsibility for the greater good that they undertake as a concomitant of their legal education.

Second, Dean Zhu is above all else a pragmatist. For him, "there is no absolute knowledge... Law is for solving practical problems."⁷ As Zhu

3. Albert H.Y. Chen, *Socio-legal Thought and Legal Modernization in Contemporary China: A Case Study of the Jurisprudence of Zhu Suli*, in *Law, Legal Culture And Politics in The Twenty First Century* 227-49 (Günther Doeker-Mach & Klaus A. Ziegert, eds., 2004).

4. Zhu Suli, *Songfa Xiexiang: Zhongguo Jiceng Sifa Zhidu Yanjiu [Sending Law To The Countryside: Research On China's Basic Level Judicial System]* (2000).

5. Frank K. Upham, *Who Will Find the Defendant if He Stays with His Sheep? Justice in Rural China*, 114 *Yale L. J.* 1675 (2005) (reviewing Zhu Suli, *Sending Law To The Countryside: Research On China's Basic Level Judicial System* (2000)).

6. See, e.g., Zhu Suli, *Nide shi you chuxide haizi, zai beijing daxue faxueyuan biye dianlishangde zhici* [You are Children with a Future, Remarks at the 2005 Graduation Ceremony of Peking University Law School] (June 29, 2005) (transcript available at <http://lawthinker.com/show.asp?id=2775>); Su Li, *Diyige mengxiang chengzhen, Su Li 2005 nian beida faxueyuan xinsheng zhici* [The First Dream Becomes Fact, Su Li's Fall 2005 Remarks to Peking University Law School's New Students] (Sept. 14, 2005) (transcript available at <http://law-thinker.com/show.asp?id=2855>); Zhu Suli, *Xuanze Beida, Su Li 2006 nian beida faxueyuan xinsheng ruxue zhici* [Picking Beida, Su Li's Remarks at the Matriculation of Peking University Law School's 2006 Entering Class] (September 2006) (transcript available at http://article.chinalawinfo.com/article/user/article_display.asp?ArticleID=34429); Ni ruoruandi xiangqilai zhege xiaoyuan Political Parties In China (zai beida faxueyuan 2006 jie xuesheng biye dianlishangde zhici, 2006/6/23) [Your Tender Thoughts of this Campus, Graduating Remarks at the June 23, 2006 Commencement Ceremony for Peking University Law School] (June 23, 2006) (transcript available at <http://law-thinker.com/show.asp?id=3277>).

7. Chen, *supra* note 3, at 231 (quoting Zhu Suli). Zhu Suli frequently uses the pen

makes clear in *Sending Law to the Countryside*, foremost among these problems is the absence of law and legal services in rural China.⁸ How, he asks in a recent essay on a celebrated rural judge, can China be a rule of law country when the sixty percent of its population that lives in the countryside is largely without law, that is, without affordable legal services and dedicated adjudicators?⁹ Thus, he calls for China's legal education to be less theoretical and more practical; for there to be more former judges and litigators among its law professors; and for legal academics to worry less about developing ideal models and more about what is appropriate and what works. Unlike his Beida colleague, He Weifang, Zhu sees no inherent problem in using former military officials as judges in courts of first instance.¹⁰ Certainly, at the intermediate and higher courts, there should be an emphasis on professionalization and specialization. But at the basic level rural court, where disputants are looking for substantive justice and are more likely to agree to mediation than urban residents, proceduralism can be an impediment. Zhu sees enormous value in drawing judges from practically experienced government cadres, especially if they themselves have rural backgrounds, can explain matters simply and in local dialect, deploy discretion adeptly and fairly, and draw their authority from personal qualities rather than from the trappings of the courtroom and judicial garb. He worries not about there being too many such judges, but rather about who will replace them when the current ones retire. The task, then, for legal academics, concludes Zhu, is to encourage their students to bring law to the countryside; to conduct detailed local studies that identify what works and what does not and which rural judges are effective and why; to distill the implicit logic of rural adjudicators; to express it in generalizable academic language, systematize the knowledge, and suggest creative ways to deploy diverse forms of law that suit the needs of a nation experiencing wildly uneven development.

name Su Li.

8. In an article on legal education, Zhu cites a finding that twenty percent of China's counties lack even a single lawyer. Su Li, *Dangdai Zhongguo faxue jiaoyude tiaozhan yu jiyu* [*The Challenge and Opportunity in China's Contemporary Legal Education*], 2006 FAXUE, no. 2, at 9 (2006).

9. Zhu Suli, *Zhongguo nongcun dui fazhide xuqiu yu sifa zhidude huiying—cong Jin Guilan faguan qieru* [*China's Villages Need for Rule of Law and the Judicial System's Response—The Example of Judge Jin Guilan*] (2006), available at http://article.chinalaw-info.com/article/user/article_display.asp?ArticleID=32785.

10. See generally Zhu Suli, *Annual Herbert L. Bernstein Memorial Lecture in International and Comparative Law: Political Parties in China's Judiciary*, 17 *Duke J. Comp. & Int'l L.* 533 (2007).

Third, as the above suggests, Zhu Suli is a contrarian who relishes playing the role of intellectual “bad boy” and provocateur. (Perhaps this inclination explains why he is so attracted to the work of Judge Richard Posner, who is much easier to peg ideologically than Zhu, but who, Zhu notes, is an anti-Marxist libertarian, whose analytical approach has much in common with Marxists’ historical materialism¹¹). Of Chinese and Western commentators who complain about the Communist Party’s influence on and interference in the judicial system, Zhu asks: in terms of China’s modern history, what did you expect? China’s modern political parties antedated the modern state. Indeed, the Communists (like their erstwhile competitor for political power, the Guomindang, Zhu boldly notes) established a party-state in which the party was explicitly privileged over the state. Moreover, while certainly problematic, the Party’s influence is not utterly reprehensible and sometimes produces the desired substantively just result even as its interference violates procedural justice. Yet Zhu is no apologist for the Party and openly defends the valuable social role of the public intellectuals who criticize its missteps and overreaching.¹² Zhu’s most contrarian stance is his critique of legal academics’ emphasis on rule of law, especially on a purely modern model of rule of law. It is not that Zhu is opposed to rule of law. Rather, he objects to its being treated as a decontextualized panacea, and he objects to legal professionals cutting themselves off from ordinary people by not listening to them and by speaking in overly specialized language.¹³ Zhu’s paradoxical couching of some of this critique in Western high theory has led Frank Upham to characterize *Sending Law to the Countryside* as “important,” but also as “irritating and fun.”¹⁴ Zhu’s own stature as a widely read public intellectual indicates that Upham’s characterization can arguably be applied to most of Zhu’s prolific writing.

Fourth, Zhu Suli is a scholar who reads voraciously, broadly, and integratively—his latest book, a study of law and literature, draws widely from Chinese literature as well as from Chinese and Western scholarship on the subject¹⁵—but one who is, like Clifford Geertz,¹⁶ also finely attuned

11. Su Li, *Falu Yu Wenxue: Yi Zhongguo Chuantong Xiju Wei Cailiao* [Law And Literature: Using Materials From Chinese Traditional Plays] 14 (2006).

12. Xiao Qiang, Zhu Suli on Public Intellectuals, *China Digital Times*, Jan. 15, 2005, http://chinadigitaltimes.net/2005/01/zhu_suli_on_pub.php.

13. Zhu Suli, *Fazhi yu gonggong zhengce meizhou pinglun’ kaimushide pinglun* [Comment at the Opening Ceremony of the Weekly Discussion on Rule of Law and Public Policy] (Apr. 2, 2007) (transcript available at http://article.chinalawinfo.com/article/user/article_display.asp?ArticleID37854).

14. Upham, *supra* note 5, at 1677.

15. Su Li, *Falu Yu Wenxue*, *supra* note 11.

16. Clifford Geertz, Law as Local Knowledge, in *Local Knowledge* (3d ed. 2000).

to the problems of commensurability and comparison as well as to the purpose of comparison. Is its purpose to denote one system as the perfect universal model, others as aspiring but still imperfect emulators, and others as inherently incompatible with the model? Or is it to use the perspective of one system to cast new light on the processes of another, to use one to understand the strengths and weaknesses of the other? Or, finally, is it to prepare for the task (impossible in Zhu's view) of grafting one legal system onto another?¹⁷ In his provocative, pragmatic, penetrating essay that follows, Dean Zhu attempts to answer the question: what is the proper frame of reference for a comparative legal analysis of contemporary Chinese law?

17. Zhu Suli, Zheli meiyou budongchan—faluyizhi wentide lilun shuli [Here There is No Real Property—Theoretical Parsing of the Problem of Legal Transplantation], (2007) available at http://article.chinalawinfo.com/article/user/article_display.asp?ArticleID=38679. Presented in the southwest corner of Western China's Qinghai province, a predominantly Tibetan area, this essay argued that a legal concept, such as real property, cannot be transplanted in vacuum. To have meaning and be effective, it requires the transplantation of the entire framework and infrastructure whence it came.

Political Parties in China's Judiciary*

Zhu Suli**

I. THE ISSUE AND ITS SIGNIFICANCE

The Spring 2005 issue of the *Yale Law Journal* published a lengthy review by New York University Law School Professor Frank K. Upham¹ of my book, *Sending Law to the Countryside*. Professor Upham's central criticisms are two: first, my "uncritical acceptance of a linear version of modernization theory,"² a criticism that I will not address in this essay; and second, my "greatest flaw," "the absence of politics and political power." My work, he says, "is reticent to the point of timidity when it comes to politics," "[a]side from the *small-p politics*,"³ by which he appears to mean the internal conflicts and interpersonal quarrels of the workplace. I emphasize these words to show that Professor Upham intends to make his point absolutely clear and forestall any possible misunderstanding of the word by readers. Moreover, his choice of the word "timidity" implicates the author's academic honesty in the political dominance of the Chinese Communist Party (CCP).

Contrary to Professor Upham's characterization, my book actually repeatedly reveals the influence on the judiciary of politics, especially the CCP's policies, including local Party organizations' multifarious interference in cases. This coverage is most evident in Part I of the book,

* The Fifth Annual Herbert L. Bernstein Memorial Lecture in Comparative Law. Reprinted with permission from The Duke Journal of Comparative and International Law: Zhu Suli, *Political Parties in China's Judiciary*, 17 DUKE JOURNAL OF COMPARATIVE & INTERNATIONAL LAW 533 (2007).

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1. Frank K. Upham, *Who Will Find the Defendant if He Stays with His Sheep? Justice in Rural China*, 114 *Yale L. J.* 1675 (2005) (reviewing Zhu Suli, *Sending Law To The Countryside: Research On China's Basic Level Judicial System* (2000)).

2. *Id.* at 1700.

3. *Id.* at 1698, 1703 (emphasis added).

which analyzes the influence of politics over judiciary from macro, middle, and micro levels. Chapter I projects the sending of the law to the countryside as an extension of the power of the nation-state to the basic level of society and points out that the judicial system in contemporary China assumes a political role. Chapter II discusses how the political control over judicial affairs is possible through the judicial administration within the courts and the judicial system. Chapter III focuses on the adjudication committee (*shenpan weiyuanhui*), a judicial organization within each court designed to deal—at least according to statutory law—with hard and important cases, and analyzes the multiple function of this micro institution within courts. Other chapters also have abundant analysis of politics and political power.⁴ Thus, while I may not meet Prof. Upham’s expectations about how much discussion there should be of politics and political power, his judgment that there is none at all is without foundation.

Certainly, such analyses may not be enough and should be extended by other research. However, I want to emphasize that I wrote the book in Chinese for a Chinese audience and never intended it to satisfy the political and ideological tastes of any foreign readers; Professor Upham’s frustration or dissatisfaction is therefore understandable.

Nevertheless, Professor Upham’s review attracted my attention and needs to be countered, not because he has any new insights or makes any contribution to the study of law in China, but rather because his errors in methodology are typical of some Western observers of China and are influential in China. Such errors reveal not only the deep ideological bias that is central to the “moral authority” of the Western notion of the autonomy of law and “rule of law” (a shaky authority that has evaporated after 9/11), but also a theoretical mistake that is common in comparative or implicitly comparative studies of China. In other words, it is the impact of these and similar errors on recent legal studies in China over the recent decades that has prompted me to write this response. Moreover, precisely because Upham’s errors are characteristic of the shortcomings in analyses of Chinese law, this essay is not simply a response to Upham’s book review, but also a paper of its own independent significance.

II. IS A DISTINCTION NECESSARY?

Professor Upham’s criticism of my work as failing to address politics and political power is internally illogical and contradictory because his re-

4. Zhu Suli, *Sending Law To The Countryside: Research On China’s Basic Level Judicial System* chs. 7, 10, 14 (2000).

view also acknowledges, at least implicitly, that I did analyze the influence of various social actors, including the Party and government, upon the operation of basic courts. So, what then is Professor Upham's complaint? A careful reading suggests that what troubles Professor Upham is my failure to devote a chapter or chapters to a relatively systematic analysis of the CCP's interference in the operation of basic level courts. As I already noted, this charge is untrue. However, even if the criticism were valid, we need to note that it is based on three implicit presuppositions: first, that there is a unique political influence that comes purely from the CCP; second, that it is possible to create a standard model of a judiciary free from political influence or meddling; and third, that it is possible and necessary for researchers to examine and measure independently such influence. All three presuppositions are unrealistic.

In my own view, and in the view (explicit and implicit) of many Chinese and foreign scholars, the CCP's influence and control is ubiquitous; it penetrates every aspect of society. Despite the many political differences between the CCP and its former arch-rival, the Nationalist Party (known as the *Guomindang* or GMD) and despite the fact that the CCP never used the GMD's often deployed concept of the "party-state," in practice, the CCP inherited the political tradition, initiated by Sun Yat-sen⁵ and pursued by the GMD, comprised of a "party construction of the state," "party rule of the state," and "party above the state." Indeed, eventually, the CCP's influence over society and the machinery of the state would far exceed that achieved by the GMD.

The evidence is abundant. First, during the GMD's rule of mainland China (1927–1949), political control of entire regions remained in the hands of provincial strongmen or warlords, and the GMD's unification of China was more symbolic than real.⁶ Second, the same was true of political parties. Whether or not the GMD wanted to recognize it at the time, even during the GMD's rule, the CCP occupied a considerable amount of territory, enjoyed the support of a large number of the people, and controlled independent armed military forces. There were, as well, some other smaller political parties. Third, in the Nationalist government, even within the GMD itself, there was a group of relatively independent and socially influential scholars and technocrats. Fourth, because of the GMD's weakness, to a certain extent the traditional model of social control being exercised by a combination of imperial

5. Sun Yat-sen was the first President of the Republic of China, and founder and leader of the Gmd. Sun Zhongshan, *Sun Zhongshan Quanjì* [Complete Works Of Sun Yat-sen], vol. 8, at 267–68, vol. 9, at 103-04 (1986).

6. 2 *Deng Xiaoping Xuanji* [Selected Readings Of Deng Xiaoping] 299 (2d ed. 1994).

(central) and gentry (local elite) power persisted, with the central government having rather weak influence in rural China.⁷ In conclusion, the GMD built only a superstructure and did not, because it could not, implement its will and policies down to the lowest levels of society.⁸ Indeed, this inability to achieve its goal of social transformation is what led to the GMD's loss of the mainland in 1949.

In the judiciary, too, the GMD fruitlessly sought to establish total control. From its earliest years, even before it had established national political control, the GMD insisted on “partyization of the judiciary” (*sifa danghua*). Subsequently, it continued to adopt systematic measures in this regard,⁹ and there is evidence to show that in some cases, the GMD exercised strong direct control.¹⁰ However, this insistence on partyization demonstrated that the GMD's control and influence over the judiciary was not complete. Because of this reality, it would be possible, though still very difficult, to distinguish GMD influence from other political or governmental influence.

In the years immediately following the CCP's assumption of power in 1949, such a distinction became impossible—not because the CCP's influence weakened but rather because it was too strong. First the People's Republic of China (PRC) became a modern, nationalist state with a high degree of political, economic and cultural unity. Only Taiwan was under the control of the Nationalist government, and there were no regional strongmen. Second, although there were other legal, democratic parties, they all existed under the leadership of the CCP. Even after the space for these democratic parties' political activities expanded following the reform and “opening up” in 1978, the 1982 constitution pro-

7. Fei Xiaotong, *Huangquan He Shenquan* [Imperial Power And Gentry Power] (1988).

8. Some historical researchers testify that conflicts between GMD local branches and local governments always ended with the victory of local governments during the GMD's rule. Cf. Wang Xianzhi, *Kangzhan shiqi guomindang zuzhi jianshe yu zuzhi fazhan de jige wenti* [Issues on GMD's Organizational Construction and Development During the Anti-Japanese War], 1990 *Jindaishi Yanjiu*, no. 2, at 230-50 (1990); Zhongshen & Tang Sengshu, *Shilun Nanjing guomin zhengfu xunzheng qianqi (1928-1937) de difang dangzheng jiu feng* [The Local Party-Government Conflicts in Early Tutelary Period (1928–1937) of Nanjing National Government], 1999 *Shixue Yuekan*, no. 2, at 53-58(1999).

9. The earliest recorded statement available referring to partyization was made by Xu-qian in 1926; Ju Zheng, a founding member of GMD and later Chief Justice of the Supreme Court of National Government, elaborated it in 1934. According to Ju Zheng, partyization has three criteria: all judicial personnel must be GMD's members; GMD policies must be applied in adjudications; and all the judges must accept the Three People's Principles (the political ideology of GMD). Ju Zheng, *Sifa danghua wenti* [On Partyization of the Judiciary], 1934 *Dongfang Zazhi*, no. 10 (1934).

10. Cf. *Wo Suo Zhidao De Hanjian Zhou Fuhai* [Traitor Zhou Fuhai, As I Know] (Wen Fei ed., 2005); *Wo Suo Zhidao De Hanjian Chen Gongbo* [Traitor Chen Gongbo, As I Know] (Wen Fei ed., 2005).

vides that the system is still one of cooperation and consultation by multiple parties under the leadership of the CCP.¹¹ Through various formal (for example, the Chinese Political Consultative Congress) and informal irregular meetings with non-party figures and institutions, the CCP gathers and selectively adopts the political advice of other political parties. Some leaders of these democratic parties are also CCP members.¹² Third, the vast majority of social elites, whether in government, universities, commerce, or social organizations, are party members. Other elites who are not party members accept the political leadership of CCP and most of them are staunch communists.¹³ Finally, within the CCP are some “radicals,” whose political views might be considered dissident by Westerners. In this sense, though the Party consistently proclaims itself to be the vanguard of the proletariat and the working class, and describes its highest ideal and ultimate aim to be the realization of communism,¹⁴ even before the declaration of “the three representatives,”¹⁵ the Party also emphasizes that it was the vanguard of the entire Chinese people and that it sought to represent the interests of the greatest number of people.¹⁶ In this sense, the CCP is another “nationalist” party. Its political program, despite having suffered mistakes of the right and the left (including the serious mistake of the Cultural Revolution), is widely accepted by the people.

Owing to the CCP’s political program and tight organizational structure, its influence is ubiquitous at every level and in every aspect of contemporary Chinese society; it determines the direction of society and government. Though there may be differences and conflicts within the party-state, there is no external influence on the government other than the Party: there is no such thing as government policy independ-

11. Xian Fa [Constitution] pmb., para. 10 (1982) (P.R.C.).

12. As far as I know, the former or current leaders of such political parties as Democratic League, China National Democratic Consultation Association, Zi Gong Party, and Taiwan Democratic Self-government League were or are CCP members.

13. Two examples are the late and only non-CCP Vice Presidents of PRC: Song Qinqin, wife of Dr. Sun Yat-sen, applied and was approved for membership in the CCP right before her death; and Rong Yiren, China’s leading “red capitalist,” was identified in a New China News Agency obituary as a “soldier for communism.”

14. 16TH CCP Nat’l Conf., Constitution Of The Communist Party Of China general princs. (2002) [hereinafter CCP Const.].

15. It is emphasized that CCP represents the fundamental interests of the overwhelming majority of the Chinese people, represents the development trend of China’s advanced productive forces, and represents the orientation of China’s advanced culture. It is widely considered an important change of CCP in terms of its organizational constitution and political ideology.

16. Cf. 7th CCP Nat’l Conf., Constitution Of The Communist Party Of China (1945); 8th CCP Nat’l Conf., Constitution Of The Communist Party Of China (1956).

ent from the CCP; there is nothing else truly influential, not even the military policy imagined by Western scholars. In this view, as a matter of fact, the CCP is not only the strength at the core of every undertaking in China, it is also the mechanism for the mobilization, integration, and political representation of all social forces and classes of PRC. In contemporary China, nearly every political force has either been integrated into the CCP, or, as in the case of former and present capitalists, counter-revolutionaries, bad elements, and rightists during the Cultural Revolution (1966–1976), denied political expression. However, in the more than two decades since China began its reform and “opening up” in 1978, and especially following the inclusion of the concept of the “the three representatives” in the party’s and PRC’s constitutions, the CCP has pursued becoming a governing party that represents the basic interests *of the greatest number of people* and that has daily strengthened its ability as a governing party.¹⁷

Therefore, distinguishing the status of party and government officials is truly not that important. At every administrative level in the PRC, the head of the administrative unit is not only a party member, but the number two leader (for example, the deputy party secretary) of the party organization at that level, while among the deputy leaders of an administrative unit (for example, Vice Mayor of a city), only one person is generally not a party member. Party and governmental officials are interchangeable: for example, most governors eventually assume a position as provincial Party secretary, and many provincial Party secretaries have previously served as governors or other officials. This is the pattern from the center down to the lowest level. Indeed, historically, few officials who have specialized in or worked only in Party affairs and never in the government enter the highest, core policy-making positions of the Party organization.

This pattern holds true across all the branches of government and administration regardless of the breadth of their responsibilities. For example, at all levels of government, from the municipal to the national, the chairs of the People’s Congresses and People’s Political Consultative Conferences, as well as the chiefs of all but a few government agencies, are the party secretaries of the leading party group¹⁸ in those units.¹⁹

The institutions charged with administering justice (the People’s Courts and People’s Procuratorates) are certainly no exception. Since

17. Xian Fa art. 1 (1982).

18. A leading party group is a CCP organization set in a state organ, people’s organization, and other non-party organization.

19. Currently, probably the foreign ministry is the only exception.

1949, all the Presidents of the People's Supreme Court and the Chief Procurator of the Supreme Procuratorate, except Shen Junru, the first President of People's Supreme Court, have been CCP members and secretaries of the leading Party group of the organization. Although there is commonly a non-CCP-member Vice President or Deputy Procurator, they are all carefully selected by the CCP organizational branch and trusted by the CCP; in some particularly important policy decisions, these non-Party officials may be invited to participate in an expanded meeting of the leading party group of their institution.

Given such a structure, it is not only hard to distinguish among social, administrative, or Party interference in the judicial system and its operation, it is also unnecessary to make this distinction. To insist on the distinction is to apply a standard Western model of a judiciary, inapposite for China. It fits China into a procrustean bed, akin to "cutting one's feet to fit shoes" or "marking a boat to see where one has dropped a knife in a river." This sort of "research" is not only meaningless; it also blurs and confuses the real problems to be dealt with in the Chinese judicial system and can, moreover, lead to mistaken solutions. In my view, what is truly important is for us to discover, examine, and study concretely the shortcomings and merits of influence on and interference in the legal system (whatever its sources), and to determine how to adjust and improve the performance of China's judiciary, as well as make it just, efficient, and effective.

It should be pointed out that because of the Party's ubiquitous institutional presence and because of the nature of the social revolution in China, the Party's organizations and leaders (through administrative and other agencies) have directly and indirectly influenced, interfered in, and even at times manipulated the judicial process. However, we cannot, indeed, we should not, simply look at this as unfair interference. To be sure, the Party's mistaken interference in the judicial system and its policy errors have led to some disastrous consequences. Yet even during the most extreme moments, such as the Cultural Revolution (1966–1976), there were CCP organizations and officials, who, within the scope of their ability and influence, prevented and reduced the unfairness or radicalism in some cases, including instances in the judicial sphere. Although today it is quite popular to attribute all the problems of the PRC to the CCP or the revolution led by the CCP, it is hard to imagine that the current state of Chinese society and the judicial system would necessarily be better off without the modern revolution and economic development led by the CCP. This is counterfactual, and I will not develop the argument here; I am willing to let history be the final judge. However, if one thinks the revolution led by the CCP was inevita-

ble and on balance improved China, then one has to accept the CCP and its modeling of China's modern judiciary. Though we can argue about whether the costs are worth it, there are no benefits without costs.

Today, although the CCP has adopted "relying on law to rule the country" (*yifa zhiguo*) and judicial independence is inscribed in the Constitution, party organizations and individuals persist in influencing and interfering with the judiciary. However, although these interferers are sometimes leading cadres who "wave the flag" of the local Party organization, it does not mean that this individual's interference represents the Party's or that particular party organization's interference. To the contrary, some of them are violating CCP principles, policies, and disciplinary rules. A county Party chief may interfere with a county court's handling of a case; if he or she acts out of personal interest, it is illegal; if the action is driven by "local interest," it is at a minimum unfair and inappropriate. The Court or Procuratorate has a basis in law and Party disciplinary rules to reject such interference, and both institutions have certainly resisted this sort of meddling, though not always successfully.²⁰ Moreover, sometimes the party's apparent interference is merely issuing an opinion (*pishi*) as a response to a "hot" social issue. Even in the absence of this opinion, the relevant court, acting solely on the basis of the law, would have reached a similar result. In a sense, the Party's issuing of an opinion is simply a necessary political or public relations gesture by the CCP, acting in its role as the governing party that is serving the people. It is a necessary political strategy that shows responsiveness to outcries from the people. Such gestures certainly do not fit the model of separation of powers and are often criticized by many legal scholars who, based on their knowledge of Western judicial practices, think that the CCP should keep quiet about a case awaiting trial. Yet *maybe* the gesture is necessary for the majority of Chinese people who are not interested in foreign comparisons, and want merely justice and social solidarity. From a legal perspective, I find the Party's interference unjustified and am sometimes disposed to join in the criticism. However, from a political perspective and from an objective or neutral position, I do not see why the legal perspective is necessarily more moral and more reasonable than the political perspective, and why the judicial position should always be privileged over the political position. Perhaps, my position is tendentious and conflicts with my self-interest as a legal professional. However, in my view, the Party's interference may reasonably be seen as a performance of its political functions of social integration and representation.

20. See Zhu, *supra* note 4, at 129-31, where I analyze such cases.

Another difficulty in making a distinction is that an administrative agency's interference may be arising directly or indirectly from a CCP decision or policy determination. For example, in order to attract foreign investment, a local Party organization, the local government, or government agencies may instruct (*zhishi*) the local court to "take care of" (*zhaogu*) a foreign investor in a particular case. Such actions do not comport with a pure model of judicial autonomy, but at the same time, the local Standing Committee of People's Congress or other government agencies may enact a local statute of general applicability that requires local courts to implement the CCP policy of encouraging economic development. Regardless of the form it takes, this sort of interference cannot be said to come from the government rather than the Party because it is, in fact, reflecting the political judgments and decisions of the Party center or its local branches. When we turn to the real world to look closely at how such influence is exercised, we find an even more complicated situation. In general, one can say that the final decision making power lies in the CCP. However, at the level of everyday experience, whether interference comes from the Party, the government, the People's Congress, or the media, or individuals within them all depends upon the position and actual influence of the interfering party, upon the institutions he or she thinks is the most effective instrument for intervening, and upon the actual channels he or she uses to affect the court's judgment. It is not always a CCP organization that is the most influential in such matters. Like other people, the Chinese are very practical. They will try anything and everything they think might be effective at exerting influence on the courts. Distinctions among the Party, government, People's Congress, or the mass media are not made. Nor are distinctions between lawful and unlawful methods, such as personal connections with and even bribery of judges.

Even within the judiciary (Courts and Procuratorates), there are various legal, semi-legal, and illegal interferences, both legal and administrative in nature. Sometimes, it is hard to determine whether the influence is Party or non-Party, institutional or personal, or legal or administrative. A Supreme People's Court's decision, even a judicial interpretation from its adjudication committee, the most professional organ within the Court, may still be a response to a policy decision by the Central Committee of the CCP. For example, in December 2003, Supreme Court President Xiao Yang announced that the Court had issued a "leading opinion" (*zhidao yijian*) following intensive study by the Court's Party branch of a statement from Hu Jintao, General Secretary of the CCP.²¹ In

21. Liaowang Xinwen Zhoukan, Oct. 13, 2003, at 20.

this case, it was not simply a matter of restating a CCP Central Committee policy. Rather, the decision addressed a real, pervasive internal problem of the court system. Moreover, a higher court judge or judges' unfair reversal of a lower level decision may be a product of undue social influences on those higher court judges disguised with CCP rhetoric. Finally, even if the Party interferes in a particular case, for example, through the increasingly less common practice of utilizing the Party secretary of the politics and law committee (*zhengfa wei*), the instructions, though written, are general rather than specific. Like any other texts, they need interpretation. Is such interference an interference, and in what sense? Actually, judges who try such cases may use such an instruction to hide their personal judgment, even their partiality.

Accordingly, I conclude, first, that the influence of the CCP upon the judiciary is general and diffuse; it comes not only from party institutions and party leaders, but also through many other avenues.

Second, although the CCP has its own ideology and exercises significant influence on the judiciary, taken as a whole, this ideology is not necessarily incompatible with the general view of justice shared by ordinary people. The organizational principles of the CCP are in conflict with the operation of professional logic in the legal/judicial system, but in concert with China's social development, the legal/judicial profession in China is institutionalizing itself. Third, as a concrete, operating political party within society, the CCP is not essentialist; every sort of person, interest group, and political force may try to use the mechanism of the Party to influence or interfere in the operation of the judiciary. Their actions have both a positive and negative effect on the formation and development of the judicial system. Fourth, on the level of everyday life, not only is it difficult to identify the pure party interference, it is also important to note that such interference has a strongly pragmatic and opportunistic character. Therefore, I would argue that separating Party interference from other interference cannot further our understanding of the operation of the basic level legal system. Moreover, other than exacerbating an ideological and essentialist understanding of the CCP and China, such distinctions have no intellectual significance.

III. WHAT IS THE FRAME OF REFERENCE?

Even it were possible to identify a purely Party influence, such research is untenable because of the problem of an implied frame of reference. Indeed, there are many flaws in the PRC's judiciary, and they are probably attributable to the CCP's ideology. However, I prefer to trace them to the unprecedented social transformation of China during the

last one hundred years. One of my aims in writing *Sending Law to the Countryside* was to try to identify and find solutions for these flaws. Perhaps, because my effort was insufficient, my analysis not trenchant, my vision too narrow, indeed blind in places, my work has its shortcomings. Nevertheless, it is hard to construct, indeed even to imagine, a standard frame of reference, whether experiential or ideal, for the political-judicial relationship that could be used to objectively measure the CCP's influence and interference at the basic level of the judiciary and then evaluate the pros and cons of such influence.

All modern countries have political parties, which despite the commonly recognized principle of judicial independence, influence or interfere in judicial matters in various ways. The extent of the phenomenon may be less than in China, but it is nonetheless fairly common. Actually, without the active participation and influence of political parties, it is hard to imagine the existence or perpetuation of an institutional judicial independence. My language may seem a bit cynical, but it describes a historical and contemporary reality. Was it not out of loyalty to the Federalist Party and determined resistance to the Republic-Democratic Party that Chief Justice Marshall created the system of judicial review, which serves as the core of American judicial independence?²²

Some may dismiss my example as characteristic of the early stage of judicial independence. However, even in many Western countries today, judicial independence depends on and indeed is guaranteed to a great extent by party politics. Without party politics there would be no judicial independence in these countries. For example, in the United States, the two political parties exert influence on the courts and judicial process through the system in which the Senate advises and consents to the President's nomination of federal judges. Also, as the example of the Warren Court shows, some American judges voluntarily make their judgments in accord with their party's ideology. In addition, some states have institutions of election and recall.²³ To different degrees, all these institutions and practices are influenced by party politics. Personally, I regard these political parties' influence on the judicial system as generally acceptable and lawful. Moreover, I recognize that neither in degree nor character can they be equated to the political in-

22. Oliver Wendell Holmes, John Marshall, in *The Essential Holmes: Selections From The Letters, Speeches, Judicial Opinions, And Other Writings Of Oliver Wendell Holmes, Jr.* 206-09 (Richard A. Posner ed., 1992). I discuss the background of *Marbury v. Madison* in Zhiddu ruhe xingchengde? [How was the System Formed?], 1998 Bijiaofa Yanjiu [Res. In Comp. L.], no. 1 (1998).

23. Henry J. Abraham, *The Judicial Process: An Introductory Analysis of the Courts of the United States, England, and France* 37-42 (7th ed. 1998).

fluence or interference to which Chinese judges are subject. However, the acceptance by Upham and me, as well as by *many others* of the ineluctability of parties' political interference does not mean that we can deny that it is indeed political influence.

"Many" does not mean everyone or on all issues. In America, there have been instances of what Judge Robert Bork and other scholars regard as egregious interference—for example, the struggle in 1987 between Republicans and Democrats over President Reagan's nomination of Bork to the Supreme Court. At least Judge Bork regarded it as inappropriate interference, or in his words, a "political seduction of the law."²⁴ Is this an overstatement prompted by Judge Bork's anger? Let us imagine an alternative outcome in which a Republican-dominated Senate confirmed Bork. In the eyes of adamant Bork opponents Senator Ted Kennedy and Senator Joseph Biden (who in the Democratic-controlled Senate was chair of the Judiciary Committee), would that result not also have been political? Actually, the controversy over Judge Bork's nomination reveals only the tip of the iceberg of the influence of disciplined American party politics over judicial affairs. It was an exceptional case, but less controversy in a confirmation case does not mean the absence of politics and political influence; politically non-controversial is not politically neutral or politics-free.²⁵ The nomination and confirmation of federal judges in the United States is becoming more and more political.

Politics and political interference are evident not only in the process of nominating and confirming judges, but also in some concrete cases. The interference comes not only from politicians in their role as party leaders, but also through the willing cooperation of politicians serving as judges. Sometimes, such efforts may be out of bounds. The most famous or infamous instance is Chief Justice John Marshall's handling of *Marbury v. Madison*.²⁶ In that case, there was no party leader

24. Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (1990).

25. A recent empirical study found that "the more important the court, the greater the difficulty of having the person confirmed. Although the confirmation rates have fallen and the length of the confirmation process has lengthened dramatically, the ex-post facto measures of judicial quality of circuit court nominees...or judicial independence have been decreasing over time....The most troubling results strongly indicate that circuit court judges who turn out to be the most successful judges...faced the most difficult confirmation battles . . ." The study speculates that "[p]ossibly, senators of the party in opposition to the President really care only about preventing the best judges from being on the circuit court because they will have the most impact." John R. Lott, Jr., *The Judicial Confirmation Process: The Difficulty with Being Smart*, 2 *J. of Empirical Legal Stud.*, 407, 443-47 (2005).

26. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

demanding that he handle the case in a certain way, but his aggressive personality and firm party ideology motivated him to make perhaps the greatest decision in the American constitutional system. In the last fifty years, the Berger and Rehnquist courts have, to a certain degree, been much the same: more political than juridical.²⁷ The most recent instance is the controversial case of *Bush v. Gore*.²⁸

Please note that in no way am I saying that American political parties' influence on the operation of courts is the same as the CCP's influence upon basic courts in China. The two are very different. The United States has a two-party system, while in China, the "[Communist] party is the leader of all";²⁹ in the United States, political influence on the judiciary probably comes mainly from judges' self-conscious loyalty to party ideology and platforms, while in China the influence is a function of the party's demands on and disciplinary control over judges; and in the United States, with lifetime tenure and high salaries as protection, some judges will not hesitate to "rebel against" their party,³⁰ while in China, judges, who are civil servants, can find comfort only in the supportive writings of a few scholars. Thus, I recognize that in terms of parties' political interference in the judicial system, the differences between China and the United States are ones both of degree and character.

Moreover, I want to point out that nothing I have said implies that in the course of transforming its judiciary, China should not study the United States and other Western countries. To the contrary, the PRC is in the midst of studying these examples, and out of a concern for the need to address China's problems, I approve and support this effort.

However, the position I have taken above has nothing to do with the frame of reference issue with which I want to engage. The question remains: what is the proper frame of reference for measuring and evaluating the relationship between party politics and the judiciary. The American? The British? The German? The French? Or should I construct a standard model based on the judicial practice of all of the nations in the world? But why should they be basis for the standard, and is that standard appropriate for China? From where does such a com-

27. Lucas A. Powe Jr., *The Warren Court And American Politics* (2000); Earl M. Maltz, *The Chief Justiceship of Warren Burger, 1969-1986* (2000); Tinsley E. Yarbrough, *The Rehnquist Court and the Constitution* (2001); *Rehnquist Justice: Understanding the Court Dynamic* (Earl M. Maltz Ed., 2003).

28. Cf. Richard A. Posner, *Breaking the Deadlock: The 2000 Election, The Constitution, and the Courts* (2001); *The Vote: Bush, Gore, and the Supreme Court* (Cass R. Sunstein & Richard A. Epstein Eds., 2001).

29. 2 Mao Zedong, *Mao Zedong Zhuzuo Xuandu* [Selected Readings Of Mao Zedong's Works] 852 (1986).

30. Cf. Laurence H. Tribe, *Constitutional Choices* (1985).

parative law model or statistical standard derive its normative force? From where does its justness come? If, as Speaker of the U.S. House of Representatives Tip O’Neil said, “all politics are local,” why should local judicial politics adopt a universal standard? We cannot get to this form of universal standards unless I adopt a linear version of modernization theory, which I steadfastly reject, but Professor Upham believes I support.

Should I dismiss all the empirical evidence and directly develop an ideal model frame of reference by which to examine the relations between the judiciary and political parties? This is, of course, possible and really not that hard. Or, should I derive such a model relationship from the separation of powers (with its Western origins and cultural coloring) or other similar concepts? I believe I can do it quite well if practice is not considered. But then, unless we are essentialists who not only believe that there is one true, correct, universal, and transcendent definition of the relationship between political parties and the judiciary, but also believe that we have perfect access to that definition, we still cannot prove that this ideal or deduced model for political party-judicial relations is indeed legitimate. Perhaps it is possible to broaden or loosen the standard a bit, consider the national context where a judiciary is located, and construct a “comparatively reasonable” relationship between political parties and the judiciary. But methodologically, this would still be an artificial construct which would certainly deviate from the American standard implicit in Upham’s critique, comparative law’s ideal model, or the essentialist standard, because one would have to return to the contextualized, consequentialist, functionalist model by which I abide in my book. One must come back to China’s social context, where the judiciary operates, and evaluate the relationship between party politics, the government, and the judiciary in considering the systematic consequences of such a judiciary in the Chinese society. Even if all this is possible, it is hard to avoid innumerable controversies over the reasonableness of the construct. For example, I consider that in *Sending Law to the Countryside*, I constructed a reasonable analytical structure and frame of reference for evaluating the relationship between the Party and the judiciary, and provided a focused discussion of a series of related issues. However, Professor Upham finds in it an absence “of politics and political power.” Through numerous, useless publications, we could debate forever the reasonableness of the framework, but we will get nowhere.

I say useless because not all debates end in agreement or intellectual enlightenment, and even if we can reach an agreement over the frame of reference, does this frame have any practical uses? Whether

we deduce it from the general, abstract it from empirical materials, or make a standard directly out of American or some other national experience, in the end, it mainly provides us with just another frame of reference for criticizing contemporary Chinese judicial practice, making us think that we have truth and justice in our hands. But it does not help us either to understand China's reality or to transform that reality. Indeed, we may be worse off than we started. This sort of frame of reference is doomed to fail because from the beginning, the current relationship between political parties and the judiciary is neither derived from a concept or ideology, nor modeled on a foreign standard. The current state of China's judicial practice is a product of China's modern historical and social development, a social reality constructed from various social variables.

IV. THE PARTY AS AN INSTITUTIONAL ALTERNATIVE

My response cannot stop here. Otherwise, readers may think it is not a strong response, but rather at most a defensive pleading for my methodology that, even if successful, merely dodges Upham's arrow. It might enhance the misimpression about the relationship between the CCP and the judiciary within China and the implied universal, normative character of American-type judicial politics.

More importantly, such a brief response leaves unexplored topics that are inherently deserving of further consideration and it is therefore unfair to Chinese contemporary history, the CCP, and the Chinese judiciary to stop here. So, in this section, I want to engage in a thought experiment and argue for the *contextual reasonableness* of the relationship between the CCP and the judiciary and for its necessity in China's social transformation. If my argument is sound, it will further demonstrate the problems with Professor Upham's criticism of my book, not only in his methodology, but also in his value judgments. Further, such a social science analysis of the relationship between Party and the judiciary may provide a new frame of reference for understanding and evaluating the issue of the relationship between the CCP and the PRC's judiciary. Even if my effort fails, it will advance the academic research on China's judicial system.

The relationship between the party-state and the judiciary in China evolved over the course of China's modernization. Since 1840, China's most important task has been to transform itself successfully—economically from an agricultural society to an industrial and commercial society; politically from a community unified by culture to a modern nation-state unified by politics; and culturally from a rural society dominated by Confucian humanities to an urban one led by the social

sciences.³¹ In terms of key variables such as time, population, and geographic size, this was an unprecedented historical transformation. Without a vigorous, core political power, it is unimaginable that this change could have occurred in such a short time and in the face of a fiercely competitive international society. The early history of the Republic of China is clear evidence. Only when the GMD and CCP appeared as national, revolutionary parties and twice cooperated, did Chinese society begin its first steps toward unification, and only in the Second World War, with the assistance from Soviet Union and the United States, did China win its first war against foreign invasion since 1840.

It should be noted that the GMD and CCP are profoundly different, but looked at from another angle, whatever their differences, both are different from contemporary Western political parties. Both the GMD and CCP were aware that the task and historical burden of the nation was the economic, political, cultural, and social transformation of China. To achieve this goal in the wake of imperial China's collapse and in the face of an intensely competitive world, they had to use every possible means to mobilize and integrate all political forces in the service of national unity, independence, and freedom, which are preconditions to social and economic development. What I have described is the process of *jianguo*, which is commonly translated as "state-building." I prefer to translate it as the *constitution* (or re-constitution) *of the nation-state*. It is in this historical context of constituting the nation-state that the CCP and GMD came into being. In contrast, the political parties in the West were established and operated within already-constituted nations. They were political organizations that served as vehicles for common interests within these constituted nations, and generally speaking, did not confront the historical problems and tasks that faced the Chinese political parties, nor did they have the long-term political goals of the Chinese parties.

Because of this historical task, both the CCP and GMD were revolutionary parties, rather than merely political parties holding power. They had to engage in armed struggle to gain the power, and then, even after they gained political power, they had to continue to play the role of a revolutionary party, leading society in the completion of social revolution, land reform, and industrialization. All of these historical tasks dictated that both parties be elitist: they had not only to be able to propose national reform, but also to mobilize and lead the masses to

31. Zhu Suli, *Daolu Tongxiang Chengshi—Zhuanxing Zhongguo De Fazhi Of [All Roads Lead To Cities—Rule Of Law In A Transforming China]* Intro. (2004) [Hereinafter Suli, *All Roads Lead To Cities*].

accomplish the transformation in order to construct or constitute a modern nation-state, precisely the original meaning of constitution. However, this task could not be accomplished by the political elites without the collective effort of the nation. Thus, both parties had to be capable of integrating all kinds of other social forces, representing different interests, and in this sense, they became the parties of the masses.³² As a consequence of this historical context, the CCP and GMD developed not only strong political ideologies, but also strict party discipline and tight internal organizations to insure effective implementation of party policy. Their party structures emphasize “democratic centralism,” “organized democracy,” and “disciplined freedom,” which all seem to be antinomies or oxymorons, but are actual practices within the parties. Party members who violate Party discipline will be sanctioned or even expelled.³³

Therefore, such parties are not only an important motivating and leading force for social change; they have also been a critical institutional alternative in modern Chinese society. Before they take power, they are organizational mechanisms and social mobilizers.

The party organization, party leaders, and even ordinary party members are thus alternatives to the conventional bureaucracy and bureaucrats. Given the absence of the professionals and bureaucrats China needed to order its society, after taking power, besides continuing their function of social mobilization and organization, the parties, to a certain extent, could not but assume the role of the bureaucracy, and in the course of that process, their members became the bureaucrats that modern China needed. The so-called party-state, or rule by the party, that the GMD first proposed and emphasized³⁴ is therefore not only natural, but also inevitable. The CCP always opposed the GMD’s idea of “party-state,” but in reality, such a pattern characterized the CCP both before,³⁵ and certainly also after its victory in 1949. Indeed, the CCP’s party-state was even more pronounced than the GMD’s. Thus, ei-

32. Cf. CCP Const., supra note 15, general princ. ; Const. Of The Guomindang preface [hereinafter Gmd Const.].

33. CCP Const., supra note 15, general princs. Gmd Const., supra note 32, arts. 3, 4, 5, ch. 12.

34. In 1928, the Standing Committee of the GMD stated that the Party was the Supreme Tutelar of the nation. In 1931, the Nationalist Government invited selected representatives of rural society, labor, business, and the education sector to convene and draw up a Tutelary Period Provisional Constitution of the Republic of China, Article 30 of which specifies that during the Tutelary Period, GMD will represent the National Conference to direct and supervise the National Government. Xu Juhua, *Jiang Jieshi Chenbai Lu [A Record Of Jiang Jieshi's Success And Failure]* ch. 12.

35. 1 Xiaoping, supra note 6, at 12.

ther the GMD or the CCP has been the most important part of the constitutional and governmental structure of modern China and the core force of that modernization.

The Party's objective is social transformation. Accordingly, it cannot base itself directly on democracy—the people, after all have a tendency to be conservative and short-sighted—but must insist on the central role of the Party's elites and leadership group in guiding the revolution and social transformation. But at the same time, in order to lead the masses, the Party cannot abandon them. In order to be representative, both the GMD and CCP had to maintain a certain degree of internal democracy (whether it was called “democratic centralism” or “democracy with organization”). Parties become a quasi-constitutional structure in another sense as they serve as an alternative for or a necessary stage on the road toward constitutionalism.³⁶ Within the party, party discipline and guiding principles perform the function of law and statutes. In his analysis of the party-state of China during the twentieth century, Harvard professor William C. Kirby pointed out that the goal of a party-state is not to lead the government, but to reform the Chinese people and recast them into citizens of new nation-state. The party-state, he noted, is a political entity pursuing social and economic development; its aim is complete mobilization of all China's people and total industrialization.³⁷

This historical task cannot be fulfilled within a short period, so the party-state structure may last quite long since the taking over of power does not equal constitutionalism, nor accomplishment of the self-imposed historical task. Parties want to accomplish their ideals through the coercive state and governmental powers under their control. However, when in power, the requirement of effective and stable governance will force parties to gradually adjust their policies; to enact laws; to establish conventional institutions, such as the National Congress or National People's Congress; to recruit qualified civil servants and set up bureaucracy; and to establish a judiciary and improve its function. It is a long process of transformation from a revolutionary party to a governing party; a process of transformation from a pioneer and elitist party to a popular party. Because these processes of reformation of the

36. Sun Yat-sen proposed three stages to China's constitutionalism: the period of military government, the period of political tutelage, and the period of constitutional government. See Sun Yat-sen, *Guomin zhengfu jianguo dagang* [A Constitutional Program of the National Government], in *Zhongshen*, supra note 5, at 126–29.

37. William C. Kirby, *Renshi 20 Shiji zhongguo* [Understanding China of Twentieth Century], 2001 21st Century, no. 10, 114–24 (2001), available at http://www.usc.cuhk.edu.hk/wk_wzdetails.asp?id=1523.

Party and institutionalization of modern nation-state take time, they are still ongoing in the PRC.

Thus, it is understandable why in contemporary China, complete judicial independence is impossible and why the relatively low degree of party interference in the judiciary in the developed countries of the West is not likely to be systematized in China. Actually, in contemporary China, the entire modern state apparatus, including the judiciary, consists of inventions created by the governing political parties on the basis of their political ideals, policies, and organizational structures. The specific forms, such as the GMD's "partyization of the judiciary," or the CCP's "sending law to the countryside" and political and judicial committee (*zhengfawei*) may be accidental, but the comprehensive leadership, influence, and control of the parties was inevitable and pervasive. Thus, we have the phenomenon that I have described above: in contemporary China, it is well nigh impossible to distinguish what is and what is not the CCP's influence and interference, for in fact the judiciary is the CCP's creation.

Although GMD and CCP had some commonalities, there were also significant differences between them, most notably the different social forces that they integrated and represented. From the 1920s onward, the GMD inherited most of the technocrats from the late Qing dynasty, as well as the vast majority of professionals and mid- to upper-level intellectuals, for, as the party in power, the GMD provided them with room for their knowledge and skill. Moreover, another major constituent force of the GMD was the group of military officers who had graduated from the Huangpu Military College and who served as another institutional alternative to the bureaucracy.

By contrast, despite consistently seeking a united front during its military struggles, the CCP had no way to attract the broad participation of such groups, not only because it had no space to deploy their skills, but also because for these elites, the CCP was a much riskier choice, especially in its military struggle for national power. Moreover, unlike the GMD, the CCP also did not have a captive military college to train its officers, who instead got their experience and skills on the battlefield. During wartime, most military officers of the CCP were trained in the battlefield. Thus, the CCP was less capable than the GMD of utilizing modern or Paramodern institutions and professionals.

The CCP membership came mainly from peasants and other mid and lower social classes. Because of the peasants' mode of production, they tended to be less modern, less disciplined, and less likely to be long-term thinkers. Thus, in order for the CCP to rely on this mass base to make a successful revolution, it had to develop stronger party orga-

nization and leadership, stricter discipline, and a more radical ideology.³⁸ There is substantial research to show that during the time that the GMD held power on the mainland, the actual political power and influence of its party organization and party members was substantially weaker than similarly situated CCP party organizations and cadres. For example, the GMD's propaganda and organization ministers were much less influential than the CCP's. Such evidence is abundant.³⁹ The differences between the CCP and GMD lie in the social conditions from which they were constructed; the ideological differences may not have been as important as many people think.

The CCP's stronger party organization and ideology compensated for its lack of a bureaucratic system for modern government, but they also impeded the creation and development of such a bureaucracy. Of course, the CCP felt no urgent need for a bureaucracy, and long after it took power in 1949, it remained a revolutionary party in character. There was no quick transformation into a governing party; there was no effective formation of a decent bureaucracy with technocrats, civil servants, and professionals, such as judges and lawyers. In all aspects of governance, the CCP played a decisive and dominant role. Political loyalty and ideological purity became the important criteria for selecting government employees, including those in the judiciary.⁴⁰

Not until the 1980s did the CCP begin to emphasize knowledge and human talent, seeking to create a reformed cohort of cadres who were more knowledgeable, professional, specialized, and younger. This trend was fostered by the steady, rapid development of higher education and a dramatic increase in university graduates. The 1993 Provisional Civil Service Act,⁴¹ which replaced recruitment through political channels with selection by open, competitive exams,⁴² symbolizes this

38. Cf. 1 Mao Zedong, On Correcting Mistaken Ideas in the Party, in *Selected Works of Mao Zedong*, vol. 1, Peking, Foreign Language Press, 1975.

39. See *supra* note 8.

40. Cf. Dong Biwu, *Dong Biwu Faxue Wenji [Legal Works Of Dong Biwu]* (2001).

41. Guojia gongwuyuan zanxing tiaoli [Provisional Civil Service Act] (promulgated by the State Council, Aug. 14, 1993, effective Oct. 1, 1993), available at <http://www.china.org.cn/chinese/MATERIAL/385908.htm>. On January 1, 2006, the Provisional Act was superceded by the Civil Servant Law (Zhonghua Renmin Gongheguo Gongwuyuan Fa). For the Chinese version, see the website of the National People's Congress, <http://www.npc.gov.cn/zgrdw/common/zw.jsp?label=WXZLK&id=337350&pdmc=110106>. For an English language version, see http://www.fdi.gov.cn/pub/FDI_EN/Laws/GeneralLawsandRegulations/BasicLaws/t20060620_50863.jsp.

42. For a discussion of this Act, which is compared to the Pendleton Act that created the United States Civil Service, see King K Tsao & John Abbott Worthley, Chinese Public Administration: Change with Continuity during Political and Economic Development, 55 *Pub. Admin. Rev.*, Mar.-Apr., 1995, at 169-74.

fundamental change. Similarly, the 1990s appearance of criticism of the practice of discharged military officers serving as judges⁴³ was not accidental. Though it was initiated in academic circles, it found an echo in the court system itself, indicating the rise and increasing influence in the judiciary of the first generation of post-Cultural Revolution trained legal professionals (most of whom were around forty years old). They constituted a challenge for the established institutional structure in the judiciary and led a series of judicial reforms.⁴⁴

In the mid-1980s, the CCP proposed separating party and government, but progress has been neither fast nor significant.⁴⁵ It seems to me that a prominent (though not the only) problem is that parallel duplicative systems address the same matter—the Party and the government have separate but corresponding organizations and personnel. Moreover, the logic of the Party organization impedes its becoming the logic of an organization with specialized functions.⁴⁶ High transaction costs sharply reduce work efficiency. Also, because of the Party's hold on power, opportunists can use their position to use ideological language to expand their influence and serve their self-interest. Thus, the Party has consistently promoted strengthening and improving party leadership,⁴⁷ as well as establishing a new relationship between the Party and the judiciary.⁴⁸ China still faces an enormous task of reform, and its performance is still subjected to withering criticism from West-

43. He Weifang, *Fuzhuan junren jin fayuan* [Discharged Military Officers Come to the Courts], Nanfang Zhoumo, Jan. 2, 1998.

44. Renmin fayue wunian gaige gangyao [A Five-Year Program for the Reform of People's Courts], 1999 Zhonghua Renmin Gongheguo Zuigao Renmin Fayuan Gongbao, no. 6 (1999).

45. Deng Xiaoping raised this idea in June 1986. 3 Xiaoping, supra note 6, at 164. In September of that year, he further pointed out that the separation of Party and state should be the top priority political reform. Id. at 179. Then, in October 1987, the 13th meeting of the CCP Party Congress adopted Party General Secretary Zhao Ziyang's report, *Yanzhe you zhongguo tese de shuihuizhuyi daolu qianjin* [Advancing Along the Road of Socialism with Chinese Characteristics], thereby formally listing party-state separation as the key to and the primary task in reforming the political system.

46. Su Li, *Fayuan de shenpan zhineng yu xingzheng guanli* [The Adjudicative Function of Courts and Administrative Management], 1999 Zhongwai Faxue [Chinese Foreign Jurisprudence], no. 5 (1999). Su Li is a pen name used by Zhu Suli.

47. *Dang he guojia lingdao zhidu gaige* [Reforming the System of Party and State Leadership], August 18, 1980, in 2 Xiaoping, supra note 6.

48. For some of the most recent attempts, see *Shenzhen jiangcheng dangzheng fenli zheng'gai xianfeng* [Shenzhen at the Forefront of the Political Reform Separating Party from Government], Gongshang Shibao, Jan. 14, 2003. According to the article, this was the largest political reform since the Party took power in 1949. Its key component was the separation of the Party from the administrative and legislative systems, leading toward a Shenzhen municipal government with a Western-style separation of powers, in which the municipal government and the courts were in a mutual balance of power.

ern governments and scholars, much of which is driven by their own ideology. I admit that some criticism is justified and deserves the CCP's attention. However, historically, functionally, and consequentially, China under the CCP's leadership and governance has achieved great success. Most notably, the CCP created a unique, innovative path to modernization in a country with a large peasant economy and no modern constitution or political institutions. Today, China's political system may not entirely meet our expectations, but the practical question is whether abolishing the current system of CCP leadership would make China better off and develop faster in the future, or, to put it as a counterfactual, without the CCP, could China have accomplished what it has accomplished. I think not. In the last thirty years, to an extent, the CCP actually has transformed itself and successfully led China's reform and social modernization.

This statement holds true for the judiciary. Although the recent judicial reforms have, to some degree, been in response to pressures accompanying economic transformation, the real organizational and motivating force has been the CCP, including its leaders and intellectuals. Reform has been implemented as a consequence of Party principles and policies and through the exertion of party organization discipline within the judiciary. I do not think every reform measure is good or desirable, but on balance their benefits outweigh their defects.⁴⁹ For example, although the CCP's control seriously compromises the independence of the judicial system, especially the independence of judges, in the absence of alternative institutions that are not yet fully in place during this time of social transformation, to some extent Party control has limited the corruption, laxness, and partiality of the judiciary. This last point, I should note, is the subject of considerable controversy among lawyers and legal scholars. I, personally, respect others' criticism, but conclusions about China's judicial system cannot be reached simply through debates; they will come as the result of empirical research, which requires time. I do not want to rush to judgment and am willing to be critiqued and rebutted, but if we are to research China's modernization, especially the relationship between the Party, the state, and the judicial system, then we must look at the question with an open mind and take into account the historical and social context of these institutions. Evaluations and judgments based solely on Western experience or ideology or out of the strategic considerations of Western politicians have no academic value or possible practical applicability. From the perspective of democratic theory and evolutionary

49. Suli, *All Roads Lead To Cities*, supra note 31.

economics, valid institutional development and innovation arises from competition. The vicissitudes along the road of social development are not predetermined. The same is true for the evolving relationship between the party-state and the judicial system. It is therefore critical for us to examine this relationship as scholars and not as ideologues.

V. A NEW MODEL FOR THE STUDIES OF CHINA'S JUDICIAL SYSTEM

Once we understand the role that the CCP has played in modern China in social mobilization and representation, in nation building, and in the creation of institutions, then we must maintain a degree of moderate academic vigilance against the apparently successful Western experience with the judiciary and rule of law. Vigilance is not hostility. Rather, simply because of current Western institutions' ostensible success, we should not take them as a decontextualized standard when they are in fact embedded in and abstracted from particular historical and theoretical contexts. And then, once China fails to comport with this standard, it becomes an object for politicized academic criticism and reform. Such an approach is fairly common among both Western and Chinese scholars. I am not accusing them of intentionally using ideology as a critical standard. Many of them work hard to understand China and wish it well. However, their social experience imperceptibly impedes them from placing themselves in the position of the Chinese and considering China's current situation from a value-neutral perspective. Inevitably, our life experience impedes and defines the scope of our imagination.

Beyond their social environment and history, what has also influenced Western scholars, and through them some Chinese scholars as well, is Western scholarship on the relationship between the party-state and the judiciary in the former Soviet Union and communist countries in Eastern Europe. This scholarship and its underlying theoretical framework may have prevented them from realizing the uniqueness of China's experience. In the Soviet Union and formerly communist Eastern European countries, the major function of the Communist Party was seen to be, and indeed is, to control the bureaucracy, including the judicial professionals who had been in place before the Communist Party existed. This research not only enhanced the notion of an inherent separation of and conflict of interests between the Communist Party and the bureaucracy, it also left the impression that the bureaucracy always came first and that Party control followed. This conclusion is reasonable and, considering the context of these countries, possibly correct. For example, in the Soviet Union's early years, many Red Army generals, such as the famous Marshal Mikhail Nikolayevich Tuk-

hachevsky and the hero of World War II, Marshal Georgy Konstantinovich Zhukov, were previously military officers of the Tsar. In order to secure its leadership and control, the Communist Party sent political commissars to ensure the implementation of the party's lines in the Red Army. The Party followed the same approach in many enterprises and governmental agencies, and this practice was followed by other Eastern European countries.

China, however, was not like this. Long before CCP took power in China, its leaders clearly understood that China was different from the Soviet Union. In 1936, when a presidium political commissar, Yang Chengwu, was reappointed as the military commander, Mao Zedong explained the difference between the Soviet Red Army and the Chinese Red Army: in the Soviet Union, political commissars were sent to supervise military officers, most of whom were former White Army officers, while in China all the military officers and political military officers in the Red Army were trained by the CCP and experienced in combat.⁵⁰ Yang Chengwu later became one of the most famous generals of the People's Liberation Army (PLA), but few knew that he had previously served as a political commissar;

Yang was not unique in the PLA. His career path, like that of individuals in other professions, was common.

Therefore, the model abstracted from the experiences of the former Soviet bloc is not entirely appropriate for modern China. In modern China, whether the GMD or the CCP, and whether before or after one of these parties held power, to varying degrees the general pattern was that the party preceded the government, the judiciary, and the armed forces. Before the GMD and CCP, there was hardly a modern nation-state, government, judiciary, and army.⁵¹ There is some truth in the CCP propaganda, "without the CCP there is no new China." Thus, the time sequence of the appearance of the Party and the modern institutions of China demand a new framework or model of research.

As I have said, this paper aims partly at Chinese scholars of the current legal system because some of them avoid any discussion of political parties. It may be from disgust with the extreme leftist politics of the Cultural Revolution, fear, or excessive sensitivity. However, as I have argued in this essay, their unwillingness to deal with the CCP may

50. Yang Chengwu, *Yang Chengwu Huiyilu [Memoirs Of Yang Chengwu]* 334 (1987).

51. The first national conference of the GMD convened in 1924, and the first military college, Huangpu Military Academy, which became the major source of soldiers for the national army under the GMD, opened in 1925. The national government of the GMD took power in 1927. The first national conference of the CCP convened in 1921, the Chinese Red Army was founded in 1927, and the CCP national government took power in 1949.

also simply reflect their practice of labeling the particular experience of the West as a universal theoretical framework for legal systems. This approach leads to two sorts of responses in dealing with the issue of Party influence. One is to list examples of the glorious history of judicial independence in foreign countries. Either they think that they will persuade the Chinese people, government, and Communist Party to carry out judicial reform or even revolution on the basis of the Western model, or they hope that by not talking about Party influence on the judiciary, it can be made to gradually disappear. This is not an unreasonable strategy for pushing judicial reform, but I doubt that it can be successful and find it naïve. It cannot be successful because the Party and government's influence are a historically constructed and established fact. Whether one likes it or not, the Party is an integral component around which the judicial system revolves. If one wants to reform the legal system, then one has to face this situation directly.

Another common approach by some Chinese scholars is to oppose the Party's involvement and treat it as a historical mistake rather than understand how the current system happened. They do not look for or do not see the variables that constitute the causal relationship that explains China's current system. Because they insist on using an idealistic historical point of view rather than a materialist one from which to understand the history of the judicial system, they cannot see that the Party was, from the outset, an external force in the system, but one that is now fully integrated. They persist in imagining the glorious moment in which an unsullied legal system emerged and thereafter and forever remained innocent, flawless, and pure. This sort of hope is very important in establishing the courage and commitment for judicial reform, but it is of little advantage in successfully accomplishing that reform.

Against these two approaches, I would argue that in studying contemporary China, one must treat either the GMD or CCP as a constituent element of the political and legal system or as a constitutional structure. That implies that no matter how much it deviates from "the standard" or the experience of Western countries, the system should be seen as something normal and not as a freak or an anomaly produced by mistaken theories and viewpoints. And despite the current system's weaknesses, problems, and even mistakes, nearly all of which are in some way directly or indirectly connected to the Party's influence, one cannot ignore the Party's positive contributions, which are often the flip-side of what is perceived as negative.

Without question, what was reasonable and ideal yesterday does not necessarily remain so today. Today, in the wake of China's reform and development, the relationship between the Party and the judicial

system certainly needs adjustment and reform. Whether the path to reform is the 1980s approach of separating Party from state, Jiang Zemin's "three representatives" (*sange daibiao*) approach of enlarging the party's representativeness, or something else, they all require careful, attentive, long-term work from those involved with the law. However, the effect of history means that we cannot start anew. If we cannot treat seriously China's adjudicature of yesterday, then there is no way to understand its adjudicature of today or to anticipate what it will be in the future. The past is one of the variables in the current system and will certainly influence tomorrow's. For the sake not only of legal scholarship, but also of legal practice, the Party's role in the judiciary and in administration of justice must be objectively understood and not treated as an abstraction.

I am not making a value judgment about whether the Chinese model of the Party as preceding and shaping government, judiciary, and even the army is good or right. What I am suggesting is that we revise the theoretical model for studying and understanding the relationship between the Party and modern China and base it on the Chinese experience. My aim is to make effective, practical, and, most importantly, constructive suggestions for China's social, political, and judicial reform. Even though I am expecting to be criticized or even condemned by people from both the left and right for what I have written in this essay—in particular for my undifferentiated treatment of the CCP and GMD and for my depiction of the CCP as a constitutional alternative in China's social transformation, I welcome such criticism because it may prove that I have done something right.

Desperately Seeking Subsidiarity Danish Private Law in the Scandinavian, European, and Global Context*

Joseph M. Lookofsky**

Dean Levi, colleagues, students and friends: Thank you for this great honor to lecture at this fine law school today in memory of my dear friend and colleague Herbert Bernstein. This is my fifth visit here, and I have wonderful memories.

Last January Dean Levi's predecessor, Dean Bartlett, invited me to come here to Duke to lecture comparatively, in Herbert's honor, on a topic in Danish or Scandinavian law. In response to that kind invitation, I will speak about subsidiarity, mainly within the context of Danish, Scandinavian and European private law. Thank you, Paul [Haagen], for helping me to introduce the subsidiarity concept.*** That will save me a bit of time during the first part of my lecture.

Now, to help introduce the comparative context of my lecture, I ask you to imagine a map composed of concentric circles or rings, a map which depicts the "private law universe." At the center of this universe, within the

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*** In his introduction to the lecture, Prof. Paul Haagen had explained: "Subsidiarity is a principle of European Community Law first established and defined in Article 5 of the Maastricht Treaty of 1992. It is intended to ensure that decisions are taken as closely as possible to the citizen, and that the community can only take action if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the member states. It is somewhat similar, Professor Lookofsky has noted, to the principles set out in the Tenth Amendment to the U.S. Constitution."

innermost circle of this map, lies the private law of Denmark. Just outside this, the map's second ring depicts private law applicable in all of Scandinavia, in particular, certain private law rule-sets known as the Scandinavian "Model Laws."

Both of these inner rings are surrounded by a third ring which represents the law of the European Union,¹ and this ring is the one in which the concept of subsidiarity lies. Finally, we imagine the outermost "global private law" ring, which comprises certain private law rule-sets adhered to not only by European States, but also by many non-European countries, including (e.g.) the United States and China. Within this last ring we find such commercially significant treaties as the Convention on the International Sale of Goods (CISG) and the New York Convention on International Commercial Arbitration.

This map serves to depict *my* private law universe, and it's not so unusual that I see things from my own location and perspective. After all, I've been in Denmark for some thirty-five years, and so Denmark *is* the center of my universe, not only as regards private law, but also as regards life and society in general. I realize that might be hard for an American audience to understand, since I was born and lived here in the United States for twenty-seven years, but I have lived in Denmark for an even longer period of time, and the center of my universe shifted (or at least drifted) towards Scandinavia some time ago.

As I proceed with my lecture, I'll ask you to keep my private law universe in mind. I'll use Denmark (the innermost ring) as my starting point and then work outwards. Before I tell you about Danish private law, I'll say a few things about Danish society in general. I think these observations about the societal context might make it easier to explain some of the perhaps unusual concepts of Danish law which I intend to mention later.

I will also make a few general points about Scandinavian law. There are, to be sure, many similarities between Danish and Scandinavian law, but there are also many differences. There is, in fact, no real "Scandinavian Law," as there are no (regional) Scandinavian rules which regulate conduct throughout Scandinavia,² but we do have some similar private law legislation in Denmark, Norway and Sweden, because these statutes were originally drafted on the basis of models which reflect a Scandinavian

1. The author notes that in a more perfect map of this "private-law universe" the third ring would account for the fact that one of the Scandinavian States (Norway) is not a member of the European Union.

2. A few Scandinavians once dreamed of "federalizing" Scandinavian private law. In 1947, a prominent professor at the University of Copenhagen presented his Draft for a Nordic Civil Code. Although the idea never took hold anywhere in Scandinavia, his Draft was later published in English. See *Fr. Vinding Kruse, A Nordic Draft Code* (Else Giersing trans., Munksgaard 1963).

consensus. So, just as parts of the New Jersey version of the UCC closely resemble the corresponding parts of New York or North Carolina law because they were all drafted on the basis of a uniform model, we find parts of Danish private law which resemble parts of Norwegian and Swedish private law.

But my main focus today will be a comparison between Danish and European law. That will be the main comparative context. I think many of the things I say will also invite other comparisons in your own (American) minds, but I must say that from a Danish point of view the main comparative interest these days is the relationship between Danish law as such and European Community law (which is of course becoming part of Danish law as well), as opposed to comparisons between Danish and American law. But, as I'm here in the United States today, I will also make some comparative comments in that American law direction as well.

There is a trend towards what I permit myself to call the "federalization" of private law in Europe. The word "federalization" is in quotation marks here in my notes, since some constitutional scholars in Europe would debate or contest the validity of that term, at least technically speaking, but there's no question that some key areas of private law that were previously the exclusive province of the Danish legislator and part of Danish sovereignty have been federalized and have become (or been replaced by) European law common to all Member-States of the European Union, and Denmark is, of course, one of these States. I will be illustrating this point as I go along and explaining with concrete examples—as many as I have time for—and at the end of my lecture I even hope to reach some global comparisons (the outermost ring on my map). These comparisons will be few and brief: one is about arbitration—the New York Convention on Arbitration, and the other one is about the International Sales Convention, the CISG, since I hope to say a few words regarding Denmark's special position in relation to these two significant treaties.

Well, I don't have to tell you what "subsidiarity" means, since Paul [Haagen] did that for me, but you might still ask why I (or anybody) might be desperately seeking *that*? Well, a lot of people are desperately seeking *something* these days. Indeed, when I *googled* the words "desperately seeking," I got more than *two million* hits.³ A large number of them, it seems, were related to the film entitled *Desperately Seeking Susan* (with Susan played by Madonna, herself)—that film was, by the way, one of the "top ten" films of 1985.⁴ And then there are the many others,

3. Google, <http://www.google.com/> (search "desperately seeking") (last visited Oct. 5, 2008).

4. RogerEbert.com, Movie Answer Man, <http://rogerebert.suntimes.com/apps/pbcs.dll/article?AID=/20070816/ANSWERMAN/70817006/1023> (last visited Oct. 5, 2008).

those desperately seeking other things—everything from *snoozin'* (a good night's sleep) to *sanity*.

But why seek *subsidiarity*? Well, if you search for the term in Google (one of the great sources of law these days actually), you'll see that subsidiarity had its origins in Catholic Church doctrine from the late 1800s. So, even the Church once sought subsidiarity. And though this information (subsidiarity's religious origin) is actually quite interesting,⁵ I won't take the time right now to say more about that.

Instead, I'd like to discuss what subsidiarity means in the European Union context. As you said, Paul, the term became prominent in 1992, around the same time that the European *Community* was moving towards (developing into) the European *Union*. I think it's fair to say that subsidiarity, as it was used then, was a kind of signal to the peoples of Europe who thought (and feared) that Europe was harmonizing too quickly, becoming one single "State." To counter (or slow down) that trend, the European Community, and later the Union, could "put the brakes on," if you will, by using the subsidiarity concept.

In Danish we "translate" (or re-write) the term subsidiarity to something we call—get ready—"nærhedsprincippet."⁶ This is (literally) the "closeness-principle," the idea that decisions should be taken as closely as possible to the citizens. I think that (our own freely translated) version serves to explain the *ideological* aspect of subsidiarity.

And then we have the more technical, "constitutional" aspect of subsidiarity, and this is the idea that the European Union does not (or at least should not) take action unless such (centralized/federalized/European) action is deemed to be more effective than action taken at the national level.⁷ The Union should, in other words, not go beyond what is "necessary."

But even that, I would venture to say (and I'm not a constitutional scholar), is also at the moment a kind of an ideological concept. It's just a signal; it hasn't really "put the brakes on." Denmark did, to be sure, send a shockwave through the Community by voting "No" to the Union in 1992, and for a brief period our "no" put the brakes on the entire unionization of Europe. So it was perhaps then appropriate that the European Council sent the signal of subsidiarity, saying: "Don't worry Denmark; we're not

5. Interested readers can easily obtain a wealth of information on this subject. See, e.g., Google, <http://www.google.com/> (search "subsidiarity, Catholic Church") (last visited Oct. 5, 2008).

6. Pronounced in Danish (something) like this: nair-heds-prin-seep-it.

7. Except in the areas within its "exclusive competence," see Europa Glossary, http://europa.eu/scadplus/glossary/subsidiarity_en.htm (last visited Nov. 18, 2008), and we can leave that exception alone, since it does not concern us here today.

going to take over more than is absolutely necessary in terms of federalizing European law.”

The more recent (draft) European *Constitution*—which was subsequently renamed the (draft) Reform *Treaty* (to make it sound less “federal,” I suppose)—includes provisions purportedly enhancing the principle of subsidiarity.⁸ As expressed in the Treaty on the European Union,⁹ the principle “is intended to ensure that decisions are taken as closely as possible to the citizen and that constant checks are made as to whether action at Community level is justified in light of the possibilities available at the national, regional or local level.”¹⁰

Together with this new version of the subsidiarity principle, the Reform Treaty establishes an “Early Warning System,” which gives the individual EU Member States the chance to say: “Wait, please don’t federalize *that*, if you are going in that direction.” Essentially, the warning system permits national parliaments to “ask the Commission to review a legislative proposal if they consider that it violates the principle.”¹¹ Well, as I said, I am going to be looking at this from the point of view of a “private” lawyer, and since the term “private law” (in Danish: *privatret*) sounds more European than American, I’ll try to explain it this way: Private law is, quite simply, *what I do*. It’s not a strange thing. In some legal systems, I should say, the distinction between private and public law has technical and important significance. We have a scholar here today, Ralf Michaels, who has written about that,¹² and all I want to say is that in Denmark the distinction is of no particular significance. It’s just a convenient division of labor among faculty members. Some “do” private law and some public law. People who do public law concern themselves with constitutional law, criminal law, administrative law, whereas the people who do private law do things like contracts, torts and property. I “do” obligations and that includes contractual obligations, as well as delictual obligations (the

8. See Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Protocol on the Application of the Principles of Subsidiarity and Proportionality, Dec. 13, 2007, 2007 O.J. (C 306) 150, available at <http://eurlex.europa.eu/JOHtml.do?uri=OJ:C:2007:306:SOM:EN:HTML> [hereinafter Lisbon Treaty].

9. See also Treaty on European Union, tit. II, art. G(B)(5), Feb. 7, 1992, 1992 O.J. (C 191) 1, amended by Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, art. 5, para. 2, Oct. 2, 1997, 1997 O.J. (C 340) 57.

10. See generally Europa Glossary, *supra* note 7.

11. See Europa Glossary, Together 50 Years - Subsidiarity, <http://www.together50years.eu/EN/gloss/index.htm>.

12. See generally Ralf Michaels & Nils Jansen, “Private Law Beyond the State? Europeanization, Globalization, Privatization.” 54 *Am. J. Comp. L.* 843 (2006).

things you call torts), and I also do private international law and comparative law as they relate to contract and tort.

Now, that is a non-American way of doing things, I think. In the United States, and even in much of Europe, private international law, also known as conflicts of law, is something that is done by specialists, and I think that we have some of those specialists with us today. In Europe, in Denmark at least, it is not uncommon for the person doing contracts to be responsible for comparing (e.g.) Danish contract law to the contract law of other legal systems—contracts in German law, American law etc.—and also to address related conflict-of-laws matters, including the applicable law (choice of law). So I do these things too. It's a system (division of labor) which has both advantages and disadvantages, which I won't go into now. I just wanted to explain what I mean by private law when I talk about it.

And now I would like to take you on an imaginary trip, a tour from the Duke University Law School, located on Science Drive in Durham, North Carolina, to the place I work in Copenhagen, which is on *Stuðiestræde* (that means "Study Street," which is quite similar to the German term).

There are, of course, various ways to get to Denmark from Duke. If you were to go eastward, as the crows or jets fly, towards what is now the tiny Kingdom of Denmark, you would pass by parts of the formerly *enormous* Kingdom of Denmark. We ruled Greenland (which we still "rule," though they wouldn't like me to say it that way; they now have "home rule"). Denmark also ruled most of Norway and even part of Sweden at one time. It was indeed an enormous kingdom, and a mighty one—you know, the Vikings and all of that.

But, we could also approach Denmark from the south, which I think is more interesting today, because if we came up that way, the way the Roman Legions did, we would pass through what is now the German Duchy of Schleswig, and we would pass the Eider River. But if we did what the Romans did, we would actually stop at the Eider, because there is (or at least was) a stone there saying (excuse my Latin): *Eidora Romani Terminus Imperii*, (i.e.) "The Roman Empire Stops Here."¹³ And that inscription remains significant today, because the "Civil law" stops there, too. And it is incorrect, although a common error, to include Scandinavian law within the Civil law group of law families.

There are, to be sure, numerous similarities between Scandinavian and Civil law; many of them came afterwards, when we stole or borrowed or imitated a lot of German principles in certain fields, including

13. See, e.g., Wikipedia, <http://www.wikipedia.org/> (search "Eider River") (last visited Oct. 5, 2008).

private law. But the Scandinavian States never adopted the superstructure of the Civil law system, and that fact might help you understand some of the things I am going to say about the Scandinavian position on the world comparative map, and more specifically, the Danish position.

Before moving further in that direction, however, I thought that it might be appropriate to say something about the societal context, “where I’m coming from,” if you will, after living and working in Denmark for some 35 years. Denmark is the oldest kingdom in the world. It was originally ruled by King Knud¹⁴ (his Danish name was later translated as “Canute”) and the Viking tribe that he led. And the term “tribe” is still used about the Danish people, because Denmark is such a tightly knit society, such a small and nearly homogeneous society that it is often figuratively speaking described as a tribe. And I’ll give you some examples of that.

Today, we’re not only a kingdom; we’re also a modern Welfare State. That’s Welfare with a capital “W” (welfare is not a dirty word for us).

And ours is also an extremely Democratic society (another key Danish word). Today, as fate would have it, there is a parliamentary election in Denmark.¹⁵ It is a very closely contested election, and it looks like we are going to go over 85% in terms of voter turnout, which is going to break the Danish record. And that is also the highest voter-participation in the world, if we exclude the countries where you *must* vote (by law).

So, we are going to break our own record today. And when we do that, 98% of the people who cast their votes will be represented by politicians with seats in the Danish Parliament (*Folketing*).¹⁶ It is not a winner-take-all system, which is not so unusual for parliamentary democracies, but it is unusual when the cutoff or borderline is as low as 2%, as it is in Denmark, and that means that nearly everyone in Denmark is represented in Parliament by someone who shares his or her political view, and that fact, some of us think, may contribute to the very peaceful nature of the Danish society. If people want to “do battle” and argue about things, they do it in the Parliament and not on the streets.

Well, what else should I say about Danish society? Other key words on my list here include Compromise, Realism, and Pragmatism. I’ll be returning to these concepts, but I should also mention Secularity: Denmark might well be the least religious country in the world. Don’t be fooled by the large symbol on the Danish flag; ours is a very secular society. We don’t

14. Pronounced: Keh-nood (as in “noodle”).

15. The election in Denmark was held on the same date as this Bernstein Memorial Lecture at Duke University School of Law: 13 November 2007.

16. See Folketinget, <http://www.folketinget.dk> (follow “English” hyperlink) (last visited Oct. 5, 2008).

have politicians talking about religion during our elections, at least not in the sense of wearing their religion (if they have one) on their sleeves.¹⁷

We also have great Prosperity in Denmark. The Danish Kroner is strong (we don't have the Euro, but we have linked ourselves firmly to it). And we have a concept called *Flexicurity*,¹⁸ which even the French are thinking about imitating: security and flexibility in the job market. We have "S & M" as well: do you know what that is? Socialized Medicine! And we are happy about that. We don't really call it that; we just call it the Healthcare System.¹⁹ But everyone in Denmark is covered by it, and it works fairly well.

Sharing, Honesty and Happiness. We are also "number one" in these categories.²⁰ Denmark is on top in Sharing in the sense of having the smallest disparity between rich and poor in the world (closely followed by, I think, Bangladesh, which is of course on a different scale).²¹ Denmark also has lots of Honesty, in the sense that we have—according to the people who do these surveys, I don't know how they do them—the least corruption in the world.²² And then there's Happiness: how do they measure that? Well, however they measure it, they tell us that we are the happiest people in the world.²³ Some have contested that and said: "Well, you Danes don't have very high expectations; that's why."

17. See generally Paul Zuckerman, *Society Without God: What The Least Religious Nations Can Tell Us About Contentment* (2008). During a press conference televised on Danish public television on 28 February 2007, the Danish Prime Minister said: "In my opinion, we should have less religion in the public space (det offentlige rum)." Fogh Strongly Condemns Religious Særhensyn, *Dr Nyheder*, Feb. 28, 2007, <http://www.dr.dk/Nyheder/Politik/2007/02/28/113931.htm>. See John Hansen & Kim Hundevadt, *The Cartoon Crisis—How It Unfolded*, *Udland.Jp.Dk*, Mar. 11, 2008, <http://jp.dk/udland/article1292543.ece> (regarding the Danish "Cartoon Crisis," which engendered considerable political debate in Denmark and elsewhere, both about religion and freedom of speech).

18. See, e.g., Wikipedia, <http://www.wikipedia.org/> (search "Flexicurity") (last visited Oct. 5, 2008).

19. In Danish: Sundhedssystemet.

20. According to various surveys easily accessible in Google. See *infra* notes 21–23 and accompanying text.

21. . See, e.g., Financial Security–Income Distribution, <http://www4.hrsdc.gc.ca/indicator.jsp?lang=en&indicatorid=22> (last visited Oct. 5, 2008) (describing the Gini coefficient, which measures income disparity, ranged from 22.5 for Denmark to 48 for Mexico).

22. Tied for first place with Finland and New Zealand. Infoplease, *The 2006 Transparency International Corruption Perceptions Index*, <http://www.infoplease.com/ipa/A0781359.html> (last visited Oct. 5, 2008) (providing the 2007 Corruption Perceptions Index scores). See also Christian Bjørnskov, *Combating Corruption: On the Interplay Between Institutional Quality and Social Trust* (unpublished and undated manuscript, on file with the author).

23. This has been the case for several years running. See Denmark 'Happiest' Country in the World, *CNN*, July 2, 2008, <http://edition.cnn.com/2008/HEALTH/07/02/nations.happiness/>; Denmark 'Happiest Place on Earth,' *BBC News*, July 28, 2006, <http://news.bbc.co.uk/2/hi/5224306.stm>.

We are also “number one” in some other categories, including—this is the downside I guess—Taxation. Of course, you need high Taxation (and Sharing) to get the very, very small disparity between the wealthy and the poor; we have, in fact, no “poor” in Denmark in the sense that you (in America) understand poor. That is the result of heavy taxation, heavily progressive heavy taxation. But Danish people pay it willingly, and the voting (in the Parliamentary election) today is not about whether we should have less taxes, but rather about whether we should reorganize the taxes.

Moonlighting is another negative: it seems we have the highest rate of moonlighting in the civilized world.²⁴ Teenage Drinking—we have a lot of that too. And then we have problems associated with what I might label “Tribal Initiation.” I’m not sure whether we are first in that category, but we certainly have had a lot of publicity about it, especially as regards “initiating” foreign newcomers as Members of the Danish Tribe, which is, as I said, a societal system characterized by high participatory Democracy and high Sharing (redistribution of wealth). These things have been hard for some newcomers to understand, and so it’s been hard for them to become Members of the Danish Tribe.²⁵

Well, now that you know the societal background, or at least something about it, I return to the subject of Danish private law. My first Danish private law book was a book called “*Den Borgerlige Ret*.” This was in 1975, in my first course in elementary Danish contract law. This was my first “hornbook,” if you will. I have it with me here today, and I’d like to translate one sentence in it. It says this: “Article 1 (§ 1) of the Danish Contracts Act lays down the fundamental rule that promises and contracts are legally binding.”

I read that a few times in 1975: “Promises—and therefore also contracts—are legally binding.” And then I began another kind of desperate search, desperately seeking (but not finding) some key concepts I had learned during my American legal education, things like “consideration,”²⁶ writing requirements and other formalities. And if you searched today (in-

24. Also sometimes referred to as the “black economy.” The Danish Tax Department considers “[m]oonlighting [to be] when you are offered and accept a job where neither you nor your employer informs SKAT [the Tax Authorities] about the employment and the pay you receive.” SKAT, Tax In Denmark, 18 (2005) available at http://www.skat.dk/Vejledninger/Personserien/Pnr_37_eng2005.pdf.

25. Author’s note: Lest I be accused of jingoism, I’ll readily admit that my lecture statement on this point oversimplifies a complex set of related problems—some of them also attributable to the way some Native (born-in-Denmark) Tribal Members treat newcomers to Danish territory.

26. E.g. Wikipedia, <http://www.wikipedia.org/> (search “consideration”) (last visited Oct. 5, 2008) (defining consideration as the “value paid for a promise”).

stead of in 1975) you might, as an American-educated jurist, also look for (but not find) the Law and Economics concept of “efficient breach.”

Well, I searched for some of these things in 1975, but I found none of them. There is no consideration requirement in Danish law. Indeed, there are, quite simply no formalities at all. No contract needs to be “supported” by consideration, nor does any contract need to be in writing.

Nor do many Danish jurists concern themselves with “efficient breach,” not even today, and there are several reasons for this. There happens to be an article in the American Journal of Comparative Law this month which explains why many Civil law systems are not interested in efficient breach.²⁷ I won’t go into that in detail, but I will say that the core explanation for us is that promises are not only “legally binding” in Denmark; they are also *morally binding*, and so how could Danish lawyers go out and encourage people to (efficiently) breach their promises? It would not work very well. So, in our “homemade” (pre-EC and pre-EU) version of Danish private law, promises are binding, period. Well, at least all *reasonable* promises are binding, because there’s another rule in the Contracts Act which guards against *unreasonable contract terms*.²⁸ That too applies to all contracts: consumer contracts, contracts between merchants, whatever. There are, to be sure, weak and strong merchants, and the prohibition against unreasonable terms, including promises which would be unreasonable to enforce, is applied more restrictively as between merchants, but it’s there and it’s the same rule.

As for our “homemade” law of Torts, I’ll mention one principle now, and I’ll follow up with a more concrete illustration later. Imagine that we have a defective product, and that a consumer who buys that that product is injured. The seller of the product is liable under Danish law. Why is the seller liable? Because the Danish judges who make (judge-made) private law decided that he should be liable. Is that a contractual principle? No, because the legislators who wrote the Danish Sales Act²⁹ more than 100 years ago were of the opinion that contractual rules were not well-suited for product liability cases. So even the immediate seller’s liability is based on a tort principle, but it’s a (near) strict liability principle: you can sue the seller with whom you have a contractual relationship—or even if you don’t, a member of your family can sue him—and the seller will be held li-

27. Ronald J. Scalise, Jr., *Why No Efficient Breach in the Civil Law?: A Comparative Assessment of the Doctrine of Efficient Breach of Contract*, 55 *Am. J. Comp. L.* 721, 721 (2007).

28. See Aftalelov, 1986-96, § 36 (Den.) translated in <http://www.sprog.asb.dk/sn/Danish%20Contracts%20Act.pdf> [hereinafter Aftalelov].

29. Købeloven, (1906), as subsequently amended, translated in <http://www.sprog.asb.dk/sn/Danish%20Sale%20of%20Goods%20Act.pdf>.

able unless he can prove that the producer is (without fault and therefore) not liable. This was at least the law made by our judges. I'll return to a more concrete example, which illustrates how EU law has changed our law in this area, in a minute.³⁰

I realize that I'm presenting a rather abrupt list of rules, but I do want to mention another private law rule now, one that applies to both contract and tort, and that rule says: *no unreasonable compensation*. Not only are unreasonable contract terms not binding in Denmark, but even when a binding promise is broken, the party injured is not necessarily entitled to full-blown "expectation protection." There's a regulatory mechanism, codified by statute actually, which limits compensation (in both contract and tort) to what a Danish judge would consider to be a "reasonable" amount.³¹

So, you see, the reasonableness-principle pervades Danish private law. I have one nice illustration of the fact that unreasonable contract terms do not bind. Our daughter Sarah is living in New York now. She's going to be married in the Kingdom of Denmark this summer, and she was in the process of contracting with a Danish provider of services for her wedding. When she found the standard terms of one prospective provider online, she sent me an e-mail with a link to them, asking: "Dad, can I click yes to this?" I answered her without even looking: "Don't worry about that," I said, "because even if there are any unreasonable terms in there, they're not binding." So she clicked yes, and that was that.

I looked at those terms later, by the way, and they were quite reasonable, from a Danish point of view. There was, for one thing, no arbitration clause among them. Such a clause might not be unreasonable *per se* in Denmark, but we simply don't have any Danish merchants who include arbitration clauses in their consumer contracts, probably because the merchants would not expect them to bind. I think our general prohibition against unreasonable contract terms reflects a more paternalistic attitude than the corresponding, yet "milder" rule in the United States, i.e., the rule that "unconscionable" promises are not binding. I think that "unreasonable" is, as it sounds, a more flexible and more intrusive term than unconscionable. I wouldn't say that the difference is enormous, but it certainly is a difference in spirit.

I think it's time to move on now and say something about the *sources* of Danish private law—where do all these rules that I'm talking about

30. See *infra* notes 55-58 and accompanying text.

31. See Erstatningsansvarsloven [Liability for Damages Act], No. 885 (2005) (Den.) § 24, translated in <http://uk.patientforsikringen.dk/legislation/erstatningsansvarsloven.html> [herein after *Erstatningsansvarsloven*].

come from? These flexible and open-ended legal rules, the sources of what I've been calling "home-made"(i.e.) Danish-made private law.

First, I'd like to highlight the word for "law" in the Scandinavian legal systems. The Scandinavian languages are very close on this point: the word for law is "*ret*" in Danish, "*rett*" in Norwegian, and "*rät*" in Swedish (we have a Swede here in the audience today: am I doing this well?). Interestingly, all these versions of the word mean more than just "law," they also mean *right*. The Scandinavian word for law is the same as the Scandinavian word for right. There's something nice about that. Maybe I'm being a bit sentimental, but I think there's something nice about that.

What about statutes and legislative codifications? The word for "law" can also be used to mean (a) "formal law" in the sense of a legislative enactment, a statute. That helps explain why my heading on this point is: *Make love, not codes*. I took a copyright on that phrase (by tagging a © to it in my Power Point), because I thought it was quite cute. (I used to be a copyright lawyer at United Artists Corporation, you know.) Well, the fact is that the plural of the Danish word for law happens to be "*love*," but this plural form is pronounced—not like you pronounce "love" in English, but rather—as a two syllable word: *low—vuh*. Say the word for law in the singular, and it's pronounced "low." Say the plural, however, and you can hear the "v" (in *vuh*).

But my main point here is that Danes *make laws; they don't make Codes*. Danish legislators have been enacting statutes on private law subjects for centuries, but they have never enacted a comprehensive Civil Code. As I said earlier, the Roman Empire (and Roman law) stopped at the Eider River,³² and that helps explain why we never got a general Civil Code, as in France and Germany and other Civil law systems. These days, when the European Union is moving, step by step, towards a European Civil Code,³³ we Danish jurists are nervous about that. We have never had a Code; we don't have the tradition for it; and we are worried about it.

What we do have at the "home-made" level are a few basic pieces of legislation within the private law area, the most notable being the Danish Sales Act.³⁴ It's quite similar in its coverage to Article 2 of the American UCC.³⁵ Another key Danish statute is the Contracts Act, which has a

32. See *supra* note 13 and accompanying text.

33. See generally *Towards A European Civil Code* (Arthur Hartkamp et al. eds., 3d ed. 2004). The seemingly innocuous "Common Frame of Reference" is, in my view, just the first slice of the coming, fully codified pie. For recent developments, see, e.g., Study Group on a European Civil Code, <http://www.sgecc.net/pages/en/home/index.welcome.htm> (last visited Oct. 5, 2008). See also *infra* notes 50, 69 and accompanying text.

34. See *supra* note 29 and accompanying text.

35. U.C.C. art. 2 (2004).

broader field of application: it applies not just to sales transactions; it also covers other contractual topics (which the UCC covers with respect to sales), such as contract formation. The prohibition against unreasonable contract terms, which I mentioned previously,³⁶ is in the Contracts Act.³⁷ And then there's the Liability for Damages Act,³⁸ which tells judges how to measure liability, particularly in tort cases. The Liability Act also contains the general liability-limitation I told you about,³⁹ so that plaintiffs don't get unreasonable compensation (in contract or tort).

These, I think, are our main private law statutes. But we also have judge-made law in Denmark. Indeed, since we have relatively little (detailed) statutory regulation, we have to rely on quite a lot of judge-made law. That probably doesn't surprise the American audience here. But our judge-made law might well surprise a Civilian jurist. We Danish jurists don't regard our judges as do the French, for example, as the "*bouche de la loi*"—the mouthpiece of the (French) legislature. Our Danish judges really *make* law, and everyone recognizes it. But they make it in a way that is different from the way it's made here in the States. It's made in a way that is less obvious.

For one thing, our judges write very brief decisions. The longest part of a Danish judgment simply accounts for the facts of the case and the arguments of the opposing lawyers. The decision itself and the rationale underlying that decision—the *ratio*, sometimes also referred to as the premises (*præmisserne*)—are very briefly stated, usually fitting within a single paragraph. The premises need only send a brief "signal" as regards the main factors that have gone into the judge's decision, because the judge is not trying to "set a precedent," he's trying to decide the concrete case.

I know a fair amount about this aspect of Danish law, because I often work with judges. I work with them not only because Danish judges also sometimes serve as arbitrators (and so I sometimes get to sit on arbitration tribunals with them), but also because Danish judges also serve as external examiners (*censors*), helping us grade Danish law school exams. When we talk about the solutions to a complicated problem on an essay exam in the law of contracts, for example, or in the law of tort, the judges often have the *outcome* in mind. These judges are, of course, not ignoring the applicable rules, but it's not necessarily the rules that push them towards the outcome. It's rather as if they first sense the outcome—what they feel is just and right (which goes back to the fact that they too went to law school)—and then they *test that result* by looking at the

36. See *supra* note 28 and accompanying text.

37. See Aftalelov, *supra* note 28.

38. See Erstatningsansvarsloven, *supra* note 31.

39. See *supra* note 31 and accompanying text.

premises (the *ratio*—which in an exam situation is set forth in the “model answer”) to see if the premises do indeed “lead” to that just result. Is that putting the horse before the cart or the cart before the horse? I’m not sure. It’s something which Patrick Atiyah from England (I think he’s been at this law school as well), has called *reasoning backwards*. It’s not a concept to which we claim copyright, but it’s something which we adhere to in practice.⁴⁰

I think the result of all of this is that Danish private law is made up of two main components, statutory law and judge-made law, each in a special Danish variation, what you might call “legislation light” and “precedent light.” For these reasons, among others, the Danish system is an unusual system.

I can see that I have to move along now if I want to get to some concrete examples, so that I can illustrate how Danish law is characterized by pragmatism as well as realism.

My first example, inspired by a real Danish case,⁴¹ concerns a guy named Mr. Skov. He’s a farmer who runs an egg business, producing eggs. He sells the eggs to “Bilka”, a large Danish supermarket (a bit like Wal-Mart), and two consumers (named Jette and Michael) who buy those eggs from Bilka and make what Danes call an “egg cake.” As it turns out the eggs are tainted with salmonella, and the consumers become seriously ill. Who can they sue?

Well, if we apply traditional (pre EC/EU) Danish judge-made (pro-consumer) rules to decide this one,⁴² the consumers don’t need to locate the egg-producer (Mr. Skov, whose name isn’t on the box anyway). They just go right to the supermarket (Bilka) and let that middleman-seller worry about who ultimately might be left holding the bag (i.e., Bilka or Mr. Skov). This product liability action against the supermarket is not a contractual action under Danish law.⁴³ It’s a tort action based on Danish judge-made rules of law. I suspect the nature of the judge-made law underlying this action was later misunderstood by the European Court of Justice,⁴⁴ but please excuse me if I’m wrong about that.

40. See Joseph Lookofsky, *The Limits of Commercial Contract Freedom: Under the UNIDROIT 'Restatement' and Danish Law*, 46 *Am. J. Comp. L.* 485, 490 & n.33 (1998).

41. The facts here are inspired by Danish (City and High Court) decisions which led to the preliminary ruling issued on 10 Jan. 2006 by the European Court of Justice. Case C-402/03, *Skov Æg v Bilka Lavprisvarehus*, 2006 E.C.R. I-00199.

42. As did the lower (City) court judge. *Id.* para. 16.

43. See *supra* note 29 and accompanying text.

44. See *Skov*, 2006 E.C.R. I-00199. Although a detailed explanation of the basis for my disagreement with the ECJ ruling lies outside the scope of the present (lecture) discussion, my main point is that a better understanding of the nature of the Danish judge-made rules of (tort) liability by the ECJ might well have led to an interpretation of Article 13 of the Product

Another example, also based on a real Danish case:⁴⁵ Two Danes prepare to go on a hunting trip. They find each other by way of a hunting journal in Denmark. They rent a car in Scotland and buy insurance there in accordance with Scottish law. They have an accident, and the passenger dies due to the driver's negligence (no question about that). The widow then tries to sue the Danish driver in Denmark, but the defendant argues that the action is time-barred under *Scottish* law, because the lawyer hired by the widow waited more than *three* years before commencing legal action against the driver. But the action is not time-barred under *Danish* law, because here we have a *five* year statute of limitations. How should the judges in the Danish Court of Appeal decide?

If we translate the essence of the decision—it fills no more than a small paragraph—we see that the judges quickly list the main factors which they found relevant, and then briefly add their conclusion (the outcome) to that. It goes something like this: the accident occurred in Scotland in a car registered there, and the driver was covered by compulsory Scottish insurance. For these reasons, the dispute should be governed by Scottish law, and so the action is time-barred.⁴⁶

Now you might not like the reasoning or the result, but you have to think about it. In the well-considered view of one Danish professor (who later became a Danish Supreme Court judge), the outcome (time-bar) in this case was hardly “dictated” by the formalistic application of choice-of-law rules. Quite the contrary: the outcome was quite likely rather the result of pragmatic considerations and the principle of reasonableness.⁴⁷

In other words, it was not so much a question of how to make the (formal) choice of law between Scottish and Danish law (and their respective time-bars), but rather a question of how to reach the “best” result, i.e.,

Liability Directive which preserved the viability of the Danish (middleman-liability) rule. See *infra* note 56 and accompanying text.

45. Based on the decision of the Danish High Court, reported in [B] Ugeskrift for Retsvæsen 886 (1982).

46. For a more accurate translation, see Joseph Lookofsky & Ketilbjorn Hertz, Eupil. *European Union Private International Law In Contract And Tort* (forthcoming 2009), which reads as follows: The accident occurred in Scotland while [defendant] and [plaintiff] used a car registered in that country, which was covered by compulsory liability insurance according to Scots law. Therefore, the dispute should be governed by Scots law. The [plaintiffs] are debarred from starting legal proceedings in Scotland pursuant to section 17 of the Prescription and Limitation (Scotland) Act 1973, as the statutory 3-year period has elapsed. The High Court finds that this provision cannot be disregarded in proceedings commenced in a Danish court even though it is [or at least was, when this decision was rendered] a procedural rule under Scots law. Consequently, the High Court finds for [the defendant].

47. See Jørgen Nørregård in [B] Ugeskrift For Retsvæsen 47 (1985). “Should the fact that the lawyer chosen by the plaintiff (herself) did nothing (for more than 3 years) affect the outcome of the plaintiff's case, especially considering that this same failure removed the defendant from the shelter of Scottish insurance coverage?”

the most reasonable result, or the “least unfair” result. Should the court let the widow suffer because of the negligence of the driver? Or should it let the driver suffer because the widow chose a lawyer who took no action against that driver until the insurance protecting him had expired?⁴⁸ Tough decision. The judges in the Danish High Court of Appeal made what they thought was the “right call,” and they could do it that way because the applicable (Danish) judge-made rule of private international law was flexible, so as not to “dictate” an unreasonable result in a difficult situation. I can’t give you all the details of this, I haven’t got the time. Too many of you will leave if I did it.

This was, at any rate, the (pre-EU) way Danish judges used to handle many cases like these. If we imagine a time-line depicting the development of Danish private law, we would see how Denmark moved from a period where we made all our own laws to the year when Denmark joined the EC. That was in 1972. Twenty years later, the concept of subsidiarity was introduced in response to the Danish “no” to the European Union (in 1992). Later, Denmark joined that Union (with 4 notable “reservations” or “opt-outs”),⁴⁹ and the Union subsequently moved Denmark and the other Member States further in the direction of private law federalization. Ultimately, I fear we may get “total” private law harmonization: a European Civil Code.

We are certainly moving in that direction.⁵⁰ I’m in the minority on this, one of the relatively few academics resisting the creeping federalization of Danish private law. And since we in the minority can hardly withstand the “full-court press” being exerted by our European opponents, I know we can’t win the game.

Where is this process of federalization taking us? We’re moving away from the Danish rule which simply says that contracts are unenforceable if the enforcement would be unreasonable, taking into account all the circumstances. That’s our Contracts Act rule from 1976.⁵¹ Here’s where we’re going: to a list of 17 presumptively unfair terms from Directive 93/13/EEC on Unfair Terms in Consumer Contracts.⁵²

48. *Id.*

49. The recent Irish “no” to the Lisbon Treaty, *supra* note 8, has had the effect of cementing the Danish opt-outs, at least for the time-being. See Bruno Waterfield, *Denmark Calls Off Vote on EU Opt-outs*, Telegraph (U.K.), Aug. 8, 2008, available at <http://www.telegraph.co.uk/news/worldnews/europe/denmark/2522903/Denmark-calls-off-voteon-EU-opt-outs.html>.

50. See generally Joseph Lookofsky, *The Harmonization of Private and Commercial Law: “Towards a European Civil Code,”* 39 *Scandinavian Stud. L.* 111 (2000), available at <http://cisgw3.law.pace.edu/cisg/biblio/lookofsky14.html>.

51. See *supra* note 28 and accompanying text.

52. See Council Directive 93/13, art. 3(3), 1993 O.J. (L 095) (EC).

That's the way the EU does things like that, by listing detailed examples. They tell you, "this is unfair, this is unfair, this unfair" and so on. To be sure, we in Denmark don't necessarily disagree with these EU details. We'd agree, for example, that arbitration clauses in consumer contracts are presumptively unfair.⁵³ But we don't want to clutter our Contracts Act and "pollute" its legislative simplicity with all these details. So Denmark and Sweden decided to implement the Directive of Unfair Contract Terms *without* including all these details, by simply continuing to ban (all) unreasonable contract terms. We got sued by the EC for not including the "Grey List" of seventeen (17) unreasonable terms from the Directive in our legislative text, and luckily we won, since the European Court of Justice agreed that our non-inclusion of the grey list in the black letter of our statute did not provide proof that we planned to ignore the list.⁵⁴

Now, how would our example about the salmonella-tainted eggs turn out now that the EC court has issued a preliminary ruling on that? Not the same result as before.⁵⁵ These poor consumers cannot sue the supermarket on the basis of our traditional judge-made rules, because we now know, having been brought into the EC court twenty years after our implementation of the Product Liability Directive,⁵⁶ that Article 13 of the Directive does not leave room for the Danish judge-made rules which would allow the consumers to sue the supermarket. This is the way that the EC court interpreted the Directive, and I think that they may have interpreted it in this way because they didn't fully understand the nature of tort liability under Danish judge-made law. They said we could make a supplementary fault-based rule.⁵⁷ We could also make a contractual rule, as England has, and I think we're going to have to do it now because we need to reinstate an action against sellers, but I doubt whether we'll get back to our previous pro-consumer state.⁵⁸

What about the decision reached by the Danish court in the case of the accident in Scotland?⁵⁹ We would not be able to make that kind of deci-

53. *Id.* at Annex (q).

54. See Case C-478/99, *Comm'n v. Sweden*, 2002 E.C.R. I-4147, para. 24.

55. See Case C-402/03, *Skov Æg v Bilka Lavprisvarehus*, 2006 E.C.R. I-00199, para. 45.

56. Council Directive 1999/34/EC of the European Parliament and of the Council of 10 May 1999 amending Council Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, 1999 O.J. (L141/20) (EC).

57. Denmark has now done so (in a recent revision of the Danish Product Liability Act) by basing the seller's liability on fault, although with a "reversed burden of proof" on the fault issue—thus creating a (pro-consumer) rule which might not be able to withstand scrutiny in the ECJ.

58. See *supra* note 57.

59. See *supra* notes 45-46 and accompanying text.

sion anymore, at least not under Rome II.⁶⁰ The judges can't make their call as to what they think is the right decision in this kind of case, because the EU wants to have more "certainty" when it comes to choice of law. They want every judge in the European Union to make the same decision—it doesn't matter whether it's a good decision or a good result. They want all judges in a situation like this to base their decision on *lex communis*. Since the two parties concerned come from Denmark, it should be Danish law which applies, so the action would *not* be time-barred today.⁶¹

I'm overdramatizing to be sure. But, I don't like the idea that we cannot continue to decide a case like this on the basis of what is right: on the basis of the result, by putting the result before the more technical premises. In fact, I have even complained to the Ministry of Justice, arguing that the Rome I Regulation (on the law applicable in contractual matters)⁶² would put us into a "straight jacket." And the same certainly goes for Rome II (on the law applicable in tort).⁶³

Unfortunately, I don't have time to tell you more about that. The global situation, at least, is better. The global situation is better because it's more flexible. Denmark ratified the New York Convention,⁶⁴ as did the United States, and the Convention requires that each Contracting State recognize an arbitration agreement "in writing."⁶⁵ There's a big debate about this rule these days (those of you who do arbitration know about this): what's "in writing," and what's not? We in Denmark don't much care, since under Danish law, *no agreement* (of any kind) needs to be in writing. And luckily most people interpret the New York Convention to allow for that.

60. See Commission Regulation 864/2007, art. 4(2), 2007 O.J. (L 199) 40, 44 [hereinafter Rome II]. The purpose of the Rome II Regulation, adopted in 2007, is to harmonize (and thus replace) the national conflict-of-laws rules previously applied by the courts of the individual EU Member States. The Rome II Regulation will enter into force in all EU Member States except Denmark on 11 January 2009, and the Regulation will remain inapplicable in Denmark, unless and until Denmark withdraws its reservation to the EU treaty as regards legal and home affairs. The Danish situation as regards the Rome II Regulation is thus the same as regards Denmark's position vis-à-vis the Rome I Regulation. Regarding Rome I and Rome II, see generally Lookofsky & Hertz, *supra* note 46.

61. See Rome II, *supra* note 60, art. 4(2). There is a narrow safety valve in Article 4(3) of the Rome II Regulation, *id.* art. 4(3), which would hardly affect the outcome in a case like this. See Lookofsky & Hertz, *supra* note 46.

62. See Europa, Convention on the law applicable to contractual obligations (Rome Convention), <http://europa.eu/scadplus/leg/en/lvb/l33109.htm> (last visited Oct. 5, 2008).

63. See Europa, The law applicable to non-contractual obligations—The Rome II Regulation, <http://europa.eu/scadplus/leg/en/lvb/l16027.htm> (last visited Oct. 5, 2008).

64. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21, U.S.T. 2517, 330 U.N.T.S. 38.

65. *Id.* art. II.

You must at least respect arbitration agreements in writing, but you can also respect arbitration agreements which are not in writing.⁶⁶

At the global level of commercial harmonization we also have the CISG—the Convention on Contracts for the International Sale of Goods. I'll just mention Article 16 (in CISG Part II) which says until a contract is concluded an offer may be revoked. And you know about this rule—it's similar to the American (Common law) rule which permits the offeror to revoke until an acceptance has been dispatched. Well, since an offer is a kind of promise, the CISG rule means that (some) promises are not binding. And since that runs counter to the general Danish rule,⁶⁷ Article 16 might have stood in the way of Denmark's ratification. But the CISG allowed Denmark to ratify subject to a reservation under Article 92, a declaration saying we would not be bound by CISG Part II.

I myself have argued that we should retract that CISG reservation, since I think it causes more harm than it's worth.⁶⁸ But the reservation does show that it's possible to create a system of minimum harmonization which allows Contracting States to breathe freely, to take account of local traditions, even as we join forces with the larger legal world.

Where do we go from here? Should we continue to seek subsidiarity, perhaps even *Desperately* (with a capital D)? Well, I've written a bit about private law harmonization with one of my Danish colleagues,⁶⁹ and we've tried to emphasize that there is, as yet, no real subsidiarity in Europe—nor has any cost-benefit analysis been undertaken, so as to determine whether these harmonizations are “profitable” or otherwise necessary.

But, as I've said, we skeptics are in the minority. Most jurists in Europe are seeking (or at least content with) more harmonization; some are even seeking a European Civil Code.⁷⁰ The jurists who prefer to emphasize the virtues of harmonization are numerous and well-organized,⁷¹ and so I think the skeptical minority is quite likely to lose.

Fortunately, I've got an alternative to my desperate (and probably futile) search for subsidiarity. It's what you might call my Danish “Plan B,”

66. See U.N. Comm'n on Int'l Law, Report of the United Nations Commission on International Trade Law on the Work of Its Thirty-Ninth Session, Annex II, U.N. Doc. A/61/17 (June 19-July 7, 2006).

67. See *supra* note 28 and accompanying text.

68. See generally Joseph Lookofsky, *Alive and Well in Scandinavia: CISG Part II*, 18 *J.L. & Com.* 289 (1999).

69. See Mads Bryde Andersen & Joseph Lookofsky, “Nationale Aftaleregler og EUIntegration: Problemer & Løsningsmodeller”, *Ugeskrift for Retsvæsen*, Dept. B., p. 211 (2002).

70. See *supra* note 33 and accompanying text. But see generally Pierre Legrand, “Against a European Civil Code,” 60 *Mod. L. Rev.* 44 (1997).

71. See, e.g., Study Group on a European Civil Code, *supra* note 33.

and it's simply this: *Don't worry, be happy!* As I said earlier in this lecture, we Danes are Number One in that.⁷²

I'm going to stop here and just tell you this: I have wonderful memories of my five visits at Duke and of the great times that I spent with Herbert Bernstein and with his wife Waltraud and my wife Vibeke. We were a nice foursome. And we were together in many places: in Hamburg, New York, Athens, Bristol, and—last but not least—here at Duke Law.

Thank you very much.

72. See *supra* note 23 and accompanying text.