

# Cross Border Research and Transnational Teaching under the Treaty of Lisbon

Hanse Law School in Perspective

*Christine Godt (ed.)*



HANSE LAW SCHOOL SERIES  
VOLUME 1

*General editors: Christine Godt, Christoph Schmid & Gerhard Hoogers*



This book is the first volume of the newly founded “Hanse Law School Series”. It gathers 14 articles which evolved from the Workshop “Hanse Law School in Perspective - Legal Teaching and Cross Border Research under Lisbon” in Oldenburg on 27 May 2010, celebrating 10 years of Hanse Law School. The workshop aimed at a picture of the status quo of a ten years’ time Hanse Law School cooperation, and served as a springboard for future scientific co-operations. Since then, several mutual funding proposals have been submitted, various to-teaching lessons have been taught and the Hanse Law School became successfully expanded and is about to include the University of LeHavre.

The volume gives evidence of the broad profile of comparative research of scholars involved with and related to the Hanse Law School which spans from comparative legal theory to comparative administrative law.

# HANSE LAW SCHOOL

*Fortiter in re , suaviter in modo*



rijksuniversiteit  
 groningen



9 789058 509789 >

Cross Border Research and  
Transnational Teaching  
under Lisbon

—

Hanse Law School in Perspective

Christine Godt  
(ed.)



**Cross Border Research and Transnational Teaching under Lisbon  
- Hanse Law School in Perspective**

*Christine Godt (ed.)*

ISBN: 978-90-5850-978-9

Published by:  
Wolf Legal Publishers (WLP)  
PO Box 313  
5060 AH Oisterwijk  
The Netherlands  
E-Mail: [info@wolfpublishers.nl](mailto:info@wolfpublishers.nl)  
[www.wolfpublishers.com](http://www.wolfpublishers.com)

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without prior written permission of the publisher. Whilst the authors, editors and publisher have tried to ensure the accuracy of this publication, the publisher, authors and editors cannot accept responsibility for any errors, omissions, misstatements, or mistakes and accept no responsibility for the use of the information presented in this work.

© The authors

## Contents

Introduction <i>Christine Godt</i>	1
What is to be gained from comparative research and teaching? Thoughts for an ideal agenda <i>Franz Werro</i>	7
Commentary to Franz Werro <i>Gert Brüggemeier</i>	23
Strengthening the comparative method in European legal research: three suggestions <i>Aurelia Colombi Ciacchi</i>	25
The European Union development of European property law <i>Bram Akkermans</i>	39
Comparative property law: collective rights within common law and civil law systems <i>Alison Clarke and Christine Godt</i>	61
The Dutch and German notarial systems compared <i>Christoph U. Schmid</i>	83
La protection constitutionnelle des droits fondamentaux en France et en Allemagne: la montée en puissance des juridictions constitutionnelles <i>Götz Frank &amp; Gilles Lebreton</i>	99
Eine alternative Föderalismusreform – das <i>Konsens-Reichsgesetz</i> als Muster für die Bundesrepublik? <i>Gerhard Hoogers</i>	109
L’emprise de la Convention Européenne des droits de l’homme sur la jurisprudence et la législation françaises dans le domaine de la liberté d’expression <i>Diane de Bellescize</i>	133

Governance and public health <i>Friedhelm Hase</i>	149
The quest for soft law as binding law contributing to European Integration <i>Herman E. Bröring</i>	155
The evolving conservation standards of EU marine environmental law and their effects on the common fisheries policy <i>Till Markus</i>	171
Who owns the North Pole? Concurrent claims of the arctic shelf and the challenges for international law <i>Thomas Heinicke</i>	187
Coastal protection planning in the Wadden area the role of facilitating legal systems <i>Ulrich Meyerholt and Wabbe de Vries</i>	205
<i>Addendum</i> Program 27-28 May 2010	212

# INTRODUCTION

Christine Godt\*

This book is the first volume of the newly founded “Hanse Law School Series”. It gathers 14 articles of which eleven (partly co-authored) evolved from overall 24 single oral presentations at the Workshop “Hanse Law School in Perspective – Legal Teaching and Cross Border Research under Lisbon” in Oldenburg on 27 May 2010,<sup>1</sup> celebrating 10 years of Hanse Law School.<sup>2</sup> The conference papers are complemented by three additional contributions of close friends of the Hanse Law School who were prevented to participate in the actual workshop for various reasons. Languages are non-discriminatorily English, French and German.

The workshop aimed at a picture of the status quo of a ten years' time Hanse Law School cooperation,<sup>3</sup> and was set up to serve as a springboard for future scientific co-operations in this framework at a historical turning point. Both directors in Bremen and Oldenburg had recently changed. The concept has turned out to be successful. Since then, several mutual funding proposals have been submitted, various co-teaching lessons have been taught. The Hanse Law School has expanded successfully and now includes the University of LeHavre.

The leading idea was to bring together scholars with shared scientific interests in the wide ambit of the Hanse Law School.<sup>4</sup> Therefore, we included scholars both as oral presenters and as authors with written contributions with who we share mutual interests even if they are not employed by one of the institutional Hanse Law School partners. All are joined by the mutual interest in a comparative reflection about the topic each contribution is dealing with. And yet, the contributions to the five chapters span the wide universe of legal disciplines from

---

\* Professor of Law, Carl von Ossietzky University of Oldenburg, Director Hanse Law School.

<sup>1</sup> The Conference Proceedings are printed in the annex.

<sup>2</sup> The Hanse Law School is a collaborative project of the currently three (soon four) Universities of Bremen, Oldenburg and Groningen [soon Le Havre] to educate lawyers based on a comparative and European method, offering them a Bachelor- and a double Master-degree, and providing the option to directly enter the Dutch legal profession.

<sup>3</sup> This volume thus complements the special issue of the Hanse Law Review, Vol. 7 (Dec. 2010), download: [www.HanseLawReview.org](http://www.HanseLawReview.org).

<sup>4</sup> Several speakers requested to be discharged from submitting a contribution to the conference proceedings for personal reasons, M. Evanson (Birbeck, University of London), L. Gormley (University of Groningen), A. Haan-Kamminga (University of Groningen), A. Keller (Carl von Ossietzky University Oldenburg), A. Tolleenaar (University of Groningen), J. Falke (University Bremen, Centre of European Law and Politics), K. de Graaf (University of Groningen), F. Herzog & M. Frommann (both University of Bremen).

comparative legal theory over core private law issues towards specific areas of public law along which this volume is organised.<sup>5</sup>

Chapter 1 encompasses three articles reflecting about Comparative Law and legal teaching in general. Franz Werro, University of Fribourg (CH) and Georgetown University (US), develops an “ideal model of comparative legal analysis”. He starts by reflecting on the basic questions of comparative legal teaching (integrated vs. separate; from scratch or as privilege for advanced students; comparative law as foundational education or “add-on”). The core of his contribution is a discussion of the recently re-surfaced debate about functionalism in comparative law, namely the contested question whether legal comparisons are *ex priori* prone to harmonisation. He takes a strong stance against the *presumptio similitudinis* and advocates the scientific analysis of differences (rather than impute similarities: (“[...] *la pensee unique* has become a global threat” [*infra* page 20])). Franz Werro rejects positivistic comparisons, and opts for an interdisciplinary approach to comparative studies which renders attention to the contextual information. After identifying these categories for evaluation, it comes to no surprise that he cherishes the Hanse Law School model.

Gert Brüggemeier, University of Bremen, comments on Franz Werro by picking up the idea that an international “add-on” experience abroad *after* the legal studies have been finished does not add substance to a multicultural education of young lawyers. The centre of his contribution is his quest for a re-scientification of legal education by means of comparative analysis.

Aurelia Colombi Ciacchi, University of Bremen, now University of Groningen, departs from the idea that the need for comparative legal studies has dramatically changed: Instead of being a pure academic endeavour, comparative analysis has become required in all European legislative processes, judicial activities and legal practice. Setting the process of Europeanization into the forefront, she identifies six problems which require a novel comparative reflection. I shall here only hint to her first quest: Academic comparatists shall pay more attention to the jurisdictions of smaller countries in order not to aggravate the existing power structures between big and small countries. Instead, the ingenuity and problem solving capacity of jurists from “outside”, their different perspective and overview should be more acknowledged. Eventually she comes up with three suggestions which will facilitate more ambitious comparative research.

Chapter 2 gathers three contributions dealing with Private Law. Two of them concern property law, a field of law which for long was supposed to be “too

---

<sup>5</sup> One central discipline is sorely missing in these proceedings: European law. This field of law was prominently represented at the conference by Laurence Gormley (University of Groningen) and Michelle Everson (Birbeck, University of London). Their contributions were conference highlights being at the same time articulate opposed and mutually supportive, presented with engagement and on cordial terms. Both reflected upon the institutional changes brought about by the Lisbon Treaty. Their controversial assessment invigorated a lively conference debate.



different to be compared”. Braam Ackermans article (Maastricht University) sets out to convince us of the contrary. His argument is that European influence already permeates national jurisdictions, consequently resulting in the adjustment of property laws on the national level. His focus is on nine EU-directives resp. regulatory proposals which directly and indirectly effect property relations. He brilliantly unearths how much these stipulations already made foreign property considerations penetrate national property laws. In order to be simply able to recognize the meaning and source of these rules, a comparative base knowledge, also in property, becomes cogent.

The co-authored paper by Alison Clarke, University of Surrey, and Christine Godt, University of Oldenburg, focusses on the *common* challenges of common and civil property law which become unearthed by the pressures of globalisation. Their point of departure is the common ground of Western individual property as opposed to other collective ownership forms. They distinguish them from access rights which both jurisdictions are familiar with (esp. UK-Commons Act of 2006). Its focus, however, is on collective rights to use and control natural resources, and indigenous and minority rights in land which are common in Africa and Asia. A final section on the Chinese Property Act of 2007 rounds the article off by identifying persisting collective and state institutions in a mixed structure of a German-type concept with English “property rights” language.

In the third article of Chapter 2, Christoph Schmid, University of Bremen, gives an overview of the three traditions of notarial systems in Europe. Prompted by a recent ECJ-case about the justification of the nationality requirement for notaries, he thoroughly compares the Dutch and the German system which both belong to the Latin notarial tradition.<sup>6</sup> Not only for reasons grounded in the European fundamental freedoms, his careful analysis reveals substantial advantages of a system without fixed fees and *numerus clausus* - like the Dutch one.

Chapter 3 brings together three distinguished Constitutional Law articles. The co-authored paper of Gilles Lebreton, University of LeHavre, and Götz Frank, University of Oldenburg, compare [in French] the German and French constitutional protection of fundamental rights which evolved at quite different paces.<sup>7</sup> Whereas the German system was essentially imposed and modeled on the US-Supreme Court in 1949, in France, the Conseil constitutionnel usurped the judicial review of basic freedoms only in 1971. Although the historic

---

<sup>6</sup> At the conference, the lecture of Prof. Dr. Schmid was complemented by Prof. dr. Leon Verstappen (University of Groningen) who enriched the Workshop with a double presentation. First, he portrayed the notarial system in the Netherlands, and voiced his critique of the Dutch and German system. In addition, he presented his research project on the global collection of land laws (accessible under: [www.ialtanetwork.org](http://www.ialtanetwork.org)). Prof. Verstappen requested not to put his contribution into writing for personel (reasons?) reasons.

<sup>7</sup> This article demarks the historical beginning of the enlargement of Hanse Law School by a fourth, French partner, le Université du Havre. The German-French exchange starts in October 2013.

constitutional texts of 1789 and 1946 did not plan for a judicial review of human rights [honoring the supremacy of democratic laws and governmental decisions], the decision was immediately welcomed by the public opinion. The article revolves around a most recent decision of the Conseil constitutionnel in 2008, which establishes a direct control of legislative acts based on the proposition of a human rights violation – very close to the German “Verfassungsbeschwerde”. However, the comparative analysis of the case law makes the article a most thoughtful reflection of legitimacy concerns with regard to a now quite popular institution in both countries.

The second contribution to this chapter is the article by Gerhard Hoogers,<sup>8</sup> University of Groningen, which focusses on recent constitutional reforms to the Federal state systems in Germany and the Netherlands. Whereas in Germany, legislative competences were returned vertically from the Federal level to the *Länder*, the Dutch reform centred on the horizontal territorial integration of the Caribbean territories<sup>9</sup> into a federal state. The *tertium comparationis* is the augmented complexity in state relations. Hoogers’ centre piece is the analysis of the Dutch instrument of the remarkably flexible Reichs-consensual laws, which he commends to the German legislator.

Diane de Bellescize, University of LeHavre, submitted a very fine paper on the influence of the European Court of Human Rights on France press law, considering both the way how the various instance courts have responded to the judicial supervision from Strasbourg, and how the legislative adjusted. Whereas the German ECHR–press cases centre on the protection of privacy of celebrities, the French ECHR–press cases focus on regulatory restrictions to the political press. The article stands out for its political engagement, and its language subtleness. It sensitively traces how a country as state centred (inclined towards state reason) as France gradually changes under the influence of an international court and slowly opens up towards a more discursive public debate sustaining controversial arguments.

Chapter 4 embraces two articles on Administrative Law.<sup>10</sup> Friedhelm Hase, University of Bremen, submits a thought-provoking article arguing that the public financed health care system is neither cost-sustainable nor necessary. He puts his focus on the German type of a public, mainly mandatory, insurance. The system was designed as a social security for those who cannot afford a private insurance – a prerequisite which demands restrictions to the scope of care. Except

---

<sup>8</sup> He has been co-teaching Comparative Constitutional Law together with Prof. Dr. Götz Frank for years. For his engagement, he has been attributed the title “Honorary Professor” by the University of Oldenburg in May 2012.

<sup>9</sup> Aruba, Curaçao, Sint Maarten, and the three islands Bonaire, Sint Eustatius and Saba.

<sup>10</sup> A third paper on Energy law, cross-boarder, interdisciplinary and co-authored on Carbon Capture and Storage by the conference participants A. Haan-Kamminga (University of Groningen, Groningen Centre of Energy Law) and A. Keller (Carl von Ossietzky University Oldenburg) eventually did not materialize for personal reasons.

for the elderly, he considers the system outdated as a full insurance for the gainfully employed.<sup>11</sup>

Herman Bröring<sup>12</sup>, University of Groningen, contributes a fine paper on the relation of EU's soft law and the process of European integration,<sup>13</sup> focusing on tertiary law with regulatory implications (in contrast to preparatory documents). After positioning tertiary law in the framework of Art. 289 and Art. 290 TFEU, he depicts the various ways how tertiary EU-law may be implemented by member states, and sensitively depicts the different national traditions in interpreting vague tertiary rules. He departs from the settled categorical distinction between interpretation rules and discretion rules. Not only is the difference quite often difficult to catch. Diverging national concepts about the division of power determine the answer how vague terms are interpreted. Whereas in the Netherlands courts tend to qualify terms as "discretionary" which are not to be decided by courts, under the French and German traditions, vague terms tend more often to be qualified as "non-discretionary" ("unbestimmte Rechtsbegriffe", "juridique des faits"), legitimately interpreted by the judicial power. Thus, European soft law might be treated in different ways across Europe. In his subsequent report about Dutch administrative law he includes the example of standardization norms of the Dutch Standardisation Institute, which shows that dogmatic implications require much more legal scrutiny (accessibility, publicitation of norms). The implications for the integration process, he argues, are contingent.

Chapter 5 embraces three articles concerning the special focus of Marine and Coastal Law. Till Markus<sup>14</sup> introduces the EU's Marine Strategy Framework Directive which aims to integrate environmental marine concerns in sector marine policies like fisheries, agriculture, energy production and traffic. The article, focusing on the Common Fisheries Policy, is about the limitations of this initiative. The Court continues to sharply distinguish the EU competence for environmental policy with regard to water with prejudice from other competences (thus re-enforcing the different objectives), the enforcement power

---

<sup>11</sup> Prof. Dr. F. Hase's oral presentation on 27 May 2010 was complemented by a lecture by Dr. A. Tollenaar (University of Groningen) about the consequences of privatization to public health care in the Welfare State.

<sup>12</sup> Prof. Dr. J. Falke (University of Bremen, Centre of European Law and Politics) served as commentator to Prof. H. Bröring's conference presentation, but asked for discharge of publication duty.

<sup>13</sup> The contribution was submitted immediately after the conference in 2010. Thus, some more recent articles with regard to the topic have been published.

<sup>14</sup> T. Markus' oral presentation was supplemented by K. de Graaf (University of Groningen) who essentially presented his paper K. de Graaf, "Balancing Exploitation and Protection of the Dutch North Sea – The Dutch Struggle with the Need for Wind Energy at Sea and a Legal Framework for the Protection of the Marine Environment", in: H. C. Bugge and C. Voigt (eds) *Sustainable Development in International and National Law. What did the Brundtland Report do to Legal Thinking and Legal Development, and Where can we go from here?* The Avosetta series No. 8, Groningen: Europa Law Publishing 2008, pp. 573–589.

rests with the member states, the institutional set up for multi-level decision making, the comitology procedures, differ thus sustaining inconsistencies. Considering that the directive refrains from clear cut use restrictions, it remains to be seen if it exerts a beneficial effect on member state policies, with again repercussions on sectoral EU policies.

Thomas Heinicke reflects upon the tensions about the gradually accessible mineral resources under the melting Arctic Shelf and raises the question if there is a need for a special Arctic regime. At the centre are conflicting economic and non-economic interests since the arctic functions as a gigantic water pump for the ocean conveyor belt which controls the world's climate, and various indigenous peoples live there. He explores the existing regime under the UN-Convention on the Law of the Seas (UNCLOS), and the submitted claims to its Commission on the Limits of the Continental Shelf. The core of the article is a thorough analysis of the institutional shortcomings which account for why the Commission will not meet the expectations to serve as a moderator and decision-taker. Heinicke advises against a simple revision of the Commission's set-up and advocates an inclusive re-start of negotiations based on modern principles of international law like precaution and sustainability.

The third article of the Chapter by Wabbe de Vries and Ulrich Meyerholt redeems the conference spirit of cross boarder co-authorship and worthily concludes the volume. It complements the earlier contributions by a paper on planning law, focusing on the integration of use and protection conflicts in the Wadden Area. It takes up a historical stance, looking on coastal protection by dykes and dwelling mounds for human constructions (and remnants thereof), thus including cultural-historical alongside of environmental protection. Echoing the concerns of Heinicke for the Arctic, de Vries and Meyerholt identify a lack of a proper legal regime which is geared towards a balance of conflicting interests. Consecutively, they devise a set of procedural and substantive criteria, including a coordinative authority for the Wadden Sea, which should form the centre of a future Wadden Area regime.

# WHAT IS TO BE GAINED FROM COMPARATIVE RESEARCH AND TEACHING? THOUGHTS FOR AN IDEAL AGENDA

Franz Werro\*

## I. INTRODUCTION

The short and de-contextualized answer to the question asked in the title of this presentation could be that comparative research and teaching help those who engage in the discipline of comparing different laws enlarge their horizons and avoid self-centred parochialism. Legal comparison could help lawyers deepen their approach to law in general and to their own law in particular. It might even help practitioners gain a better understanding of reality when they give advice in international transactions and settings. This could be true even though most international legal practice remains governed by a single (national) law. Of course, fluency in a foreign legal system might occasionally be of great help. For example, if a legal expert delivers an opinion on the law of his/her country to a foreign lawyer, it is certainly decisive for the expert to have an excellent understanding of the foreign background against which this lawyer is going to give meaning to the opinion.<sup>1</sup> Be that as it may, comparative legal inquiries remain largely peripheral in practice; while things may change, to this day they are mainly the object of an academic pursuit. If, as the paper intends, one concentrates on such an academic pursuit, most would probably agree that legal comparison helps broaden one's intellectual horizon and unchallenged assumptions. Coming from experienced and reputable scholars involved in the international enterprise of the Hanse Law School, the question asked about the possible gains of comparative studies suggests, of course, a more complex inquiry and requires a more nuanced answer. Indeed, most of us probably wish to be open-minded and not parochial, but this alone does not solve the question of *why* we want it that way. We must therefore ask what we are looking for when we engage in comparing different laws. On the European landscape, as is the case at the Hanse Law School, one may wish to enable students

---

\* Professor of Law at the Fribourg University Law Faculty, Fribourg (Switzerland) and at the Georgetown University Law Center, Washington, DC (United States of America). The present text is an adaptation of the talk presented at the Hanse Law School, in Oldenburg (Germany), on 27 May 2010. I wish to thank my research assistants Jessica Mabillard, MLaw, and Wei Wen Zhu, BLaw, both at the Fribourg University Law Faculty, for their help in editing this paper. This text further derives in part from a chapter that appeared in: *The Cambridge Companion to Comparative Law* (edited by Mauro Bussani and Ugo Mattei and: 'Comparative Studies in Private Law: Insights from a European Point of View', Cambridge University Press 2012, pp. 117 et seq.). I also wish to thank Christiana Fountoulakis, Pierre Legrand, and Joseph Page, who read an earlier version of this manuscript. Their insights were quite helpful. The usual disclaimer applies.

<sup>1</sup> On this question, see *J. H. Merryman/D. S. Clark/J. O. Haley*, *Comparative Law: Historical Development of the Civil Law Tradition in Europe, Latin America, and East Asia*, New Providence: LexisNexis, 2010, pp. 131 et seq.



to meet the requirements of an ever-changing economy in the course of globalization, and to understand the challenges posed by a deepened European integration. The specific orientation of such goal will however depend on one's cultural views. One may want to subscribe to the classical idea that comparative legal studies should be used in order to reveal the fundamental unity of the law and to help understand what makes laws of different nations alike. This is the classical approach to comparative studies and has been decisive in the pursuit of legal unification and rapprochement. In contrast, legal comparison can be seen as a way of exploring differences and of promoting respect for legal diversity. This approach is arguably less classical. As it offers itself as a tool for resistance against monolithic and hegemonic thinking, this new approach has gained more and more sympathy in recent years, at least among legal theorists.

In order to appreciate the possible advantages of comparative legal analysis, we therefore need to define why we engage in it. It is the political and cultural agenda we choose that will impose a certain method and a certain spirit. Detached from any particular existing project, but certainly influenced by my own Europhilic background and my cross-Atlantic experience, I would like to make a plea in this paper in favor of an ideal of comparative legal studies that helps both students and future lawyers move away from parochialism and nationalism, but at the same time helps them to pay respect to difference and legal as well as cultural diversity. Legal integration in Europe, and elsewhere for that matter, should not forsake these values. For the purposes of my inquiry, I will divide my paper and explore the question of how to achieve these goals with the help of comparative legal studies, first at the level of teaching and then at the level of research.

## II. COMPARATIVE TEACHING

The first and somewhat classical question is whether comparative legal teaching should be dealt with as an autonomous subject or whether it should be integrated in the different classes of the curriculum of law faculties.<sup>2</sup> Perhaps regardless of the answer to that question, the second query relates to the definition of the audience: should one introduce legal comparison at the beginning of legal studies, or should one wait for students to be more advanced? Much has been written about these questions, and needless to say, a definitive answer cannot be expected.

### 1. COMPARISON IN EACH CLASS FROM THE BEGINNING TO THE END?

As a provisional answer to both questions, one could suggest that the teaching of law must help students to develop as much as possible an open mind devoid of chauvinism and nationalism. To get there, comparative teaching should be the first tool to be used in order to show that a given answer to a problem is just one out of many. It should also be employed to reveal which forces justify the variations from

---

<sup>2</sup> See *M. Reimann*, *The End of Comparative Law As an Autonomous Subject*, 11 *Tulane European and Civil Law Forum* 1996, p. 49-72.

one legal answer to the other.<sup>3</sup> By the same token, comparative teaching should aim to explain that a given answer is culturally and linguistically informed, and also that it is the result of a political choice. This has consequences for the kind of research that should be pursued. As far as the classroom experience is concerned, it certainly calls for an interdisciplinary approach to the teaching of law in general, and of comparative law in particular.

With that in mind, it appears desirable to offer a comparative study of the law as early as possible and as broadly as possible, essentially before the students' basic view of law is already firmly in place, and throughout the curriculum.<sup>4</sup> Comparative legal analysis should thus be used as a tool of understanding for beginners, as well as for advanced students in each class, regardless of the field of law. Every teacher in his/her discipline would have to make an effort to bring a non-national analysis into the classroom.<sup>5</sup> At the same time, an effort should also be made to move away from a positivistic and bookish understanding of the law. In my view, comparative studies should be used to ask those questions which lawyers driven by their clients' needs cannot ask. Such studies would help students to look back on the assumptions that practicing lawyers accept without reflection. As Fletcher puts it, one would use comparative law as a subversive discipline.<sup>6</sup>

Whether and to what extent this curriculum is possible is of course debatable. In certain schools, more than in others, there seems to be an interest in adopting a cosmopolitan and interdisciplinary approach to law. As long as daily practice remains governed by national law, one may even question the necessity to increase the difficulty of law teaching by using foreign law or comparative analysis along the lines just suggested. In my perception, the trend towards less localism and a more comprehensive understanding of law seems, however, to be gaining ground and, despite price pressure from publishing companies, basic national law books on traditional subjects such as tort and contract seem to contain more information on foreign and European law than before. Almost always though, European books lack any reference to other sources than legal ones.

## 2. GENERAL COURSES ON LEGAL COMPARISON AND ADVANCED SEMINARS ON SPECIFIC TOPICS

### A) GENERAL COURSES

Regardless of the quality and feasibility of the comparative teaching just described, or perhaps precisely because of the uncertainty of the matter, the curriculum should include one or several general courses on comparative legal studies, preferably at

---

<sup>3</sup> See *R. Sacco*, *Legal Formants: A Dynamic Approach to Comparative Law*' 39 *American Journal of Comparative Law* 1991, pp. 1-34.

<sup>4</sup> See *M. Reimann*, *supra* fn. 2, p. 64; *H. H. Koh*, *Why Transnational Law Matters*, 24 *Penn State International Law Review* 2006, pp. 745, 751.

<sup>5</sup> See *M. Reimann*, *supra* fn. 2, p. 65; *H. Koh*, *supra* fn. 4, p. 751.

<sup>6</sup> See *G. Fletcher*, *Comparative Law as a Subversive Discipline*, 46 *American Journal of Comparative Law* 1998, pp. 683-700.

the beginning of the education process, and preferably again with a view to providing a non-positivistic approach to problems, that would be grounded in some 'law-and-ism'.

In these courses, students should, as a consequence, be offered not only an understanding of the 'grands systèmes de droit contemporain' (or major contemporary legal systems of the world), but also and, even more so, be exposed to the variety of possible answers to contemporary problems. This offering should be conceived essentially on the basis of daily-life issues and as problem-based, be it only because the (successful and responsible) practice of law does ultimately not rest so much on the mastery of a systemic and conceptual edifice, as European private law teachers seem to believe, but rather on the ethical ability to control an art and a technique for the resolution of concrete disputes. This approach does neither exclude the possibility of trying to answer an overarching question to provide the class with some consistency; nor does this exclude giving an insight into methodological and theoretical problems. For instance, it would be useful to study the link between law and language,<sup>7</sup> law and culture, as well as law and psychology or anthropology.<sup>8</sup> This point is important because comparative 'law', as it is often called, does not exist as such; what is described as 'comparative law' is merely a process of investigation. The need to emphasize problem-based teaching against the background of a general question that gives the course as much coherence as possible is also crucial to define the manageable boundaries of a general course on legal comparison. To draw from my own experience, I have often used the question of the feasibility of a European Civil Code to introduce my Georgetown students to legal comparison, both on a practical and on a theoretical level. Dealing with this question (perhaps particularly with common law students) implies analyzing where a civil code stands in relation to society and to a functional market. It also requires thinking about legal diversity in a multilingual and multicultural context,<sup>9</sup> and, ultimately, reflecting on what law is about. Regardless of the question chosen in a given course, and because of the different sensibilities that come along with the public-private law divide, more than one general course should be offered, including perhaps a specific one that is precisely devoted to

---

<sup>7</sup> *S. Glanert*, *Speaking Language to Law: The Case of Europe*, 28 *Oxford Journal of Legal Studies* 2008, p.161; *B. Grossfeld*, *Comparatists and Languages*, in: P. Legrand/R. Munday (eds), *Comparative Legal Studies: Traditions and Transitions*, Cambridge: Cambridge University Press, 2003, pp. 154 et seq.; on the relation between law and language, in general, *R. Sacco*, *Langue et droit*, in: L. Castellani (ed.), *Les multiples langues du droit européen uniforme*, Turin: L'Harmattan Italia, 1999, pp. 163 et seq.; *D. G. Réaume*, *Official-Language Rights: Intrinsic Value and the Protection of Difference*, in: W. Kymlicka/W. Norman (eds.), *Citizenship in Diverse Societies: Theory and Practice*, New York: Oxford University Press, 2000, pp. 245 et seq.

<sup>8</sup> For an approach to comparative law and sociology, see *R. Cotterell*, *Comparatists and Sociology*, in: P. Legrand/R. Munday (eds), *Comparatives Legal Studies: Traditions and Transitions*, Cambridge: Cambridge University Press, 2003, pp. 131 et seq.

<sup>9</sup> See *R. Sefton-Green*, *The European Union, Law and Society: Making the Socio-Cultural Difference*, in: T. Wilhelmsson/E. Paunio/A. Pohjolainen (eds), *Private Law and the Many Cultures of Europe*, Alphen aan den Rijn: Kluwer, 2007, pp. 37 et seq.

overcoming the rigid separation between the private and the public.<sup>10</sup> This could be particularly useful in the European context, where the distinction sometimes tends to obscure the unity of the law.

#### b) ADVANCED SEMINARS ON SPECIAL TOPICS

In addition to the general courses just described, comparative seminars for advanced students in a number of key issues would need to be offered as well, ideally combining again practice and theory.<sup>11</sup> These upper level classes would have to concentrate on specific topics, perhaps preferably in those areas of the law where differences and cultural clashes are most pronounced. This is undoubtedly, for example, the case in the field of privacy where the US approach seems irreconcilable with the European one.<sup>12</sup> Because of the global dimension of a number of contemporary problems, these classes should explore the reality beyond the Western boundaries. The only limit would be the teacher's comparative ability and confidence in a given area of the law. Co-teaching would certainly be of help where expertise in a foreign law and/or in another discipline is missing.

### 3. COMPARATIVE TEACHING AS A WAY OF ACHIEVING A MORE GENERAL AND MORE FUNDAMENTAL THEORETICAL UNDERSTANDING OF LAW?

A question that Europeans should consider more than they have done is whether and how they can engage in the creation of 'European' law schools. These schools should aim at providing a more general and fundamental understanding of law than the one offered in regular law schools. Leaving aside to some extent the professional goal that regular national law schools have traditionally pursued, the 'European' faculties would offer a legal education based on European and global concerns, with a less positivistic and more interdisciplinary understanding of the law. Such institutions already exist to some extent. The European University Institute in Florence (EUI) is one of them operating at the graduate level.<sup>13</sup> However, at a European University law faculty of the kind, I am suggesting here, the idea would be to offer a comprehensive legal curriculum, from beginning to end. As SciencesPo now does with its 'école de droit',<sup>14</sup> law teaching would be

---

<sup>10</sup> Instead of a general course, such teaching can also be offered in the form of a seminar. Every year, Markus Schefer, Chair of Constitutional and Administrative Law, at the Basel University, Faculty of Law, and I teach a comparative joint seminar on issues that help to bridge the divide between private law and public law.

<sup>11</sup> See also *H.-H. Koh*, supra fn. 4, pp. 751 et seq.

<sup>12</sup> *J. Q. Whitman*, 'The Two Western Cultures of Privacy: Dignity versus Liberty', 113 *Yale Law Journal* 2004, pp. 1151 et seq., pp. 1153-1160.

<sup>13</sup> On the European University Institute and its activities, see <http://www.eui.eu/Home.aspx>, and, for more details on the program, see <http://www.eui.eu/Departments And Centres /Law/Index.aspx> (accessed on 14 Jan. 2013).

<sup>14</sup> For more details about the graduate and undergraduate programs, which include a general and interdisciplinary approach to the humanities in an international perspective, see <http://www.sciencespo.fr/>. For more information about the law school at the graduate level

designed to shape the critical mind of students and help them acquire what it takes to develop skills and tools of understanding and interpretation. These goals appear to be shared by the Hanse Law School, which has been founded upon principles of legal comparison and interdisciplinarity.<sup>15</sup>

According to the approach I recommend, which is comparable in certain ways to the one to be found in the US, the local and the international bar would then have to undertake a more positivistic legal education, whether local or not. In the US landscape, things are perhaps easier than in Europe because the culture and the market favor and promote the creation of elite schools and accept that these 'national' institutions leave aside the teaching of positive law, at least as long as this kind of teaching does not threaten the success rate of their students on the bar examination. In addition to a more ambitious approach to legal studies, legal realism has also made it possible in the US to consider that theory is a legitimate part of law teaching. At a national elite school, mere doctrinal teaching is of relatively little interest to faculty and students.<sup>16</sup> Specific legal rules do not really matter as such. Law teaching is about reasoning and asking questions rather than bothering with offering a precise solution to a problem under a given law. Positive law is dealt with at the bar level, and it is the bar or the State that will enforce its own requirements to make sure that local lawyers can be equipped with the appropriate mastery of local rules.<sup>17</sup> This paper cannot explore further what it would take to promote the development of European law schools as I just described them. Undoubtedly, the multicultural and multilingual reality of Europe poses a particularly demanding challenge in this regard. Furthermore, law schools in Europe may wish to remain attached to the present model in which most of the upper-level, theoretical international or comparative teaching is addressed through graduate courses via the Erasmus system or other networks.<sup>18</sup> This model has its merits, but it carries the risk that it leaves demanding and comparative legal studies at the periphery, benefitting only those students who choose to go abroad and

---

and on the adopted teaching method in particular, see <http://master.sciences-po.fr/droit/en/node/28> (accessed on 14 Jan. 2013).

<sup>15</sup> For more information about the Hanse Law School and its program, see <http://www.hanse-law-school.de/index.htm> (accessed on 14 Jan. 2013). Founded in 2002 under the auspices of the University of Bremen, the Carl von Ossietzky University Oldenburg, and the Dutch University of Groningen, the Hanse Law School includes a co-teaching program, 'which should give students the skills to practice in a globalized world and to face the challenge of a more deepened European Integration.'

<sup>16</sup> *J. Gordley*, *Mere Brilliance: The Recruitment of Law Professors in the United States*, 41 *American Journal of Comparative Law* 1993, pp. 367-384.

<sup>17</sup> The fact that US elite law schools engage in theory meets sometimes with skepticism; for a critique of how 'theory'-minded professors, who ignore doctrine and practice, do not provide to law students, see *H. Edwards*, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 *Michigan Law Review* 1992, pp. 34-42.

<sup>18</sup> For an interesting global teaching enterprise launched by the Georgetown University Law Center in a partnership with schools from all continents, called the Center for Transnational Legal Studies, in London, see <http://cts.georgetown.edu/>. Also operating at the graduate level, the new Master's program in cross-cultural business practice offered by the Universities of Fribourg, Berne and Neuchâtel, brings together professors and students from all the continents, see [www.MLCBP.ch/](http://www.MLCBP.ch/) (accessed on 28 Nov. 2012).



want to have the ‘auberge espagnole’ experience. Of course, these travelling and away-from-home models have the merit of generating foreign immersion and of favoring multicultural student encounters. However, they should not replace cosmopolitan, interdisciplinary and cross-cultural education at home.

### III. A COMPARATIVE RESEARCH

Let us now turn to the question of how to conduct comparative research. The answer to this question will determine the kind of teaching we engage in with students and the method that needs to be used, both in teaching and in writing. As mentioned in the introduction, the way we define academic comparative research will depend on the goal we assign to legal comparison, and thus on whether we want to use comparative studies in order to explore similarity(ies) or difference (s) or possibly both. One can understand why, after World War II, European lawyers who had witnessed the horrors of nationalism were tempted to promote an integrative understanding of the law. Erasing differences must have borne the sign of hope. However, now that the European Union often appears to be a menace to cultural diversity, one can relate to the idea that the recognition of difference should be placed at the heart of the academic and theoretical comparative enterprise.<sup>19</sup>

#### 1. LEGAL COMPARISON IN ORDER TO FAVOR CONVERGENCE, TO PROMOTE RESPECT FOR DIFFERENCE, OR BOTH?

As one knows, the question posed in this subtitle has become a matter of dispute in recent years.<sup>20</sup> The orthodox view, still the majority position, is that comparative studies should lead to an understanding of the commonality between the different laws and enable specialized lawyers to come up with the required skills to define unified rules.<sup>21</sup> Under the lead of Pierre Legrand, a minority view, but one that is gaining more and more acceptance, suggests to the contrary that legal comparison should bring lawyers to the recognition and the respect of difference.<sup>22</sup> As just mentioned, the idea of ‘similarity’ must certainly have had a particular appeal to the generation of lawyers who grew up after WWII. Legal comparison and the use of foreign law were often presented as a way to understand what unites the different legal systems. The idea of legal unification was also attached to a project of peace and economic growth. In addition, this quest for commonality is still often presented as a scientific enterprise that looks at law rationally and without ideological prejudices.<sup>23</sup> Along those lines, it is sometimes argued that it would not

---

<sup>19</sup> *P. Legrand*, *Le droit comparé*, Paris : Presses universitaires de France, 3rd edition, 2009, p. 107.

<sup>20</sup> *G. Dannemann*, *Comparative Law: Study of Similarity or Differences?*, in: M. Reimann/R. Zimmerman (eds), *The Oxford Handbook of Comparative Law*, Oxford: Oxford University Press, 2006, pp. 383 et seq.

<sup>21</sup> *K. Zweigert/H. Kötz*, *Introduction to Comparative Law*, Oxford: Oxford University Press, 3rd rev. ed. transl. by Tony Weir, 1998, p. 46.

<sup>22</sup> For example, among many other contributions by him, see *P. Legrand*, *Paradoxically Derrida: For a Comparative Legal Studies*, 27 *Cardozo Law Review* 2005, p. 631.

<sup>23</sup> *K. Zweigert/H. Kötz*, *supra* fn. 21, p. 46.

come to anyone's mind to think of German physics or American chemistry, and that the same should be true for law.<sup>24</sup> Accordingly, the 'scientific' comparative inquiry remains fundamentally destined to help identify and understand the underlying principles that give coherent meaning to decisions and rules that otherwise do not reveal those principles. Arguably, this approach does not specifically differ from the kind of reasoning national lawyers engage in when trying to give meaning to national precedents.<sup>25</sup>

That first understanding of comparison has certainly led to some results. International conventions are often the product of that comparative effort, and some of them have been successful, because the solutions chosen seem to merge different traditions and overcome clashes between different legal cultures. Lawyers from different national backgrounds working on these unification efforts in teams have put together regulatory frameworks that offer the agents of international or transnational commerce or of other cross-border situations valuable help in solving some of the conflicts that come up. The 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG), for example, has convincingly been described as a neutral general platform that offers parties from different countries the possibility of having their transaction governed by rules that are not those of either one of the parties involved.<sup>26</sup> Of course, common statutory texts and principles offer psychological comfort in international settings such as the one just mentioned, but they do not necessarily trigger much of a common law. This point has perhaps not been recognized enough. There is still a widespread assumption that common rules generate common law, as if law was limited to the statement of rules. Applying such textual understanding of the law, one is likely to overlook the fact that the way one reads into a text depends primarily on one's cultural understanding and 'Vorverständnis'. Legal comprehension is not only contextual, but it is also certainly cultural. To the extent that cultures vary, the same is true for legal interpretation and implementation, regardless of the common text that one applies. In the absence of a federal court system, this would still be true in Switzerland, where the French Swiss do not necessarily read into the same federal text as the Swiss Germans or the Italian Swiss do. One can therefore relate to some of the attacks launched against the majority view held by comparativists, especially when diversity becomes threatened by integrational moves, as is the case with respect to private law in the perception of numerous actors in Europe. Despite the fact that one may hold the unification of private law as a deeply interesting enterprise, it should not come as a surprise to witness reactions of fear and opposition defending pluralism and thus national solutions. Despite its sometimes conservative and even chauvinistic tone,<sup>27</sup> this opposition appears

---

<sup>24</sup> J. Gordley, *Is Comparative Law a Distinct Discipline?*, 46 *American Journal of Comparative Law* 1998, pp. 607 et seq.

<sup>25</sup> *Ibid.*, p. 615.

<sup>26</sup> For an interesting analysis, see C. Fountoulakis, *The Parties' Choice of 'Neutral Law' in International Sales Contracts*, VII *European Journal of Law Reform* 2005, pp. 303 et seq. and pp. 313-321.

<sup>27</sup> See for example Y. Lequette, *Quelques remarques à propos du projet de code civil européen de M. von Bar*, *Dalloz*, 2002, "Chroniques", p. 2202.

ultimately culturally grounded and politically legitimate. The European Union is not the United States of America, and commercial pressure should not change this reality.

Regardless of the political dimension of the debate, it seems fair to recognize, as a matter of principle, that private law is tied to a cultural and linguistic environment and that national differences remain, despite the common heritage and common aspirations of the actors involved.<sup>28</sup> Thus, from an academic and non-instrumental point of view, a number of comparativists argue today that comparison should not encourage the finding of the same, but rather help recognize, respect, and discuss difference.<sup>29</sup> Considering that law is culture, these scholars also contend that legal comparison should be based on an understanding of the specific forces that drive laws to be the way they are. It may be that this new approach does not serve the immediate, concrete and client- or case-oriented needs of the legal practitioner who seeks inspiration from foreign law. As a specifically academic or political enterprise, however, this type of comparison is certainly more than convincing and useful.

The growth of uniformity and hegemonic thinking, particularly reinforced by economic actors with a global reach, requires students to learn to think with an open mind and to do away with the idea that there is one solution for all. In my opinion, this is truer than ever on a global level. But it is also true at a regional level, such as in Europe. Where legitimate interests require ignoring local demands, localism should be ignored; instead, where local culture requires it, localism should prevail. In any event, what remains decisive is a multilateral approach based on a profound knowledge of diversity. The choice of one solution deemed 'better' or 'more efficient' should not be the proposed solution, contrary to what the Draft Common Frame of Reference (DCFR) and other model laws sometimes suggest.<sup>30</sup> The political death of (at least some parts of) the DCFR in 2010 no doubt finds an explanation in that it ignored the need to respect legal plurality and diversity. Also, by going beyond contract law as had been envisaged in Brussels, the project attracted multiple criticisms. This is certainly what has led the European Commission again to limit further work to the field of contract law, as the adoption of CESL, the proposed - and already much criticized - regulation for a

---

<sup>28</sup> *R. Sefton-Green*, supra fn. 9, pp. 37 et seq.

<sup>29</sup> *P. Legrand*, *Comparative Legal Studies and the Matter of Authenticity*, 1 *Journal of Comparative Law* 2006, p. 365, which begins with an apt quote by Larkin: 'Insisting so on difference, made me welcome: Once that was recognized, we were in touch'.

<sup>30</sup> For more details about the DCFR, see *C. von Bar*, *A Common Frame of Reference for European Private Law – Academic Efforts and Political Realities*, 12 *Electronic Journal of Comparative Law* 2008, pp. 1-10, available on <http://www.ejcl.org/121/art121-27.pdf> (accessed on 28 Nov. 2012); for a French critique of the DCFR, see *B. Fawarque-Cosson*, *Droit européen des contrats: bilan et perspectives pour la prochaine décennie*, *Revue des Contrats* 2010, p. 1; for the view that case law should bring about integration at the European level, see *W. van Gerwen*, *The ECJ Case-Law As a Means of Unification of Private Law?*, in: *A. Hartkamp et al. (eds), Towards a European Civil Code*, Nijmegen: Kluwer, 3<sup>rd</sup> edition, 2004, pp. 101 et seq.; see also, *L. Antonioli/F. Fiorentini/J. Gordley*, *A Case-Based Assessment of the Draft Common Frame of Reference*, 58 *American Journal of Comparative Law* 2010, p. 343.

common European sales law confirms.<sup>31</sup> Be that as it may, if respect for diversity is the principled goal, this has implications for the way in which comparative reading or research should be done.

## 2. THE CHOICE OF METHOD

The goals assigned to comparative studies have their methodological implications.

### a) DOING AWAY WITH THE MONOPOLY OF THE FUNCTIONAL APPROACH?

As mentioned above, it has been argued that mainstream comparative literature remains attached to the notion that divergences in legal rules are often variations on common principles. Pursuant to this approach, law is fundamentally and universally supposed to be the same; local variations are superficial only and incidental manifestations of the same truth. To accompany faith in the existence and validity of this truth at a methodological level, one finds the proclaimed principle of *presumptio similitudinis*.<sup>32</sup> Thus, a local rule is merely the more or less adequate expression of the function that the law is trying to serve. The comparative search must therefore lead to the identification of the foreign rule or institution that serves as a functional equivalent of the rule identified in the place where the inquiry began.<sup>33</sup> This understanding certainly has had its appeal and its justification. It rests in part on the belief that where the mere recording of the surface of the law would reveal dividing difference only, sophisticated reading and understanding reveals commonality and togetherness. Again, one can relate to the idea that for comparativists in the late twentieth century, this approach has brought the hope of peace and the possibility of overcoming destructive rivalries and differences between cultures of different nationalities. Yet, at the same time, sameness, at least if proclaimed as a dogma, bears the risk of doing violence to some interesting and important differences.<sup>34</sup> It also celebrates one solution as being superior to others.<sup>35</sup> It assumes that the comparativist should find the same in the other, regardless of the specificities of that other. Clearly, the risk of hegemonic imperialism is lurking, together with a threat to the right to be different. The principle of sameness may

---

<sup>31</sup> Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, 11 Oct. 2011, COM (2011) 635 final.

<sup>32</sup> K. *Zweigert/H. Kötz*, supra fn. 21, p. 45.

<sup>33</sup> *Ibid.*, pp. 45 et seq.

<sup>34</sup> The term ‘violence’ is used by *Legrand*, and convincingly so: *P. Legrand*, Paradoxically, Derrida: For a Comparative Legal Studies, 27 *Cardozo Law Review* 2005, pp. 631, 706. The fact that this would reveal an ‘emotional investment’, as underlined by *R. Cotterell*, Is It so Bad to Be Different? Comparative Law and the Appreciation of Diversity, in: E. Öricü/D. Nelken (eds), *Comparative Law. A Handbook*, Oxford: Hart Publishers, 2007, p. 138, does not undermine the legitimacy of *Legrand’s* claim and choice of words; see also *A. Colombi Ciacchi*, Strengthening the Comparative Method in European Legal Research: Three Suggestions, in this volume.

<sup>35</sup> *K. Zweigert/H. Kötz*, supra fn. 21, p. 8 and p. 47, who state that ‘[o]ne of the aims of comparative law is to discover which solution of the problem is the best’ and that ‘[o]ften...one solution is clearly superior.’

also hide the fact that some notions celebrated in certain parts of the world do not find an equivalent elsewhere. This is for example the case with the notion of ‘private law’ that may be problematic or even irrelevant in certain contexts outside Europe.<sup>36</sup>

In any event, if one is interested in respecting cultural identity and is thus tempted to investigate difference rather than operating by reference to the principle of convergence, one has to address the question of how to proceed. While the answer to this question does not impose one given method only, deciding in favour of the exploration of difference has methodological implications. Sacrosanct functionalism must surely leave room for other methods of investigation.

#### b) INVESTIGATING DIFFERENCE, REJECTED POSITIVISM AND ENGAGING IN INTERDISCIPLINARITY

In addition to maintaining the assumption of convergence, traditional legal comparison often assumes that foreign law has a firm given content that can be found in the legal sources in the country under scrutiny. Along with harboring this positivistic and static assumption, legal comparison often consists in a mere description of legal outcomes and rules in a reportorial and, ultimately, not very informative way.<sup>37</sup> By focusing on what is stated to be the law in official legal documents, the work often resembles that of presenting skeletons.<sup>38</sup> The tensions, controversies and debates that surround a given decisional process are largely ignored.

As he tends to take things too literally, the orthodox comparativist fails to relate to the way in which culture permeates the foreign legal institution or rule, and he does not account for the uncertain reasoning process out of which a given rule has emerged. In doing so, he fosters conclusions that will most likely be incomplete, and certainly, from the point of view of the indigenous lawyer, unacceptable in their simplicity. Again, to the extent that the search for convergence drives

---

<sup>36</sup> We will leave out here the ethical and political need to also recognize similarity. Indeed there is a long Orientalist tradition of ‘recognizing’ the non-West’s difference (consider historic claims that China has had no tradition of civil and private law, but only penal law and despotic public law). Obviously it can be important to be able to see that what looks different can be re-interpreted as being not so different from the European or Western standard; on this question, see *T. Ruskola, Legal Orientalism*, 101 Michigan Law Review 2002, p. 179; see also from a more general point of view, on the questionability of the representation of China as fundamentally different *Jean-François Billeter, Contre François Jullien*, Paris: Allia, 2006.

<sup>37</sup> This goes together with the fact that European scholars believe too much that ‘the law par excellence is a Code’ or that they remain fascinated with law-in-the-books; on these points, see *A. Colombi Ciachi*, supra fn. 34, pp. 5 et seq.

<sup>38</sup> *G. Fletcher*, supra fn 6, pp. 691 et seq.; for a similar point, see *H. Patrick Glenn, Comparing*, in: E. Örüciü/D. Nelken (eds), *Comparative Law: A Handbook*, Oxford: Hart Publishers, 2007. p. 91, where the author makes the point that the way foreign law is often taught consists of bringing an understanding of ‘what the foreign law somehow is, with very little or no place for discussion of why it might be the way it appears to be, and what consequences that might have for the law we have already learned in other courses’.



traditional comparison, the comparativist will often praise or blame a given foreign solution, depending on how well this solution matches his home rule or institution, and on how it appears to serve the home-defined function assigned to the matter under scrutiny. For example, the traditional comparativist may, as many civilians have done, look at common law consideration in the formation of contracts and declare it to be a superfluous institution. In addition to being superficial, this comparison ignores which decisive forces have led a given law to adopt this rule and leads one to assume the superiority of the rule with which one is familiar.

If it is accepted that difference and cultural diversity are also assets rather than just impediments to social and commercial exchanges, this certainly implies a different attitude and method for the comparativist than the ones just described. Rather than merely making a descriptive and formal inventory of foreign legal rules and institutions and judging their value in the light of his own, the comparativist should engage in recognizing and respecting the foreign and the other as such. To study, recognize and respect the foreign becomes a complex and unlimited exploration, in the course of which the comparativist must 'avoid positioning himself as that by reference to which the other ought to be assessed.'<sup>39</sup>

One way of avoiding such self-centrism is to engage in a collective enterprise, where knowledge of foreign law is conveyed by different *rapporteurs* who discuss and analyze the information together. This is the method that has often been adopted in comparative settings. It was refined in the Common Core project,<sup>40</sup> where the comparison made by the editor of a given volume dealing with a given subject is done by reference to concrete and factual hypotheticals. These are prepared on the basis of information supplied by national *rapporteurs*, who display a cosmopolitan and open-minded attitude.<sup>41</sup> Accordingly, the result of the comparative analysis is not just based on law-in-the-books, but on some empirical and cultural investigation.

Regardless of whether work is done in a team or by one person alone, legal comparison should become an inquiry. The process of understanding the law of the other should take the form of an investigation into the forces that justify its existence from within.<sup>42</sup> By definition, this appears to call for interdisciplinarity as history, politics, literature, economics, and other configurations define what *Legrand*, using *Derrida*, calls the 'spectral' dimension of texts in general, an insight which applies to legal texts also.<sup>43</sup> These disciplines thus become some of the

---

<sup>39</sup> P. *Legrand*, *The Verge of Foreign Law – With Derrida*, 1 *Romanian Journal of Comparative Law* 2010, pp. 73, 78.

<sup>40</sup> For more details, see [http://www.common-core.org/index.php?option=com\\_content&view=article&id=47&Itemid=54#3](http://www.common-core.org/index.php?option=com_content&view=article&id=47&Itemid=54#3) (accessed on 28. Nov. 2012); for an appraisal of the Common Core method and for further suggestions on the formulation of questionnaires, see A. *Colombi Ciachi*, *supra* fn. 34, pp. 12 et seq.

<sup>41</sup> M. *Bussani/U. Mattei*, *Le fonds commun du droit privé européen*, 52 *Revue Internationale de Droit Compare* 2000, pp. 29, 44.

<sup>42</sup> P. *Legrand*, *supra* fn. 38, pp. 85 et seq.

<sup>43</sup> *Ibid.*

indispensable tools for giving meaning to legal texts.<sup>44</sup> Along those lines, it is clearly not sufficient to assume that the same common Roman law representations have been haunting European private law texts for more than two thousand years. Within Europe, different cultures and languages, not to mention different forms of capitalism and respect for the State, have shaped the law and the relation of individuals to it in ways that partially blur and indeed erase the past heritage. Thus, comparative studies will benefit from some form of 'law-and-ism', just as any serious academic legal research will, if it wants to produce something other than mere doctrinal analysis.

Some object to this approach that lawyers are not equipped to deal with interdisciplinarity.<sup>45</sup> It is certainly true that the law practitioner rarely engages in an inter- or multidisciplinary investigation for the sake of solving her clients' problems. In fact, if he/she needs to do so, he/she will hire the required experts. Even academic jurists armed with the time and motivation to engage in such an inquiry may find the research impossible due to lack of expertise or the volume of material. In other words, interdisciplinary research may appear quite difficult, at least when done alone. However, this should not mean that one must give up on that challenge, at least if one claims to engage in useful and responsible studies. In effect, lawyers might want to revisit their simplistic and reductionist understanding of the world and consider working in teams with colleagues from other disciplines. But this question shows that not only competence, but also courage and independence are at stake. Indeed, it may be hard for scholars to find themselves without the reassuring support they enjoy from the world of practice. In that respect, it is interesting to compare European professors with their American counterparts: whereas the former make sure that courts refer to their work, and often engage in consulting, the latter are much more often exclusively involved in the pursuit of free theoretical reflections. These theory-minded professors are obviously not cited in court decisions and forego additional revenues, but they can launch important debates and generate influential schools of thought.

Be that as it may, one manageable interdisciplinary method appears to be that which *Mitchel Lasser*, borrowing from literary criticism, calls *close reading*. Specifically, *Lasser* suggests that the comparativist should do his/her research in a foreign legal system based on a rigorous literary analysis of the discourses deployed by the jurists within that system. Furthermore, this close reading should not be practiced only on the official and public output generated by formal state agencies,

---

<sup>44</sup> See *G. Samuel*, Taking Methods Seriously (Part Two), 2 *Journal of Comparative Law* 2007, pp. 210, 229.

<sup>45</sup> On this objection, see *B. Fauvarque-Cosson*, Development of comparative Law in France, in: *M. Reimann/R. Zimmermann* (eds), *The Oxford Handbook of Comparative Law*, Oxford: Oxford University Press, 2006, p. 61, who argues that '...when Legrand advocates complex cultural and interdisciplinary comparison, his approach renders the discipline so complicated that it may well discourage and deter scholars from becoming involved in the first place'.

but also on the many other discourses that are produced in and around the legal system being studied.<sup>46</sup>

In whatever form, some interdisciplinary approach seems vital for comparative studies.<sup>47</sup> As an alternative to engaging in the rigorous study of another discipline, it may also help to immerse oneself repeatedly, physically and emotionally, into the country whose law is being studied. This empirical, and somewhat sociological, approach will yield contextual information revealing new perspectives on the foreign law under investigation. The observations made during immersion in the foreign culture may not only guide the comparativist gain new insights into his own law, but, if properly communicated, may add valuable information that will be useful for the local lawyer, whose perception is often limited by a lack of external feedback.<sup>48</sup>

Among other things, it is precisely this form of interdisciplinary or immersive approach that seems to be lacking in many efforts at legal unification. This is generally true, for example, in the contemporary making of European private law. It might be that work based on some deeper analysis would reveal that a common civil code, or whatever common frame of reference, makes no sense today. To the contrary, however, it could perhaps show that the specificities that once characterized sharply divided cultures have now evolved and that a common regulation is possible or, even, superfluous. The fact that cultures in general as well as legal cultures evolve must not be neglected. In any event, without comparative work willing to consider the law of the other seriously and to take into account its cultural dimension, a common private law codification, such as the one undertaken by some lawyers at the European level, may prove to be nothing more than a fallacy.

#### IV. CONCLUSION

In this short paper, I have tried to address what benefits can be gained from comparative research and teaching. This was the question put by the organizers of the conference. As I have explained, it is in the nature of such a question to raise the matter of the goals we should assign to the comparative endeavor. Leaving aside the possibility of comparative research in legal practice, which is driven by other more immediate needs, comparison should, as a matter of principle, help recognize what makes each law unique. Rather than remaining attached to the perspective of convergence only, as has traditionally been the case, I have tried to show why one should engage in the kind of study that sheds light on the forces

---

<sup>46</sup> *M. Lasser*, The Question of Understanding, in: P. Legrand/R. Munday (eds), *Comparative Legal Studies: Traditions and Transitions*, Cambridge: Cambridge University Press, 2003, pp. 203 et seq.

<sup>47</sup> For a similar point, see *G. Samuel*, Form, Structure and Content in Comparative Law: Assessing the Links, in: E. Cashin Ritaine (ed.), *Legal Engineering and Comparative Law*, Zurich: Schulthess, 2009, pp. 27 et seq. and p. 46.

<sup>48</sup> *R. Sacco*, *La comparaison juridique au service de la connaissance du droit*, Paris: Economica, 1991, pp. 115 et seq.

generating difference across laws, and I have suggested that lawyers should be educated into respecting such difference. On a methodological level, this type of inquiry must abandon the dogma set by the presumption of similarity. In addition, research and teaching must, as much as possible, rest on interdisciplinary investigation. At a time where *la pensée unique* has become a global threat, I find that this way of engaging in comparative legal studies offers comfort and hope.



# COMMENTARY TO FRANZ WERRO<sup>1</sup>

Gert Brüggemeier\*

Franz Werro is a well educated, European minded and sophisticated scholar – and a cosmopolitan, in other words: he is all that what I am not. For this reason, and for reason of clarification, I am overaccentuating and simplifying matters a little bit. I focus on Franz's remarks on comparative legal teaching from a Bremen/Oldenburg perspective. Roughly spoken, we can distinguish three models of legal teaching: parochialism, parochialism plus, and non-parochialism.

Since the emergence of nation states and the substitution of *ius commune* by national codes in continental Europe the absolutely dominant type of legal education is parochialism. Let us take the example of Germany. Here – I would guess – 80 % of the law students are exclusively interested in those parts of the (national) law which they need to pass the quintessential final exam. It is the exam which determines everything. Cramming up – to a large extent and time at private institutions outside the law schools – displaces studying. The final exam is a state exam. Subject of examination is the national law. Examiners are state functionaries: judges, prosecutors, civil servants, law professors of state universities. All this leads to a general de-scientification of legal education. In other words: Foreign law does simply not exist for this large majority of students. Having passed the first exam they are heading for the second state exam, which is completely dominated by practitioners of national law, to get to the bar and to the money. Comparative teaching and this system of national legal education do not fit together. Even worse: Having gone through this system of legal education these jurists are convinced that what may have been good for the authoritarian Prussian State of the nineteenth century is still today the best of all possible legal worlds. This parochialism reminds me of the renowned Chief Justice Learned Hand of the US Court of Appeals (2nd Cir.) who once thought that US-like pre-trial discovery as a matter of course is available all over the world: "Parochialism over all". What I stated for Germany holds more or less true for all other large countries in Europe and outside the European civil law world, e.g. the US.

The second model of legal education is "parochialism plus". This means: Students pass the national (parochial) system and then spend one year abroad to make a master of laws (LL.M.) in the US, in England, Australia or elsewhere. This is the "*auberge espagnole* experience", Franz mentioned. By-products of "parochialism plus" are these typical comparative dissertations. Franz called them "discarnated skeletons". Trivialities of two national legal orders are compiled to supposedly exciting legal novelties. German examples: "AGB-Kontrolle in Deutschland und

---

\* Professor of Law, University of Bremen.

<sup>1</sup> A genuine rendition of the short oral contribution to the workshop "Hanse Law School in Perspective – Legal Teaching and Cross Border Research under Lisbon" (27 May 2010).



Südkorea”; “Schockschäden in Deutschland und in den USA, unter besonderer Berücksichtigung des Rechts von Louisiana”. “Parochialism plus” also comprises models such as the one or two years at the European University Institute in Florence or at the Centre of Transnational Legal Education in London.

If Franz is right when he claims that “parochialism plus” should not replace cosmopolitan education at home, then we have to move forward to a third model of legal education – non-parochialism. Non-parochialism means integrated comparative legal teaching right from the beginning and throughout the whole education. Now I am talking – you may presume it – about the Hanse Law School (HLS). It is one of the rare established institutions of integrated comparative and trilingual legal education in Europe. Damian Meuvissen, the founding father of the HLS, got attracted to this idea during a research stay in Montreal. At McGill University, the Law Faculty offers a common law curriculum *and* a civil law curriculum. In addition to this alternative, students can choose as a third model an integrated curriculum.

Integrated comparative legal education at HLS is still a thrilling intellectual challenge and leading to innovation. This approach insists that “there is other law outside” and that there are reasons for these differences of legal regimes. These are comprehensible, given their cultural, political, and social roots. To grow up with legal diversity is enriching, enables transnational legal discourse and helps to recognise and respect the foreign. It also paves the path for a re-scientification of legal education.

Here is not the place to go into details. The HLS concept has been presented, *inter alia*, on the 27<sup>th</sup> annual meeting of the German Society of Comparative Law 1999 in Freiburg.<sup>2</sup> It has been twice certified by a competent certification authority. Suffices here to state that the HLS concept of non-parochialism is unique. It needs support – politically and financially – especially in these tough times of never ending budgetary cuts. It also requires excellence to meet its high standards, excellence on both sides – on the side of the students and of the teachers. One may doubt whether both conditions, financial and intellectual, have been fulfilled up to now. Perhaps a critical evaluation should be undertaken. Anyway, I am proud to have contributed to inaugurate such a fascinating new model of non-parochial legal education. I wish good luck to the new generation of teachers who carry on this pioneering academic endeavour.

---

<sup>2</sup> *H.-D. Assmann/G. Brüggemeier/R. Sethe* (eds), *Unterschiedliche Rechtskulturen – Different Legal Cultures*, (Grundlagen und Schwerpunkte des Privatrechts in europäischer Perspektive Bd. 3), Baden-Baden: Nomos, 2001.

# STRENGTHENING THE COMPARATIVE METHOD IN EUROPEAN LEGAL RESEARCH: THREE SUGGESTIONS

Aurelia Colombi Ciacchi\*

## I. THREE TRANSFORMATIONS IN EUROPEAN COMPARATIVE LAW

The European Community and the European Union have profoundly changed the role of comparative law. No longer responding to the sole needs of academics and conflict of laws practitioners, comparative law has been increasingly permeating national and European legislative processes, judicial activity, and legal practice. This development is owed to the European integration agenda on one hand,<sup>1</sup> and the increased cross-border mobility of legal scholars and practitioners on the other.

One may argue that the role of comparative law in the fast-developing European Union is experiencing a threefold transformation: The first one is the transformation of comparative law from an elite-driven and elite-oriented exercise into a tool used by a much larger number of actors within a more democratic legal discourse.<sup>2</sup> The second one is a transformation from traditional small-scale comparisons involving very few jurisdictions (usually two or three) into large-scale, virtually pan-European comparisons. The third one is a transformation from a discipline-specific and rather doctrinal approach (comparative private law, comparative criminal law, comparative constitutional law, etc.) into a more

---

\* Professor of Law and Governance and Academic Director of the Groningen Centre for Law and Governance at the University of Groningen, Law Faculty. The present text is an adaptation of the speech given at the conference 'Hanse Law School in Perspective', Oldenburg (Germany), 27 May 2010.

<sup>1</sup> On the role of comparative law in the processes of European integration and globalization, see inter alia *D. I. Kieckheaf*, *Comparative Law: Method, Science or Educational Discipline?*, 7.3 *Electronic Journal of Comparative Law* 2003, <http://www.ejcl.org/73/art73-2.html> (accessed on 20 Nov. 2012); Cf. also *R. Michaels*, *Conference Report: Epistemology and Methodology of Comparative Law in the Light of European Integration: Brüssel 26.-28. Oct. 2002*, 11 *Zeitschrift für Europäisches Privatrecht*, 2003, p. 453. On the influence of (especially American) comparative lawyers on the language of the European integration, see *G. Martínico*, *Comparative Legal Studies and European Integration. Looking at the Origins of the Debate*, 122 *Boletín Mexicano de Derecho Comparado* 2008, p. 859.

<sup>2</sup> The democratisation of the comparative legal discourse should not be confounded with the use of comparative law for legal transplants of Western concepts of democracy in the world. For a critique of the latter functionalisation of comparative law see *G. Monateri*, *The 'Weak' Law: Contaminations and Legal Cultures*, 1 *Global Jurist Advances* 2001, Art. 5. For a non-European perspective on this issue see *M. González Maros*, *Comparative Law at the Service of Democracy: A Reading of Arosemena's Constitutional Studies of the Latin American Governments*, 21 *Boston University International Law Journal* 2003, p. 259, available at <http://sr.nellco.org/nyu/plltwp/papers/15/> (accessed on 05 Nov. 2012).

practice-oriented approach focussing on topical, cross-cutting legal issues (i.e. environmental liability,<sup>3</sup> euthanasia,<sup>4</sup> etc.). These three transformations constitute a big challenge for comparative law, in both a positive and a negative sense. The positive aspects of the above-mentioned developments are obvious, while the negative ones are less so. It is submitted that comparative legal research has been reacting too slowly to the challenges posed by the very fast development of the European Union. This paper concentrates on six specific problems arising from the different paces of development of comparative law on the one hand, and the European Union on the other.

## II. SIX PROBLEMS IN CONTEMPORARY EUROPEAN COMPARATIVE LAW

### 1. FIRST PROBLEMS: SIZE MATTERS

Size matters: Larger countries attract much more attention than smaller ones. Richer countries attract much more foreign students, doctoral and post-doctoral researchers, visiting professors and training practitioners than poorer countries. The languages of politically, economically and culturally dominating nations spread all over the world, while other languages are neglected. Turkish students and researchers want to go to Germany. German students and researchers want to go to the UK and the US. Students from the UK and the US want to go to France. Many want to learn English and go to Oxford, Cambridge, Harvard or Yale. Few want to learn Polish or Lithuanian and go to Warsaw or Vilnius.

This is a pity, because less known jurisdiction such as the Polish and Lithuanian ones enclose fascinating details and highly modern solutions<sup>5</sup> which could be a precious source of inspiration for legislators, courts and scholars also in the largest and richest countries. Small and less explored jurisdictions are gold mines. Discussions with Lithuanian and Estonian scholars, for example, reveal that the differences between the contemporary laws of these countries are perhaps greater than the ones between German and Italian law.<sup>6</sup> Exploring less known legal systems helps overcoming prejudices about supposed similarities between some jurisdictions and others. Of course comparative lawyers may not have the time to learn Polish or Lithuanian. The author of this paper does not read these languages

---

<sup>3</sup> See C. Godt, *Haftung für ökologische Schäden*, Berlin: Duncker und Humboldt, 1997; M. Hinteregger (ed.), *Environmental Liability and Ecological Damage in European Law*, Cambridge: Cambridge University Press, 2008.

<sup>4</sup> See J. Griffiths/H. Weyers/M. Adams, *Euthanasia and the Law in Europe*, Oxford: Hart Publishing, 2008.

<sup>5</sup> See e.g. A. Smaliukas/G. Šulija, Lithuania, and I. Łobočka, Poland; both in: A. Colombi Ciacchi/S. Weatherill (eds), *Regulating Unfair Banking Practices in Europe. The Case of Personal Suretyships*, Oxford: Oxford University Press, 2010 pp. 401 et seq. and pp. 435 et seq.

<sup>6</sup> Compare the Estonian report by I. Kull and the Lithuanian report by A. Smaliukas/G. Šulija in: A. Colombi Ciacchi/S. Weatherill (eds), *Regulating Unfair Banking Practices in Europe: The Case of Personal Suretyships*, Oxford: Oxford University Press, 2010, pp. 179 et seq. and pp. 401 et seq.

either. However, there are two good ways to approach the law of a country without reading its language. The first one is working in research networks with scholars from this country. The second one is reading contributions on the law of this country which are written in English or other widespread European languages.

The problem is more a problem of mentality than one of language or time. There are simply not enough comparative lawyers interested in discovering smaller and lesser known European jurisdictions. This was a problem in the past as it is today. However, in today's European Union, this factual discrimination against smaller and linguistically disadvantaged Member States becomes a serious political and legal problem. The laws of the largest Member States, the laws of the countries whose languages are widely spread, inevitably influence the European legislation and the case law of the European courts more than the laws of other Member States. French, German and UK laws have massively influenced EU law,<sup>7</sup> unlike the laws of the Nordic countries<sup>8</sup> – although the Nordic laws are at least as progressive as, or even more progressive than, their French, German and UK counterparts.

Insofar as comparative lawyers continue to follow the tradition of their academic fathers and grandfathers, and concentrate on economically and linguistically dominating countries, they create more and more political, legal and cultural injustice in a European Union which already suffers from an overweight of the most powerful nations. A shift in mentality of contemporary comparative lawyers is thus needed.

## 2. SECOND PROBLEM: THE IRRESISTIBLE TEMPTATION OF LEGAL UNIFICATION

Legal scholars have been fascinated for centuries by ideals of unification of the law. This fascination is stronger than ever in today's Europe, where the ideal of an 'ever closer Union' is an explicit motto of the European integration agenda.<sup>9</sup> Therefore,

---

<sup>7</sup> On the problem of 'legal transplants' in Europe and for some examples of French and UK transplants in European Directives in the field of environmental law see *K. H. Ladeur*, Flexibility and 'Cooperative' Law: The Coordination of European Member States' Laws – The Example of Environmental Law, in: G. De Búrca/J. Scott (eds), *Constitutional Change in the EU: From Uniformity to Flexibility*, Oxford: Hart Publishing, 2000, p. 282 and p. 292. For some examples of French, German and UK transplants in the Unfair Terms Directive of 1993 see *A. Colombi Ciachi*, Art. 1469-bis, 3 comma, n. 3 Codice civile, in: G. Alpa/S. Patti (eds), *Clausole vessatorie nei contratti del consumatore*, Milano: Giuffrè, 2003, p. 243.

<sup>8</sup> There is however an example of Nordic law transplants in the Late Payment Directive of 2000; on this see *A. Colombi Ciachi*, Die EG-Richtlinie über den Zahlungsverzug und ihre Umsetzung durch das Schuldrechtsmodernisierungsgesetz, *Europäisches Wirtschafts- und Steuerrecht* 2002, p. 306.

<sup>9</sup> The formulation stems from the Preamble to the EEC Treaty of Rome of 1957: 'Determined to establish the foundations of an ever closer union among the European peoples'; see *D. Dinan*, *Ever Closer Union: An Introduction to European Integration*, Boulder/London: Palgrave Macmillan, 4th edition, 2010 (with further references).

it is no surprise that the majority of top European comparative lawyers are now working in projects of harmonisation or unification of the law in Europe.<sup>10</sup> Legal harmonisation is mostly understood, at least in continental Europe, as legislative harmonisation. Thus an appalling number of excellent comparative lawyers devote an appalling amount of research time and resources to the drafting of uniform model laws.<sup>11</sup> This is no evil as such, but this means that for other good comparative projects which are not targeted at legislative unification, too few persons, time and resources are left. Even those scholars who are not involved in the drafting of such model laws cannot resist the temptation of searching for the ‘common core’ of laws which are already in force in different European countries. This common core, where existing, is often a substantive one, hidden behind the veil of different formal sources of law and regulatory techniques.<sup>12</sup> Both the drafting of pan-European model laws and the search for a ‘common core’ may lead to a bias of legal comparison in favour of substantive commonalities between different national laws, thus neglecting the substantive disparities.<sup>13</sup> Comparative lawyers observing legal phenomena through the glasses of a search for unity, run the risk of losing the impartiality which is needed for really accurate comparative studies.<sup>14</sup>

---

<sup>10</sup> According to the prevalent view among continental European scholars, comparative studies should lead to an understanding of the commonality between the different laws; cf. *K. Zweigert/H. Kötz*, Introduction to Comparative Law, Oxford: Oxford University Press, 3rd rev. ed., 1998, p. 46; for a critique of this approach see *P. Legrand*, Comparative Legal Studies and the Matter of Authenticity, 1 *J. Comp. L.* 2006, p. 365; *F. Werno*, What Is to Be Gained from Comparative Research and Teaching? Thoughts for an Ideal Agenda, in this volume.

<sup>11</sup> For what concerns the law of obligations, most famous examples of academic drafts of pan-European model laws are, in chronological order, the PECL: *O. Lando/H. Beale* (eds), Principles of European Contract Law: Part I and II, The Hague: Kluwer Law International, 2000; *O. Lando/E. Clive/A. Prüm/R. Zimmermann* (eds), Principles of European Contract Law: Part III, The Hague: Kluwer Law International, 2003; the PETL: European Group on Tort Law, Principles of European Tort Law. Text and Commentary, Wien/New York: Vienna: Springer, 2005; and the DCFR: *C. von Bar/E. Clive/H. Schulte-Nölke et al.* (eds), Principles, Definition and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), Outline Edition, München: Sellier European Law Publishers, 2009.

<sup>12</sup> Cf. *M. Bussani/U. Mattei*, The Common Core Approach to European Private Law, 3 *Columbia Journal of European Law* 1997–1998, p. 339; *ibid.*, Opening Up European Law. The Common Core Project, Bern: Stämpfli Verlag, 2007; see also <http://www.common-core.org/> (accessed on 05 Nov.2012).

<sup>13</sup> For a focus on substantive disparities see *A. Colombi Ciacchi* (ed.), Protection of Non-Professional Sureties in Europe: Formal and Substantive Disparity, Baden-Baden: Nomos, 2007. On the ‘uncommon core of European suretyships law’ see *M. Kenny*, The Uncommon Core of European Suretyship Law, in: *A. Colombi Ciacchi* (ed.) *ibid.*, p. 361. One may see the recognition of and respect for difference as the aim of comparative law altogether: cf. *P. Legrand*, Le droit comparé, Paris: Presses Universitaires de France, 3rd ed., 2009, p. 107.

<sup>14</sup> On this problem see e.g. *P. Legrand*, Paradoxically, Derrida: For a Comparative Legal Studies, 27 *Cardozo Law Review* 2005, p. 631 and p. 706; *F. Werno*, What Is to Be Gained from Comparative Research and Teaching? Thoughts for an Ideal Agenda, in this volume, cf. also *G. Dannemann*, Comparative Law: Study of Similarity or Differences?, in: *M. Reimann/R. Zimmerman* (eds), The Oxford Handbook of Comparative Law, Oxford: Oxford University Press 2006, pp. 383 et seq.

### 3. THIRD PROBLEM: THE MUCH LOVED AND MUCH HATED CODES

For too many legal scholars in continental Europe, the law *par excellence* is a Code. This is the heavy historical legacy of the Great Codifications. Continental European lawyers love Codes. English common lawyers hate them. Passionate battles are fought pro or contra a possible future European Civil Code.<sup>15</sup> Too much attention, time and resources are devoted to this history of love and hatred, on both a national and a supranational level. The hearts of too many comparative lawyers start to beat higher when a country in the world adopts a new Code. A Code is just a text. It is just a small part of the law-in-the-books. The regulatory frameworks and techniques in today's Europe have become highly sophisticated, complicated, multi-layered, and perhaps apparently illogical. In order to completely understand the regulation of a certain matter in a certain country, one should thoroughly look at other legislative and non-legislative sources as well. This is a difficult challenge for comparative lawyers. Though, this difficulty cannot be an excuse for avoiding exploring complex legal realities and seeking refuge in good old, simple and logical Codes instead.

### 4. FOURTH PROBLEM: THE FASCINATION OF THE LAW-IN-THE-BOOKS

Legal scholars including comparative lawyers like working with legislative texts. These are much easier to compare than the law in action on a certain subject. However, what really matters for the addressees of a legal regulation and for the actual interests of European citizens in general, is the law in action. Still too few comparative studies are devoted thereto.

The most classical sources of law in action are judicial decisions. In the last two decades, important projects aimed at law-in-action comparisons were initiated in Europe. The most famous are the *Ius Commune Casebooks* (commented collections of judgments),<sup>16</sup> and the *Common Core of European Private Law* book series (comparisons of solutions of fictitious, though reality-related cases).<sup>17</sup>

---

<sup>15</sup> For some accounts on this debate see *A. S. Hartkamp/M. W. Hesselink/E. Hondius/C. Mak/E. Du Perron* (eds), *Towards a European Civil Code*, Alphen a.d. Rijn: Kluwer Law International, 4th revised and expanded ed., 2010; *H. Collins*, *The European Civil Code: The Way Forward*, Cambridge: Cambridge University Press, 2008; *M. Kenny*, *Constructing a European Civil Code: Quis Custodiet Ipsos Custodes?*, 12 *Columbian Journal of European Law* 2006, p. 775; *M. Hesselink*, *The Politics of a European Civil Code*, 10 *European Law Journal* 2004, p. 675; *P. Legrand*, *Against a European Civil Code*, 60 *Michigan Law Review* 1997, p. 44.

<sup>16</sup> On the project 'Ius Commune Casebooks for the Common Law of Europe' (general editor: *W. van Gerven*), see <http://www.casebooks.eu/welcome/> (accessed on 05 Nov. 2012); published Casebooks include *W. van Gerven/P. Larouche/J. Lever* (eds), *Cases, Materials and Text on National, Supranational and International Tort Law*, Oxford: Hart Publishing, 2000; *J. Beatson/E. J. H. Schrage* (eds), *Cases, Materials and Text on Unjustified Enrichment*, Oxford: Hart Publishing, 2003; *D. Schiek/L. Waddington/M. Bell* (eds), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*, Oxford: Hart



Comparing the case-law treatment of one and the same factual problem in different European countries helps discovering completely new patterns of divergence and convergence between national solutions, which often do not match with the taxonomy of legal families which can be found in ordinary comparative law books. The author of this paper has experienced this while working together with other twenty-six scholars from fifteen different countries, at a law-in-action comparison of the tort law protection of personality interests in Europe,<sup>18</sup> embedded in the project ‘*The Common Core of European Private Law*’.<sup>19</sup> One might hope that the new fascination of the discoveries to be made by law-in-action comparisons will motivate more and more comparative lawyers to resist the old fascination of the law-in-the-books.<sup>20</sup>

## 5. FIFTH PROBLEM: THE EXPANSIVE EFFECT OF CONSTITUTIONS - FUNDAMENTAL AND HUMAN RIGHTS

One may argue that constitutions and other sources of fundamental or human rights have an expansive effect insofar as their field of operation extends in the course of time so as to embrace more and more fields of law. The horizontal effect of fundamental rights in private law, and the constitutionalisation of criminal law are just two manifestations of a more general phenomenon. This phenomenon and its manifestations have been only scarcely explored by comparative lawyers yet.

When the constitutional, fundamental or human right dimension of a certain subject matter is taken into consideration within a comparative study, this poses new challenges to the traditional comparative law accounts (such as the legal families’ taxonomy). New differences and new similarities between national jurisdictions emerge, which cannot be found in any of the standard books on comparative law. This was experienced by Gert Brüggemeier, Giovanni Comandé and the author of this paper, together with the other fifty-eight scholars of the Research Training Network ‘Fundamental Rights and Private Law in the European Union’, while exploring the horizontal effect of fundamental rights in the contract, tort, property and family laws of nine European countries.<sup>21</sup> Both the

---

Publishing, 2007; H.-W. Micklitz/J. Stuyck/E. Terry/D. Droshout (eds), *Cases, Materials and Text on Consumer Law*, Oxford: Hart Publishing, 2010; H. Beale/H. Kötz/A. Hartkamp/D. Tallon (eds), *Cases, Materials and Text on Contract Law*, Oxford: Hart Publishing, 2010.

<sup>17</sup> For references on the Common Core project supra fn. 12; in the framework of this project, twelve books have been published between 2000 and 2010; see the list at [http://www.common-core.org/index.php?option=com\\_content&view=article&id=49&Itemid=56](http://www.common-core.org/index.php?option=com_content&view=article&id=49&Itemid=56) (accessed on 05 Nov. 2012).

<sup>18</sup> G. Brüggemeier/A. Colombi Ciacchi/P. O’Callaghan (eds), *Personality Rights in European Tort Law*, Cambridge: Cambridge University Press, 2010.

<sup>19</sup> M. Bussani/U. Mattei, supra fn. 12.

<sup>20</sup> For a critique of the mainstream positivistic, textual, bookish understanding of the law see F. Wero, *What Is to Be Gained from Comparative Research and Teaching?: Thoughts for an Ideal Agenda*, in this volume, with further references.

<sup>21</sup> G. Brüggemeier/A. Colombi Ciacchi/G. Comandé (eds), *Fundamental Rights and Private Law in the European Union*, Vol. I: A Comparative Overview, Vol. II: Comparative Analyses of Selected Case Patterns, Cambridge: Cambridge University Press, 2010.

work of this Research Training Network and a more recent project on fundamental rights in civil adjudication, co-ordinated by Hans Schulte-Nölke and Christoph Busch,<sup>22</sup> are based on law-in-action comparisons. The main focus of both research endeavours lies on how the courts of different EU Member States deal with fundamental rights in adjudicating private law cases. These two projects have evidenced that the subject matters touched by the horizontal effect of fundamental rights in many European countries lie at the core of private law. This could require a re-thinking of comparative private law as a whole.

## 6. SIXTH PROBLEM: THE LACK OF EMPIRICAL RESEARCH

Comparative legal studies are too seldom backed up by empirical research. Moreover, some of the rare existing legal comparisons based on empirical data are highly unsatisfactory, as they simply follow US or World Bank approaches, which bear a strong bias in favour of US and UK law. Serious comparative lawyers cannot but harshly criticise economists who quickly summarise the history of Western legal families, and praise the superiority of English law based common law systems as they allegedly enable a more market-oriented and more financially developed economy than the French law based civil law systems.<sup>23</sup> ‘Numerical comparative law’, as it has been called,<sup>24</sup> is no neutral scientific exercise. It goes back to hegemonic US approaches to political economy, which take the US model as a yardstick to measure how good or bad, how efficient or inefficient the legal treatment of economically relevant issues in other countries is. Almost inevitably, US law is evaluated with 1,0 (best solution), and the solutions of European countries are judged the better the more they resemble the US model.<sup>25</sup>

What is needed are good, i.e. much more neutral and scientifically reliable, European counterparts to these US-influenced studies. A certain amount of empirical research should be devoted to the specific social and economic contexts of legal developments in the individual EU Member States.

---

<sup>22</sup> C. Busch/H. Schulte-Nölke (eds), *EU Compendium – Fundamental Rights and Private Law*, Munich: Sellier European Law Publishers, 2010.

<sup>23</sup> So the Legal Origins theory: E.L. Glaeser/A. Shleifer, *Legal Origins*, 117 *Quarterly Journal of Economics* 2002, p. 1193; for a comment see M. M. Siems, *Legal Origins: Reconciling Law & Finance and Comparative Law*, 52 *McGill Law Journal* 2007, p. 55.

<sup>24</sup> See M. M. Siems, *Numerical Comparative Law – Do We Need Statistical Evidence in Law in Order to Reduce Complexity?*, 13 *Cardozo Journal of International & Comparative Law* 2005, p. 521; R. Michaels, *Comparative Law by Numbers?: Legal Origins Thesis, Doing Business Reports, and the Silence of Traditional Comparative Law*, 57 *American Journal of Comparative Law* 2009, p. 765.

<sup>25</sup> Cf. the recent critique of the Legal Origins theory by N. Garoupa/C. Gómez Liguère, *The Syndrome of Efficiency of the Common Law*, 29 *Boston University International Law Journal* 2011, p. 287.

### III. THREE SUGGESTIONS AND ONE EXAMPLE

#### 1. FIRST SUGGESTION: TRANSLATION OBLIGATIONS

National legal materials from all EU Member States would become much more easily accessible if translations of these materials were freely available. If translations of the major statutes and highest court judgments of all Member States were published as free online sources, this would help comparative lawyers and other legal actors to take the law of all Member States into equal consideration. Discriminations between large and small countries, and between linguistically accessible and linguistically inaccessible laws, would progressively diminish. One may argue that the costs for translating all Member States' major statutes and highest court judgments into all official languages of the EU would be so exorbitantly high, that neither the EU nor its Member States could afford it. An alternative scenario is therefore worth being considered: translating these materials into only one language. It does not seem desirable that the EU expressly obliges its Member States to let statutes and judgments be translated into a certain, pre-determined language, say English or French. This would make some official languages of the EU more official than others, which would be politically and culturally problematic.<sup>26</sup> However, the EU could order that major statutes and judgments passed in a certain Member State are translated into *another* European language, freely chosen by that Member State. This would preserve the Member States' sovereignty and the formal parity between all EU languages. In practice, most Member States would choose either English or French. The rather theoretical danger that a Member State chooses to translate its materials into a hardly accessible language, say Finnish or Greek, could be avoided by expressly linking the translation obligation to the objective of making the laws of a Member State more easily accessible to citizens of the other Member States.

To summarise: It is submitted that the EU should provide for the major statutes and highest court judgments passed in a certain Member State to be translated into another European language, freely chosen by that Member State in consideration of the aim of making its law more accessible by citizens of the other Member States.

The answer to the question which statutes or highest court judgments are to be considered as 'major' should be left to the Member States. However, the EU could set a minimum quantitative limit, e.g. providing that at least 5% of all statutes and highest court judgments passed in a certain Member State should be translated.

In order to ensure effective compliance with such a translation obligation, a correspondent provision should be best included in an EU Regulation. This could

---

<sup>26</sup> In favour of legal diversity in a multilingual and multicultural context see inter alios *R. Sefton-Green*, *The European Union, Law and Society: Making the Socio-Cultural Difference*, in: T. Wilhelmsson/E. Paunio/A. Pohjolainen (eds), *Private Law and the Many Cultures of Europe*, Alphen aan den Rijn: Kluwer Law International, 2007, pp. 37 et seq.; *F. Werro*, *What Is to Be Gained from Comparative Research and Teaching? Thoughts for an Ideal Agenda*, in this volume.

be enacted on the basis of art. 81 and art.82 TFEU (judicial cooperation in civil and criminal matters).

## 2. SECOND SUGGESTION: 'NEUTRAL' COMPARATIVE STUDIES UNDERTAKEN BY EUROPEAN NETWORKS

Europe needs legal comparisons which are pan-European, or at least involve a large number of Member States. These comparisons are needed for both academic and practical purposes. Because of the interest of EU institutions in such comparative works, several funding opportunities are available for networks willing to undertake them. These funding opportunities are seldom exploited by comparative lawyers. Still too few legal scholars participate in international networks, and the majority of those who do so concentrate on the drafting of model laws (which is usually not funded by the EU as a research project<sup>27</sup>). It is submitted that a considerable amount of underexploited funding resources exists, which could be used in order to build new networks of European comparative lawyers and/or develop existing networks further. In order to remedy the first problem dealt with in this paper, i.e. discrimination between larger/smaller, richer/poorer Member States, and between linguistically more accessible and less accessible laws, these networks should include representatives from all or almost all Member States.

An EU funding sometimes enables the foundation of a network, which then continues its activity or even expands after the termination of the initial funding. For example, under the Marie Curie Host Fellowships for the Transfer of Knowledge scheme within the Sixth Framework Programme of the European Commission, a co-operation between the Universities of Oxford and Bremen in the project 'Protection from Unfair Suretyships in the EU' was funded from 2004 until 2007. This funding, which was relatively small, enabled the appointment of Marie Curie Fellows coming from ten European countries. However, experts from further twelve Member States were then invited to participate in project conferences and/or joint publications. Thus the network rapidly expanded so as to make a comprehensive comparative study involving twenty-two European jurisdictions possible.<sup>28</sup>

This experience evidences that building pan-European networks is much easier than one might think. It would be desirable that more and more networks of this kind come into existence. For example, if a network is institutionally composed of

---

<sup>27</sup> An important exception is the Joint Network on European Private Law (CoPECL Network of Excellence: <http://www.copecl.org/> (accessed on 05 Nov. 2012), whose work at the academic Draft Common Frame of Reference was funded by the European Commission between 2005 and 2008 under the Sixth Framework Programme.

<sup>28</sup> On this project see *A. Colombi Ciacchi*, *The Protection of Non-Professional Sureties in Europe: A Research Project*, in: *A. Colombi Ciacchi* (ed), *Protection of Non-Professional Sureties in Europe: Formal and Substantive Disparity*, Baden-Baden: Nomos, 2007, p. 15; *A. Colombi Ciacchi/S. Weatherill*, *Regulating Unfair Suretyships in Europe: Methodology of a Comparative Study*, in: *A. Colombi Ciacchi/S. Weatherill* (eds), *Regulating Unfair Banking Practices in Europe: The Case of Personal Suretyships*, Oxford: Oxford University Press, 2010, p. 1.

universities from eight Member States, it can enhance the number of legal cultures involved in two ways: firstly, by hiring researchers coming from seven other Member States, and secondly, by inviting scholars from further twelve Member States as speakers at network conferences or authors of joint publications. At the end, all twenty-seven Member States would be represented in the network. Furthermore, it would be desirable that these networks devote themselves to in-depth comparative research which may be called ‘neutral’, in the sense of not being bound by objectives of legal harmonisation. This does not exclude the later use of those research results by other legal actors, for a plurality of purposes, including legal harmonisation. Neutrality should characterise the research activity and its method: of course, it cannot characterise all possible future uses of the results of a research. Neutrality only means that the comparative assessment of a certain legal situation should be carried out disregarding possible future uses of those assessment results. This neutrality in European comparative research is not a new concern. It has been pursued by the project ‘*The Common Core of European Private Law*’ since its beginning in 1994. Despite its name, this project does not intend to harmonise the private laws of Europe. It only aims at detecting substantive convergences and divergences in the solutions given in different European countries to the same cases.<sup>29</sup> The existence of a ‘common core’ is not presupposed in advance. It is true that this project aims at discovering whether and to what extent substantive commonalities exist in the way in which different Member States deal, on a law-in-action basis, with the same factual patterns of litigation. This is however not the only aim of the project. Another, equally important objective pursued by the *Common Core* comparisons is exploring the beauty of legal diversity and different legal cultures.<sup>30</sup> Because of its neutrality, this project has attracted both promoters and opponents of legal unification in Europe.

*The Common Core of European Private Law* is a wonderful project, however, on its own it cannot remedy the six problems outlined above in this paper. The two weaknesses of the *Common Core* project are the same features which makes it very sympathetic: (1) the focus on fictitious cases, and (2) the slow working pace, due to the lack of strict deadlines and economic incentives.<sup>31</sup>

Anyway, the new generation of European comparative lawyers has learnt a lot from the *Common Core* project and could exploit this lesson further. At least six features of this project could and arguably should guide present and future comparative studies undertaken by European networks:

- 1) the focus on the law-in-action,
- 2) the focus on specific factual patterns of litigation,

---

<sup>29</sup> *M. Bussani/U. Mattei*, supra fn. 12; for a description of the project methodology see also <http://www.common-core.org/> (accessed on 20. Nov. 2012).

<sup>30</sup> *M. Bussani/U. Mattei*, ibid. believe that cultural diversity in the law is an asset.

<sup>31</sup> For an interesting sociological study on the Common Core project see *A. Schreiner*, *The Common Core of Trento. A Socio-Legal Analysis of a Research Project on European Private Law*, in: A. Jettinghoff/H. Schepel (eds), *In Lawyers' Circles. Lawyers and European Legal Integration*, The Hague: Elsevier Reed, 2004, p. 125.

- 3) the consideration of a plurality of legal ‘formants’,<sup>32</sup> i.e. sources of law or extra-legal sources of ‘operative rules’,<sup>33</sup>
- 4) the attention for the ‘meta-legal formants’,<sup>34</sup> i.e. the policy-related, economy-related or culture-related grounds which consent to choose between two or more possible operative rules,
- 5) the aim of providing country reports from (almost) all Member States, and
- 6) the use of a questionnaire as a basis for the comparison.

### 3. THIRD SUGGESTION: A NEW QUESTIONNAIRE METHOD

All broad comparative studies the author of this paper has been directly or indirectly involved in so far have been carried out on the basis of questionnaires. This is true for the *Common Core* project,<sup>35</sup> for the project ‘Fundamental Rights and Private Law in the EU’,<sup>36</sup> for the project ‘Protection from Unfair Suretyships in the EU’,<sup>37</sup> and for the ‘Fundamental Rights Action Plan’ project coordinated by Busch and Schulte-Nölke.<sup>38</sup>

Questionnaires can be drafted in many different ways. The *Common Core* questionnaires consist of a list of fictitious cases to be solved under the law-in-action of the Member States. The questionnaires used by the other three projects mentioned above differed considerably from the *Common Core* questionnaire. They required answers to a relatively large number of questions which were grouped and structured under a headings system. This system then shaped the structure of the books arising from these comparisons.

Arguably, the problems outlined in the second part of this paper under the numbers 2. to 6. can be remedied by means of an appropriate formulation of the questionnaires used for the comparison. In particular, the questionnaires should require national reporters to:

- 1) take account of the empirical context of a certain issue, by assessing its practical relevance and the existing practices (market practices, legal practices, other relevant social practices),

---

<sup>32</sup> Cf. R. Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, 39 *Am. J. Comp. L.* 1991, pp. 1 et seq. and pp. 343 et seq.

<sup>33</sup> On the distinction between operative rules, descriptive formants and metalegal formants see M. Bussani/U. Mattei, *supra* fn. 12, pp. 339 et seq.

<sup>34</sup> *Ibid.*

<sup>35</sup> On the questionnaire method of the *Common Core* project see *ibid.*

<sup>36</sup> On the methodology of this project and the underlying questionnaire see G. Brüggemeier/A. Colombi Ciacchi/G. Comandé, Introduction, in: G. Brüggemeier/A. Colombi Ciacchi/G. Comandé (eds), *Fundamental Rights and Private Law in the European Union*, Vol. I: A Comparative Overview, Cambridge: Cambridge University Press, 2010, pp. 1 et seq.

<sup>37</sup> Cf. A. Colombi Ciacchi/S. Weatherill, *Regulating Unfair Suretyships in Europe: Methodology of a Comparative Study*, in: A. Colombi Ciacchi/S. Weatherill (eds), *Regulating Unfair Banking Practices in Europe: The Case of Personal Suretyships*, Oxford: Oxford University Press, 2010, pp. 1 et seq.

<sup>38</sup> C. Busch/H. Schulte-Nölke (eds), *EU Compendium - Fundamental Rights and Private Law*, Munich: Sellier European Law Publishers, 2010.



- 2) make reference to all legal formants: legislation, case law, scholarly opinions, and self-regulation,
- 3) pay attention to the impact of constitutions or other sources of fundamental or human rights on the topic in question,
- 4) consider also meta-legal formants,<sup>39</sup>
- 5) go beyond a mere description of the existing state of affairs, by taking position on the quality of the existing solutions and – where necessary – proposing new interpretations and solutions.

Should one cast doubt on the practical feasibility of comparative studies of this kind within reasonable time, an example could help overcoming such doubt. At the final stage of the above-mentioned project ‘Protection from Unfair Suretyships in the EU’, twenty-two comprehensive national reports were completed within a relatively short time. All of them consider both the complex plurality of sources of law and discourses, and the law-in-action dimension. All of them pay attention to the impact of fundamental or human rights. All of them go beyond a mere description of the existing state of affairs, and take position on the quality of the existing solutions. Many of them propose new interpretations and solutions. Most of them take account of the economic context, refer to empirical data, and report on market practices. All reports were written by private law scholars, who nevertheless went beyond private law and managed to go beyond law altogether.

All this was made possible with the help of a detailed questionnaire (see Annex A). The book embodying this comparative study was published in 2010.<sup>40</sup> It arguably gives sufficient evidence that the questionnaire method proposed in this paper actually works.

---

<sup>39</sup> See above, III. 2. 4).

<sup>40</sup> A. Colombi Ciacchi/S. Weatherill (eds), *supra* fn. 37.

**Annex A: The Questionnaire ‘Unfair Suretyships in Europe’<sup>41</sup>**

1. Are suretyship contracts (or equivalent personal guarantees) frequent in the banking practice of your country? If not, why?
2. Is there a clear demarcation between commercial suretyships and consumer suretyships?
3. To what extent are suretyships responsible for personal or family indebtedness? In particular:
  - i. Do lenders frequently give credit which is only secured by a suretyship of a non-professional guarantor? If not, why?
  - ii. Do lenders frequently conclude suretyship contracts with natural persons who do not have the financial means to meet such obligations? If not, why?
4. Under which circumstances would you, and/or the prevalent opinion in your country, consider a suretyship of a non-professional guarantor as being unfair? For instance:
  - i. Suretyships of young children for their parents’ debts?
  - ii. Suretyship agreements between spouses called in after divorce?
  - iii. Suretyships of persons unaware of the financial risk when signing the guarantee or credit agreement?
  - iv. Suretyships of persons who, although perfectly aware of the risk, nevertheless had no choice but to sign the agreement e.g. because a refusal would have impaired family harmony/ close relationships?
  - v. Surety obligations manifestly disproportionate to the guarantor’s financial means?
5. In your country, in which branches of the law are the instruments providing protection from unfair suretyships located?
  - i. Consumer protection law?
  - ii. General law of obligations and contracts?
  - iii. Specific provisions concerning suretyship contracts?
  - iv. Family law?
  - v. Consumer insolvency law?
  - vi. Constitutional law?
  - vii. Other branches of law?
6. What impact do changes in the relationship between the debtor and the creditor have on the guarantor’s position?
7. Are there any other, not necessarily legal, instruments of protection from unfair suretyships?
8. Of the above mentioned instruments, which ones extend the most effective protection to non-professional sureties?
9. Would you describe the overall level of protection extended to non-professional guarantors in your country as high or low? Do you consider this level as satisfactory?
10. Would it be possible and advisable to modify or supplement any legal or other instruments already existing in your country with a new interpretation or practical application, so as to increase the level of protection of non-professional guarantors?

---

<sup>41</sup> Cf. *A. Colombi Ciachi/S. Weatherill*, *supra* fn. 37.



# THE EUROPEAN UNION DEVELOPMENT OF EUROPEAN PROPERTY LAW

Bram Akkermans\*

## I. INTRODUCTION

These are exciting times for European Private Law. In 2007 and 2008 the Study Group on a European Civil Code and the Research Group on Existing EC Contract Law presented the outline editions of the Draft Common Frame of Reference (DCFR), completed in 2009 with the full edition.<sup>1</sup> Although the DCFR mainly concerns contract law, other fields of private law are also included. These include tort, unjust enrichment and property law.<sup>2</sup> Starting out as a contract law project to answer the call of the European Commission for a more coherent contract law, the drafters soon saw that other fields of private law had to be included to complete the effectiveness of the set of principles and rules they were preparing.<sup>3</sup> The result is an impressive body of principles and rules that can serve as the basis for the development of future European Private Law.

Although the DCFR increasingly takes the centre stage in academic debate, other comparative and European private law projects also contribute to the further enrichment of the field.<sup>4</sup> Comparative private law scholarship is an increasingly important discipline. Added to this are European private lawyers that focus, rather than on the comparison of legal systems, the development of European Union private law and the influence of European Union law on national law. This European focus creates new challenges such as the combination of knowledge on European Union and private law, the understanding that European Union Law, in

---

\* Assistant Professor European Private Law, Maastricht University, Faculty of Law.

<sup>1</sup> C. von Bar et. al (eds), Principles Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). Interim Outline Edition, München: Sellier European Law Publishers, 2007; C. von Bar et. al (eds), Principles Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). Outline Edition, München: Sellier European Law Publishers, 2008; C. von Bar et. al (eds), Principles Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR) Full Edition, 6 volumes, München: Sellier European Law Publishers, 2009.

<sup>2</sup> See DCFR Books VI Non-contractual liability arising out of damage caused to another (Tort), Book VII Unjustified Enrichment and Books VIII-X Property Law.

<sup>3</sup> C. von Bar/U. Drobnig (eds), Study on Property Law and Non-contractual Liability Law as they relate to Contract Law, [http://ec.europa.eu/consumers/cons\\_int/safe\\_shop/fair\\_bus\\_pract/cont\\_law/study.pdf](http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/study.pdf); on the effects of contract law on the law of property in particular see B. Akkermans, Common Frame of Reference (CFR), the EU consumer acquis and European Property Law, available at [http://papers.ssm.com/sol3/papers.cfm? Abstract\\_id=1626793](http://papers.ssm.com/sol3/papers.cfm?Abstract_id=1626793) (accessed on 18 June 2010).

<sup>4</sup> See, recently, inter alia, C. Twigg-Flesner (ed.), The Cambridge Companion to EU Private Law, Cambridge: Cambridge University Press, 2010; M. Faure (ed.), Tort Law and Economics, volume 1 Encyclopaedia of Law and Economics, Cheltenham: Edward Elgar Publishing, 2nd edition, 2009; B. Bouckaert (ed.), Property law and Economics, Cheltenham: Edward Elgar Publishing, 2nd edition, 2010.

particular the European Court of Justice (ECJ), does not care for national classifications of private law and the difficult relationship between European Union law and national law.<sup>5</sup> European private law has, in other words, become a complex and rich discipline that is quickly gaining ground at the cost of national private law.<sup>6</sup>

European Property law is a part of this development. For many decades the law of property was left alone mainly because the differences between the legal systems of the Member States were considered to be too diverse to reach easy harmonisation. Different from contract law, where many legal systems share a common heritage or have developed in a similar direction over time, the law of property in each Member State has remained static and somewhat unique.<sup>7</sup> Because legal scholarship mostly focused on comparative law, the law of property was less interesting to many. Of course, a select group of researchers in Europe also compared systems of property law and research results were often surprising.<sup>8</sup>

The surprise of these research results was that although many substantive and principal differences between legal systems were found, a clear set of common underlying values and principles was slowly discovered. This is perhaps best visible in Van Erp's Walter van Gerven Lecture in 2006. He does not only refer to the three leading principles of property law: the principle of *numerus clausus*, the principle of specificity and the principle of publicity.<sup>9</sup> Van Erp identifies some ground rules that are shared in most property law systems: *nemo dat, potior iure* and rules of protection (including an exception to this for mother and daughter rights).<sup>10</sup> Finally, Van Erp declares the rest of the property law rules technical rules, meaning they are of a technical nature, often created because of political choices that were made in the legal system. These rules, but this seems to be implied, can

---

<sup>5</sup> On the challenges this offers, in particular to legal education, see *A. W. Heringa/B. Akkermans* (eds), *Educating European Lawyers*, Antwerp/Oxford/Portland: Intersentia, 2011.

<sup>6</sup> On the need to change legal education to better reflect this development see *B. Akkermans*, *Challenges in Legal Education and the Development of a New European Private Law*, 10 *German Law Journal* 2009, pp. 803-814.

<sup>7</sup> On contract law see *R. Zimmernann*, *The Law of Obligations: Roman Foundations of the Civilian Tradition*, Oxford: Oxford University Press, 1996.

<sup>8</sup> See, inter alia, *C. von Bar* (ed.), *Sachenrecht in Europa, systematische Einführungen und Gesetzestexte*, Band 1-4, Osnabrück: Univeritätsverlag Rasch, 1999; *L. P. W. van Vliet*, *Transfer of movables in German, French, English and Dutch law*, Nijmegen: Ars Aequi Libri, 2000; *S. van Erp*, *A Numerus Quasi-Clausus of Property Rights as a Constitutive Element of a Future European Property Law*, *Electronic Journal of Comparative Law* 2003.

<sup>9</sup> *S. van Erp*, *European and National Property Law: Osmosis or Growing Antagonism?*, Groningen: Europa Law Publishing, 2006, pp. 13-16. Some of the leading principles have received more attention already, on which some extensive doctoral theses are in the process of preparation: *T. Struycken*, *De numerus clausus in the Goederenrecht*, Deventer: Kluwer, 2007; *B. Akkermans*, *The Principle of Numerus clausus in European Property Law*, Antwerp/Oxford/Portland: Intersentia, 2008; *R. Jansen*, *Beschikkingsonbevoegdheid*, Antwerp/Oxford/Portland: Intersentia, 2009. Doctoral theses on publicity are in preparation at the University of Utrecht and the University of Amsterdam, all under auspices of the *Ius Commune Research School* (see [www.iuscommune.eu](http://www.iuscommune.eu) (accessed on 26 Nov. 2012)).

<sup>10</sup> *S. van Erp*, supra fn. 9, pp. 16-17.

be overcome if the necessary political will would be present.<sup>11</sup> More of such principle analysis have been carried out.<sup>12</sup> I have tried to classify and describe primary and lesser property rights to provide a set of terminology and systematic thinking that can be applied to multiple legal systems to enable comparison.<sup>13</sup>

This type of analysis is of crucial importance for the further development of European property law because it allows comparatists to move beyond the technical differences between legal systems and focus on the principal compatibility of legal systems to investigate the possibilities for harmonisation or the making of European property law. Moreover, it allows a change of focus beyond the Member State level towards the European level. Such a change in focus will help to overcome differences at the national level. It also enables an investigation into the effects of European Union law on the law of property beyond the specific EU property legislation. Examples of such are emission trading rights, wills and succession and matrimonial property rights. Moreover, aspects of environmental law (soil protection) and maintenance obligations have effect on property law as well. Although these are very specific and often technical rules, the effect on the property law systems of the Member States is often fundamental.

When considering the making of European Private Law, these effects should not be neglected.<sup>14</sup> In fact, the political reality of making European private law often means that technical regulation can achieve more effects. This is therefore, not direct but indirect making of European Property Law. The following will provide a short discussion on the direct making of European Property Law after focusing on some prime examples of indirect making of European Property Law. Emission trading, wills and successions and matrimonial law will be used as examples of how often technical rules require substantive and doctrinal changes in the property law systems of the Member States.

## II. DIRECT MAKING OF EUROPEAN PROPERTY LAW

Contrary to what is sometimes held, there is already European property law.<sup>15</sup> This existing body of rules is much more fragmented than the current EU contract law *acquis*. These instruments are instances of direct making of property law because they deal with property law matters directly, including third party protection (II.1.), retention of title (II.2. and II.3.), the right of pledge and security ownership

---

<sup>11</sup> *S. van Erp*, supra fn. 9, p. 17.

<sup>12</sup> See *G. Gretton*, Ownership and its objects, *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 2007, pp. 802-851; *V. Sagaert*, Het goederenrecht als open systeem van verbintenissen? Poging tot een nieuwe kwalificatie van de vermogensrechten, 42/3 *Tijdschrift voor Privaatrecht* 2005, pp. 983-1086.

<sup>13</sup> *B. Akkermans*, supra fn. 9, p. 398.

<sup>14</sup> On the making of European Private Law, see *J. M. Smits*, *The Making of European Private Law*, Antwerpen/Oxford/New York: Intersentia, 2002.

<sup>15</sup> Evidence of this is plenty, see, inter alia, *P. Sparkes*, *European Land Law*, Oxford: Hart Publishing, 2007; *S. van Erp/B. Akkermans*, supra fn. 15, p. 173.



(II.4.), rules on transfer of ownership, property security rights and trusts (II.5.) and, potentially, a European right of hypothec (II.6.).

## 1. RETURN OF STOLEN CULTURAL OBJECTS

In 1993 the European Union produced a Directive that deals with the return of cultural objects from other Member States. Although this Directive is aimed at a very specific problem, it has potential wide ranging effects in the law of property. When a cultural object is stolen and brought to another Member State, where it is sold without the buyer knowing or being able to know that the object was stolen, the buyer usually acquires ownership of the object. At least, until it is found out that the object was stolen many legal systems in the Member States treat the buyer as owner of the object.

However, cultural property unlawfully removed from one Member State and brought to the other must be returned under the conditions of Directive 93/7/EEC.<sup>16</sup> As a result, the substantive property law of the Member States must accommodate the return of these cultural objects. Because of the ownership relations in the property law of the Member States, the unlawfully removed cultural object should therefore no longer be owned by the possessor in the Member State, and the lawful owner in the other Member State is able to revindicate, i.e. claim back, the cultural object. This obligation under the Directive has had far-reaching consequences in the property law systems of the Member States. For example, in Dutch law the acquirer of a cultural object who acquired for value and who was in good faith, comparable to the bona fide purchaser for value in English law, cannot be entitled to acquire a right of ownership. A special third-party protection rule has therefore been adopted to make a general exception to the bona-fide-purchaser-rule.<sup>17</sup>

## 2. RETENTION OF TITLE IN LATE PAYMENT SITUATIONS

In June 2000 the European Parliament and the Council enacted a Directive in the field of European Contract Law combating late payments in commercial transactions. This Directive is aimed to remedy one of the most disturbing complications arising in cross-border trade: the non- or late payment for a delivery of a good or for a service. Due to the differences between the laws of the Member States and the applicable rules of private international law on jurisdiction and enforcement, this Directive seeks to harmonise certain aspects of trade.

One of the approaches taken by the Directive is that it ensures the lawfulness of retention of title clauses.<sup>18</sup> Retention of title is defined by the Directive as 'the contractual agreement according to which the seller retains title to the goods in

---

<sup>16</sup> Art. 2 Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State, OJ L 74, pp. 74-79.

<sup>17</sup> Art. 86a Dutch Civil Code.

<sup>18</sup> Art. 4 Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions, OJ L 200, pp. 35-38.

question until the price has been paid in full.<sup>19</sup> Interestingly, not all Member States accommodated for retention of title in their legal order when the Directive was introduced. Originally a more far-reaching formulation than the current one had been proposed. However, a debate on the competence of the EU to interfere in the property law of the Member States, led to a formulation that focuses more on private international law than on substantive property law.<sup>20</sup> Nonetheless, although this Directive does not seek to harmonise the law of property, it does have some harmonising effects in this area.

### 3. RETENTION OF TITLE IN CROSS-BORDER INSOLVENCY CASES

In May 2000 the Council adopted a regulation dealing with cross-border insolvency procedures.<sup>21</sup> This regulation is intended to resolve issues of applicable law in cross-border insolvency procedures. The regulation is therefore mainly procedural and aimed at private international law rules. However, in its Art. 7 the regulation deals with the reservation of title. For a property lawyer, reservation of title is a complicated term, as it seems a combination of the English retention of title and the civil law reservation of ownership.<sup>22</sup> Art. 7 of the regulation states:

“1. The opening of insolvency proceedings against the purchaser of an asset shall not affect the seller’s rights based on a reservation of title where at the time of the opening of proceedings the asset is situated within the territory of a Member State other than the State of opening of proceedings.

2. The opening of insolvency proceedings against the seller of an asset, after delivery of the asset, shall not constitute grounds for rescinding or terminating the sale and shall not prevent the purchaser from acquiring title where at the time of the opening of proceedings the asset sold is situated within the territory of a Member State other than the State of the opening of proceedings”.

In particular sect. 2 of Art. 7 Insolvency Regulation is relevant. In the laws of the Member States it is an important question what happens to the reservation of title in case of insolvency. When the reservation of title, which is essentially a contractual arrangement, is no longer recognised in insolvency, it is not considered to have a proprietary character. However, when the effects of a reservation of title clause are recognised in insolvency, which is generally the rule, property lawyers speak of a property effect of this special type of contractual arrangement.<sup>23</sup> Generally speaking, the Insolvency Regulation guarantees the property effect of a reservation of title clause both in case of insolvency of (1) the buyer and (2) the

---

<sup>19</sup> Art. 2 (3) Directive 2000/35/EC.

<sup>20</sup> See *J. M. Milo*, *Combating Late Payment in Business Transactions: How a New European Directive Has Failed to Set a Substantial Minimum Standard Regarding National Provisions on Retention of Title*, *European Review of Private Law* 2003, pp. 387-393.

<sup>21</sup> Council Regulation (EC) 1346/2000 of 29 May 2000 on insolvency proceedings, OJ L 160, pp. 1-18.

<sup>22</sup> On the difference see *B. Akkermans*, *supra* fn. 9, pp. 404-407.

<sup>23</sup> See *V. Sagaert*, *De verworvenheden van het Europese goederenrecht*, in: A. S. Hartkamp/C. H. Sieburgh/L. A. D. Keus (eds), *De invloed van het Europese recht op het Nederlandse privaatrecht*, Deventer: Kluwer, 2007, pp. 318-319.

seller. Most importantly, it therefore strengthens the position of the buyer in case of insolvency of the seller. From a traditional property law point of view, the buyer would have a mere personal right to the right of ownership, which could no longer be enforced in insolvency. However, by continuing to recognise the reservation of title, the right of the buyer is strengthened to a quasi property right, as the right to the ownership can now also be exercised in insolvency against another person, i.e. the administrator.<sup>24</sup>

#### 4. RIGHT OF PLEDGE AND SECURITY OWNERSHIP IN FINANCIAL COLLATERAL ARRANGEMENTS

In June 2006 the European Parliament and the Council adopted a Directive on Financial Collateral Arrangements.<sup>25</sup> This Directive is aimed at banks and other large financial institutions and seeks to regulate aspects of transactions between these institutions. These aspects include rules on the applicable law in case of cross-border financial transactions, but also some substantive rules that have a direct effect on the law of property. Art. 2 defines Financial Collateral Arrangements as ‘a title transfer financial collateral arrangement or a security financial collateral arrangement whether or not these are covered by a master agreement or general terms and conditions’.

Although this Directive is very technical, there are two property law aspects. First, the title transfer arrangement mentioned in the definition is generally characterised in property law as a transfer of ownership for security purposes. In such a transaction the right of ownership (or title to goods) is transferred to another party with the intention not to transfer the ownership or title to the acquirer outright, but rather for purposes of providing security for an underlying claim. In civil law systems this transaction is known as a *fiducia cum creditore*, in the common law it is known as a mortgage.<sup>26</sup> In some legal systems, this type of transfer is more developed than in others, but all legal systems must enable this transaction under the Directive.

Secondly, a security financial collateral arrangement is an agreement whereby one institution grants a property security right to the other institution as security for an underlying claim. Here, the ownership or title remains with the financial institution, but the other party receives a right to satisfy itself from the objects given as security, collateral in the terms of the Directive, when the claim is not repaid. Because of the specific nature of these transactions between banks and financial institutions, the general rules of property security rights do not necessarily apply. In general in property law, the holder of a property security right is prohibited from

---

<sup>24</sup> In the same sense see *V. Sagaert*, supra fn. 24, p. 321.

<sup>25</sup> Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements, OJ L 168, pp. 43-50.

<sup>26</sup> Please note, a mortgage of land in English law is, since the Law of Property Act 1925, no longer a conveyance of the fee simple, but a charge by deed expressed to be by way of legal mortgage; see *Lionel D. Smith* 2000, *Security*, in Peter Birks (Ed.) *English Private Law*, Oxford: Oxford University Press, 2000, pp. 404-407.

keeping the objects given as security for himself in case of default payment by the debtor. However, under the financial collateral Directive this is allowed.<sup>27</sup> Moreover, in general property law the property security right is aimed at one specific object. However, under the Financial Collateral Directive the creditor may also return like objects instead of the original object.

The Financial Collateral Directive therefore harmonises some aspects of property security rights. Its implementation has, in some Member States, been problematic.<sup>28</sup> Some Member States have chosen to make specific legislation; other Member States apply their own general property law rules. The result, however, is a modernisation of property security law which already has effects on the general law of property.<sup>29</sup>

## 5. BOOKS VIII, IX AND X OF THE DRAFT COMMON FRAME OF REFERENCE (DCFR)

The Draft Common Frame of Reference in contract law is a very interesting project.<sup>30</sup> Although it generally concerns contract law, the drafters have realised that there are effects of contract law on other areas of private law.<sup>31</sup> This includes aspects of the law of property.<sup>32</sup> These aspects include the transfer of ownership of movable objects and the law on property security rights on movable objects and trusts. In both areas there is a clear link between the law of contract and the effects of contractual arrangements in the law of property. Examples have already been seen above in the transfer of the right of ownership for security purposes or the reservation of the right of ownership.<sup>33</sup>

However, by providing a set of rules that deals with these property law aspects, the drafters have started the creation of a system of European property law. Although the rules only contain the selected elements, the property law of the Member States is generally a coherent system of law. Therefore, in most Member States the rules applicable to the transfer of ownership of movables? are also applicable to the

<sup>27</sup> Art. 5 Directive 2002/47/EC.

<sup>28</sup> See, inter alia, *L. P. W. Vliet*, De Financiële zekerheidsvereenkomst: Een Tussenbalans, *Nederlands Tijdschrift voor Burgerlijk Recht* 2005, pp. 190 et seq.; *J. H. M. Van Erp*, Naschrift: De Implementatie van de Richtlijn Financiële zekerheidsvereenkomsten Vanuit Europeesrechtelijk en Rechtsvergelijkend Oogpunt, *W.P.N.R.* 2005, pp. 252-256.

<sup>29</sup> See, e.g. the French law on property security rights that was changed in 2006 and which now also allows the creditor to keep the objects under security in case of non-performance by the debtor (*a pacte commissoire*), Art. 2364 Code Civil.

<sup>30</sup> See *H. Beale*, *European Contract Law: The Common Frame of Reference*, in: C. Twigg-Flesner (ed.), *The Cambridge Companion to European Union Private Law*, Cambridge: Cambridge University Press, 2010, pp. 116 et seq.

<sup>31</sup> *C. von Bar/U. Drobnig* (eds), *Study on Property Law and Non-contractual Liability Law as they relate to Contract Law*, 2002 [http://ec.europa.eu/consumers/cons\\_int/safe\\_shop/fair\\_bus\\_pract/cont\\_law/study.pdf](http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/study.pdf) (accessed on 08 Feb. 2013).

<sup>32</sup> *Ibid.* pp. 309 et seq.

<sup>33</sup> *C. Von Bar et al.* (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)*, München: Sellier European Law Publishers Outline Edition, 2009, pp. 20-21.

transfer of ownership of immovables and to the creation of limited property rights. Moreover, the rules on personal property security rights, i.e. property security rights in respect to movables, are usually in conformity to the rules on immovable property security rights. Further, there is a clear link between the transfer rules and security rights, as a transfer of ownership for security purposes and a non-possessory right of pledge, come very close to each other.

Although it remains unclear what the exact form of the DCFR will be, in 2010 the European Commission has created an expert group that looks into the form and content of the Common Frame of Reference.<sup>34</sup> A likely form is an optional instrument of contract law, allowing parties to choose this set of rules applicable to their legal relation.<sup>35</sup> Property law can hardly be excluded from this, as aspects (like?) the transfer of ownership, i.e. the passing of risk from the seller to the buyer, and property security rights such as retention of title and pledge can be left to national law, but then most effects of the transaction governed by the optional CFR will not be European and hence will differ from Member State to Member State.

## 6. FUTURE EU PROPERTY LAW: A RIGHT OF EURO-MORTGAGE

Cross-border mortgage lending is not very popular in the European Union. A survey of 2004 showed that only 1 % of all transactions concerned a cross-border sale of immovable objects.<sup>36</sup> The European Commission has taken this data as a signal that there must be obstructions to cross-border acquisition of land, as the free movement of persons, services and capital all guarantee the possibility (to do what?).<sup>37</sup> One of the initiatives therefore concerns the creation of a European property security right that would enable European citizens to use one single type of right for the acquisition of land in any Member State.<sup>38</sup> As a result the property law systems of the Member States might be enriched by a new property security right. This new right would be modelled to German and Swiss law and would be a non-accessory property right, meaning it would not be automatically connected to an underlying claim. Moreover, the right would be able to be used by banks to finance a portfolio of acquisitions throughout the Member States. Especially this second aspect is relevant in terms of the secondary mortgage market. It is on the secondary mortgage market that banks themselves acquire money to be used for

---

<sup>34</sup> Commission Decision 2010/233/EU of 26 Apr. 2010 setting up an expert group on a Common Frame of Reference in the area of European Contract Law, OJ L 105, pp. 109-111.

<sup>35</sup> On the optional model see *H. Schulte-Nölke*, The way forward in European consumer contract law: Optional instrument instead of further deconstruction of national private laws, in: C. Twigg-Flesner (ed.), *The Cambridge Companion to European Union Private Law*, Cambridge: Cambridge University Press, 2010, pp. 131 et seq.

<sup>36</sup> *Group European Opinion Research*, Standard Eurobarometer 205 / Wave 60.2 - Public Opinion in Europe: Financial Services - Report B, Brussels: European Communities, 2004, p. 58.

<sup>37</sup> See, Green Paper Mortgage Credit in the EU COM (2005) 237 final, p. 5.

<sup>38</sup> *O. M. Stöcker*, *Die Eurohypothek*, Berlin: Duncker & Humblot, 1992; *H. G. Wehrens/E. Gresser*, *L'eurohypothèque/Die Eurohypothek* Amsterdam: Union Internationale du Notariat Latin, 1992.

mortgage lending to consumers.<sup>39</sup> In 2005 the creation of this type of right was a serious option for the European Commission.<sup>40</sup> However, at the end of 2007 the Commission seemed, possibly under influence of the financial crisis, to have changed its mind.<sup>41</sup> It remains to be seen whether the Commission will, in its new legislative term, continue its work on the EU mortgage market.

### III. INDIRECT MAKING OF EUROPEAN PROPERTY LAW

The term “indirect making” refers to those instruments that do not have as their objective to alter or add rules of property law at a national level, but which nonetheless have an effect on the property law systems of the Member States. Sometimes the indirect effect is taken into consideration, f. e. when dealing with wills and successions and the applicable matrimonial law, but sometimes the effects are unintentional, i. e. in case of emission trading rights, soil protection and maintenance obligations.

The indirect making of European Property Law offers very interesting insights, because it sometimes makes legal-political choices or legal-political choices must be made on the basis of it, which would be very controversial in case of direct making of European Property Law.<sup>42</sup> On the basis of these instruments, further steps towards a European property law can be made.

#### 1. EMISSION TRADING RIGHTS

A prime example of indirect property law making is offered by the European Emission Trading System. Introduced in 2003, it created a system of tradable emission rights. Emission rights are exclusive rights to emit carbon-dioxide into the air.<sup>43</sup> Environmental in scope, the objective of this Directive is to take control of emissions and to reduce the availability of the allowances to emit gas into the air over the next decades. As a result, companies are expected to reduce their greenhouse gas emission and trade excess rights they might have with other companies.<sup>44</sup> Although the allowance of emission rights is for the Member States to determine, the trading between these leads to questions of property law.

---

<sup>39</sup> P. Sparkes, *European Land Law*, Oxford: Hart Publishing, 2007, pp. 409-412.

<sup>40</sup> Green Paper Mortgage Credit in the EU COM (2005) 237 final, pp. 13-14.

<sup>41</sup> White Paper on Mortgage Credit Markets COM (2007) 807 final, p. 5.

<sup>42</sup> On the political aspects of European Private Law see M. W. Hesselink, *The Politics of a European Civil Code*, 10 *European Law Journal* 2004, pp. 675-697; S. van Erp, *Deconstruction and reconstruction of European property law: A research agenda*, in: E. Ritaine-Cashin (ed.), *Legal engineering and comparative law/L'ingénierie juridique et le droit comparé*. Rapports du colloque du 25e anniversaire de l'Institut Suisse de Droit Comparé du 29 août 2008 à Lausanne, Zurich/Basel: Schultess, 2009, pp. 105-121.

<sup>43</sup> Directive 2003/87/EC of the European Parliament and the Council of 13 Oct. 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, OJ L 275, pp. 32-46. The definition of an allowance is provided by Art. 3 as “an allowance to emit one tonne of carbon dioxide equivalent during a specified period”.

<sup>44</sup> Preamble to Directive 2003/87/EC, recitals 1-10, 20, 23.

Emission allowances are temporary exclusive rights, defined in Art. 3 of the Directive. As such they are best described as permits representing a specific value.<sup>45</sup> Moreover, Art. 3 also prescribes that these rights are transferable in accordance with the provisions of the Directive. The transfer of the rights is further dealt with in Art. 12 (1), stating that any person within the EU is capable of acquiring emission allowance rights. As such, this Directive does not provide any more rules on the transfer of Greenhouse Gas Emission Rights and it seems that it does not concern matters of property law. However, making the Directive work at a national level does require property law, as emission rights are objects of property law and fall under the relevant property transfer system used. Member States had to implement the Directive by the end of 2003.<sup>46</sup>

In many Member States implementation was unproblematic from a property law point of view. However, in the Netherlands, correct implementation of the Directive required adopting special rules to accommodate the transfer of emission rights. Under the Dutch system of *vermogensrecht* (patrimonial law), emission rights are *vermogensrechten* (patrimonial rights), as these are rights that represent a certain value and which are transferable.<sup>47</sup> With this classification, emission rights fall under the normal property law rules.<sup>48</sup> A transfer of any transferable object in Dutch law requires a valid contract, a power to dispose of the entitlement of that object of the transferor and a delivery of the object.<sup>49</sup> The Dutch transfer system is a tradition system, requiring a delivery (or deed and registration) besides a valid underlying agreement (known as title).<sup>50</sup> The Dutch transfer system is also a causal transfer system, requiring the underlying agreement to be and remain valid.<sup>51</sup> However, the nature of emission rights, as well as the European system in which they function, brings difficulties that put this system of transfer under pressure. An emission right is, by its nature, perishable in the sense that once the greenhouse gas has been emitted, the right is gone. Moreover, when the underlying agreement between the

---

<sup>45</sup> On Emission Rights and emission trading see *S. Weishaar*, *Towards Auctioning: The Transformation of the European Greenhouse Gas Emission Trading System*, Deventer: Kluwer, 2009, pp. 1-11.

<sup>46</sup> Art. 31 Directive 2003/87/EC.

<sup>47</sup> Art. 3:6 BW (Dutch Civil Code).

<sup>48</sup> A debate was held whether emission rights can be seen as registered objects (*registergoederen*) since registration of a transfer is required. However, eventually the Dutch government decided against this, as not all transfers of emission rights are public. The registration is therefore not necessarily public either; see *Wijziging van de Wet milieubeheer en enige andere wetten ten behoeve van de implementatie van richtlijn nr. 2003/87/EG van het Europees Parlement en de Raad van de Europese Unie van 13 oktober 2003 tot vaststelling van een regeling voor de handel in broeikasgasemissierechten binnen de Gemeenschap en tot wijziging van Richtlijn 96/61/EG van de Raad (PbEU L 275) en de instelling van een emissieautoriteit (Implementatiewet EG-richtlijn handel in broeikasgasemissierechten)*, Advies Raad Van State En Nader Rapport, p. 25, and *Memorie Van Toelichting TK*, p. 72.

<sup>49</sup> Art. 3:84 BW.

<sup>50</sup> On transfer systems see *L. P. W. van Vliet*, *Transfer of movables in German, French, English and Dutch law*, Nijmegen: Ars Aequi Libri, 2000, pp. 23 et seq.

<sup>51</sup> Hoge Raad (HR) 5 mei 1950, NJ 1951, 1 (Damhof/Staat), *L. P. W. van Vliet*, supra fn. 51, 2000, pp. 133 et seq.



parties would become invalid at the end of the year, and therefore the transfer would also become invalid, an automatic return of the emission right to the transferor is unlikely, as most of the emission right will have been used. Finally, also out of practical concerns the Dutch government argued that emission rights function in a European trading system, but with national registration systems for the transfer. In its Memorandum accompanying the implementation act of Directive 2003/87/EC the Dutch government argues that an invalid agreement of a transaction between a Dutch buyer and an English seller would bring the need to alter three registries: the Dutch, the English, and the log held by the European Commission.<sup>52</sup> As a result of this the law implementing Directive 2003/87/EC includes an interesting Art. 16.42. It states:

1. Voidance, avoidance or rescission of the agreement that led to the transfer, has, after the transfer has been completed, no consequences for the validity of the transfer.
2. Every condition in relation to the transfer ends at the moment that transfer has been effected.
3. In derogation from article 228 of book 3 of the Civil Code a right of pledge cannot be created on an emission right.<sup>53</sup>

As far as emission rights are concerned, an abstract transfer system is followed. Moreover, conditions in the underlying agreement normally have property effect. Art. 3:85 BW (Dutch Civil Code) provides that a right transferred under condition results in the acquisition of a conditional right. Para. 2 of Art. 16.42 of the implementation law also derogates from this fundamental causal principle of the transfer system. In other words, the causal system, which brings a link between the otherwise separated systems of contract law and property law has been broken for pragmatic reasons, and has been replaced with an abstract transfer system, resembling the transfer system in, for example, Germany.<sup>54</sup>

Although the legislation and therefore the exception to Dutch property law is very specific, the consequences should be considered more severe than this. A system of property law will only function properly if it is a system. The transfer system underlying property law fulfills an important function in this. It is not only the way in which objects are transferred between parties, but also the way in which property rights are created and destroyed.<sup>55</sup> The doctrine behind the system is based on the idea that it applies throughout the system, so that complicated cases can be dealt with. Dutch law is becoming famous for its derogations under pressure from European and international law. Other examples include the prohibition on the

---

<sup>52</sup> Memorie Van Toelichting TK, p. 73.

<sup>53</sup> “1. Nietigheid, vernietiging of ontbinding van de overeenkomst die tot de overdracht heeft geleid, heeft, nadat de overdracht is voltooid, geen gevolgen voor de geldigheid van de overdracht. 2. Elk voorbehoud met betrekking tot de overdracht is uitgewerkt op het moment dat de overdracht tot stand is gekomen. 3. In afwijking van artikel 228 van Boek 3 van het Burgerlijk Wetboek kan op een broeikasgasemissierecht geen recht van pand worden gevestigd.” (translation made by author).

<sup>54</sup> See also *S. van Erp*, *De osmose van Nederlands en Europees goederenrecht*, 10 N.T.B.R. 2004, p. 535.

<sup>55</sup> In Dutch law Art. 3:89 and 3:81 BW.

transfer of ownership for security purposes which was set aside to implement the Financial Collateral Arrangements Directive mentioned above as well as to ratify the Hague Convention on the Law Applicable to Trusts.<sup>56</sup>

A property law system that needs derogation is a system that needs reform. French law offers an excellent example, where in 2008 a proposal for a new property law was launched.<sup>57</sup> Whether such a change should bring an abstract transfer system remains to be doubted. The German system is increasingly put under pressure and also the proposed transfer system in the Draft Common Frame of Reference is causal rather than abstract.<sup>58</sup> Be that as it may, the implementation of Directive 2003/87/EC offers a prime example of indirect making of European property law.

## 2. WILLS AND SUCCESSIONS

In 2006 the European Commission launched a green paper in which it introduced proposed rules to deal with wills and succession in the EU internal market.<sup>59</sup> Recognising the increase in movement to other Member States and the complications this brings to matters of succession law, the Commission proposed a change of regime to create better conditions and more legal certainty, especially as concerns the applicable law to cross-border succession matters. In 2009, following the consultation on the Green Paper, the Commission proposed a Regulation dealing with cross-border succession.<sup>60</sup> The Council discussed and approved the proposal with political amendments in 2010 with the United Kingdom, Ireland and Denmark opting out of the adoption and application procedure.<sup>61</sup>

Although the proposed Regulation offers a private international law approach to wills and succession, its consequences might be severe on the succession and property law systems of the Member States. At the basis of the proposal is the abolition of the *lex rei sitae* rule in favour of a choice of law for the parties. This choice of law is limited; the Regulation only allows a choice of law of the applicable succession regime to one of the systems the citizens are connected. Furthermore, the Regulation introduces a scheme of mutual recognition of property relations from another Member State. It is the choice of law that potentially could have major effects on national property law. A choice for German

---

<sup>56</sup> On this see *B. Akkermans supra* fn. 9, pp. 306-310.

<sup>57</sup> Association Henri Capitant Des Amis de la Culture Juridique Française, Avant-projet de réforme du droit des biens - Version du 19 Novembre 2008; to be found at [http:// www .henricapitant.org/](http://www.henricapitant.org/) (accessed on 28 Nov. 2012).

<sup>58</sup> See The Draft Common Frame of Reference, Book VIII, in particular Art. VIII.-2:101 and VIII.-2:202; on the pressure on the abstract transfer system see *J. T. Füller, Eigenständiges Sachenrecht?, Jus Privatum. Beiträge zum Privatrecht*, Tübingen: Mohr Siebeck, 2006, pp. 8 et seq.

<sup>59</sup> Green Paper of 1 March 2006 on Succession and Wills COM (2005) 65 final.

<sup>60</sup> Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession, COM (2009) 154 final.

<sup>61</sup> Press Release of the 3018th Council meeting, Justice and Home Affairs, Luxembourg 3-4 June 2010 (10630/1/10 REV 1).

law by a German couple living in Italy for most of the year combined with a last will in which various, German-specific, property rights are created, could lead to the introduction of a new property right in the Spanish (or Italian?) property law system. For example, the German *beschränkte persönliche Dienstbarkeit*, in English best described as a limited personal servitude, is unknown to most other European property law systems.<sup>62</sup> Other examples include the real burden *Reallast*, which is very much unrecognised in other systems due to the positive burden this property right imposes.<sup>63</sup> Finally, also the creation of a right of *Grundschild* in all its non-accessory glory, could create serious problems in another legal order that only recognises accessory property security rights.<sup>64</sup> The choice of law in succession matters could, in other words, upset the system of property rights in a Member State, usually known as the *numerus clausus* of property rights.<sup>65</sup> The principle of *numerus clausus* is the fundamental principle of property law that limits party autonomy in the creation of new property rights and generally prevents the creation of new types of property rights. Even systems not outrightly prohibiting the creation of new types of property rights adhere to the principle of *numerus clausus* in offering criteria for the creation of new property rights.<sup>66</sup>

The pressure on the *numerus clausus* in any Member State is increasing because of, besides national developments, the increase cross-border movement of persons in the European Union. Increasingly, Member States are confronted with the recognition of foreign property rights into their legal system. Here, the general *lex rei sitae* rule applies and because of the national *numerus clausus*, foreign property rights will have to be transformed into national equivalents or simply be not recognised. This recognition brings challenges to property law in relation to the free movement of goods, persons, services and capital.<sup>67</sup> This internal market law pressures the recognition of foreign property rights as well as the *lex rei sitae* rule.

---

<sup>62</sup> On this right see *J. von Staudinger et al*, Buch 3 Sachenrecht - Erbb VO; §§ 1018-1112, In: W. Wiegand (ed.), *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen*; Berlin: Sellier - de Gruyter, 2002, p. 682; in English *B. Akkermans*, supra fn. 9, pp. 201 et seq.

<sup>63</sup> On the *Reallast* *J. von Staudinger*, supra fn. 63, 2002, p. 813; in English *B. Akkermans*, supra fn. 63, pp. 213 et seq.

<sup>64</sup> Although the non-accessory character of the right of *Grundschild* has been somewhat limited by recent legislation, this legislation will of course not necessary apply in another jurisdiction; on the right of *Grundschild* see *J. F. Baur/R. Stümer*, *Sachenrecht*, München: C. H. Beck, 18. Edition, 2009, pp. 505 et seq.; in English *V. Sagaert*, *Security Interest*, in: S. van Erp/B. Akkermans (eds), *Ius Commune Casebook for the Common Law of Europe: Text, Cases and Materials on Property Law*, Oxford: Hart Publishing, 2012, p. 425 et seq.; *B. Akkermans*, supra fn. 9, pp. 224 et seq.; *L.P. W. van Vliet*, *Mortgages on immovables in Dutch law in comparison to the German mortgage and land charge*, in: M. Hinteregger/T. Boric (eds), *Sicherungsrechte an Immobilien in Europa*, Vienna: Lit Verlag, 2009, pp. 285 et seq.

<sup>65</sup> On the concept of *numerus clausus* see *B. Akkermans*, supra fn. 9, p. 5 and pp. 385-396.

<sup>66</sup> Examples are English law, Spanish law and South African law; on these systems see *B. Akkermans*, supra fn. 9, p. 390.

<sup>67</sup> *E. M. Kieninger*, *Mobiliarsicherheiten im Europäischen Binnenmarkt: Zum Einfluß der Warenverkehrsfreiheit auf das nationale und internationale Sachenrecht der Mitgliedstaaten*, Baden-Baden: Nomos, 1996; *J. W. Rutgers*, *International Reservation of Title Clauses: A study of Dutch, French and German Private International Law in the Light of European Law*

It is no real surprise therefore that the Commission seeks another approach in its proposal for a Regulation on Succession and Wills. However, that should not imply that the Commission intends to upset the national systems of property rights. The explanation of the Commission to the proposal states the following:

The Regulation does not affect the "*numerus clausus*" of property law in the Member States, the classification of property and rights, and the determination of the prerogatives of the holder of such rights. As a consequence, it is not, in principle, valid to establish a right in rem without knowing the law of the place in which the property is located. The law on succession cannot lead to the introduction in the State in which the property is located of a property law clause, or the stripping of such clause, without the knowledge of the State. For example, usufruct cannot be introduced in a State which does not recognise it. However, this exception does not apply to the transfer of a right in rem recognised by the Member State in which the inherited property is located.<sup>68</sup>

Although the intention of the statement is clear, it raises several important property law questions. First of all, it creates a tension between the applicable law to the succession and the applicable law under the *lex rei sitae* rules of the Member State in which the object is located. When, for example, English law applies to the succession, a trust will come into being upon death, rather than the universal succession rule that applies in civil law systems.<sup>69</sup> As a result of this, the succession regime will grant entitlement to the executor of the deceased set of assets. The heirs will not receive direct entitlement, but will become beneficiaries under the trust and receive an equitable entitlement. This becomes even more complicated when a last will provides for a trust to be created or appoints certain specific beneficiaries. A trust as such will not create any property relations, but when the subject matter of a trust is a property right, the legal and equitable entitlement will also have a proprietary character.<sup>70</sup> For objects located in England, this will not cause any problems. However, for objects located in any civil law jurisdiction, the equitable entitlement of an heir-beneficiary will be problematic. The recognition of the

---

study of Dutch, French and German Private International Law in the Light of European Law (Diss.), The Hague: T.M.C. Asser Press, 1999; T. Roth, Vereinheitlichung des Rechts der Mobiliarsicherheiten. Möglichkeiten und Grenzen im Kollisions-, Europa-, Sach- und Vollstreckungsrecht unter Berücksichtigung des US-amerikanischen Systems der Kreditsicherheiten, Tübingen: Mohr Siebeck, 1999; P. von Wilmsowsky, Europäisches Kreditsicherheitsrecht: Sachenrecht und Insolvenzrecht unter dem EG-Vertrag, 60 Beiträge zum ausländischen und internationalen Privatrecht, Tübingen: Mohr Siebeck, 1996; J. Israël, European Cross-Border Insolvency Regulation, Antwerpen/Oxford/Portland: Intersentia, 2005; B. Akkermans, Property Law and the Internal Market, in: S. van Erp/B. Akkermans/A. Salomons (eds), The Future of European Property Law, München: Sellier European Law Publishers, 2012, pp. 199 et seq.

<sup>68</sup> Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession. COM (2009) 154 final, p. 5.

<sup>69</sup> K. G. C. Reid/M. J. de Waal/R. Zimmermann (eds), Exploring the Law of Succession: Studies National, Historical and Comparative, Volume 5, Edinburgh: Edinburgh University Press, 2007.

<sup>70</sup> W. Swadling, Explaining Resulting Trusts, 124 Law Quarterly Review 2008, pp. 72-102.

beneficial interest for example in a valuable painting, or – even more complicated – a piece of land in another Member State, does not fit in the civil law *numerus clausus*. Whereas in other situations a German *usufruct* might be transformed into a French *usufruct* and, because these rights are almost the same in content, no real problems will result, the receiving legal system will, without equity or a serious trust device, be hardly able to recognise a property right in equity, while remaining to do justice to the trust relation.<sup>71</sup> Any problem accommodating the beneficial interest of an heir will lead to serious legal problems.

In any international property law situation, the recognition of foreign property rights can be problematic.<sup>72</sup> The rules of private international law are aimed at accommodating foreign property relations by transforming these into national law equivalents. The European Union legal order creates an additional problem for this. The law governing the internal market, especially the law relating to the free movements of goods, persons, services, and capital, applies to private international law. As a result, the recognition of a property right validly created in another Member State will fall under the free movement of goods. Moreover, also a property right acquired by a person from another Member State or a mortgage loan obtained for the acquisition of land in another Member State will fall under the free movement of persons, services or capital.<sup>73</sup> Whether the application of free movement law in these situations leads to the duty to directly recognise and accommodate the foreign property right without any transformation, will depend on the justification offered by the Member State and the principle of proportionality.

However, when a Member State is confronted with a foreign property right that was created under the scheme of the proposed Regulation on Wills and Successions, it becomes a lot harder for Member States to refuse direct recognition and accommodation. After all, the normal rules on private international law will also fall (directly) under the competence of the European Court of Justice, rather than the national courts, because these rules accommodate the Regulation. Moreover, the scheme created under the Regulation, leaving the *lex rei sitae* rule in favour of party autonomy, will bring another dimension to internal market law. Free movement of persons will now include the right to choose the applicable law to your own succession, and such a right will be protected by the European Court of Justice. The Court of Justice will look at the effect of the Regulation in national law, rather than the letter of the legislation provided by the Member State.

---

<sup>71</sup> On the recognition of foreign property rights *E. M. Kieninger*, supra fn. 68; *J. W. Rutgers*, supra fn. 68; *B. Akkermans/E. Ramaekers*, Krantz Revisited: Free Movement of Goods and Property Law, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1617182](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1617182) (accessed on 28 Nov. 2012).

<sup>72</sup> *J. Israël*, European Cross-Border Insolvency Regulation, Antwerpen/Oxford/Portland: Intersentia, 2005, pp. 11 et seq.

<sup>73</sup> Case C-222/97 *Manfred Tnummer v Peter Mayer* [1999] ECR I-1661; see also *C. Bamard*, The Substantive Law of the EU: The Four Freedoms, Oxford: Oxford University Press, 2nd edition, 2007, p. 535; *B. Akkermans*, Property Law and the Internal Market, in: S. van Erp/*B. Akkermans/A. Salomons* (eds), The Future of European Property Law, München: Sellier European Law Publishers, 2012, pp. 199 et seq.

There are two problems to face. First, a Member State may simply refuse to recognise a property relation from another Member State. This could happen with a beneficial interest under a trust, as only five Member States have signed and ratified the Hague Trust Convention and are therefore obliged to recognise such a right.<sup>74</sup> A legal system refusing to recognise the right in equity as a fragmented form of ownership will have to reconsider under the rules of the Regulation and its effect on the internal market. Secondly, the Member State may try and apply its own law by transforming the foreign property right into a national equivalent. However, it remains to be seen if such a transformation would be in conformity with EU law, too.<sup>75</sup> Following the approach the Court has taken in cases as *Inspire Art*, *Überseering* and *Grunkin-Paul*, it remains to be seen whether a Member State will be allowed to follow any of these options.<sup>76</sup> It is more likely that a system of mutual recognition of property rights results, with all the problems for the national *numerus clausus* systems.<sup>77</sup> The example of the beneficial interest offers an interesting example of this because it offers a property right not recognised in other systems. The fact that the United Kingdom is likely to opt out of the Regulation is of no concern as the free movement of persons still includes English living in other Member States and they can, of course, not be excluded from the Regulation.<sup>78</sup>

A second point that is raised by the explanation of the Commission is in the exception it provides itself. The Commission states that its own exception will not apply to a transfer of an object, likely under a provision in the last will, to another Member State including a property right created on it. This very much strengthens the argument I made above for the recognition of property rights. The example of a property right the Commission provides itself is a right of *usufruct*. A right of *usufruct*, originating from Roman law, is a right to use and enjoy an object that is owned by another. Most, if not all, civil law systems recognise it. The right is, however, not recognised in English law.<sup>79</sup> Even so, there are also substantive differences regarding the right of *usufruct* in civil law systems. Here, Dutch law – once more – takes a different position.

A right of *usufruct* as a right to use and enjoy an object traditionally brings a duty to maintain and preserve the object. However, in the Dutch Civil Code which entered into force in 1992, this duty to preserve the object has disappeared as a

---

<sup>74</sup> These are The United Kingdom, Italy, Malta, The Netherlands and Luxembourg; France has signed, but not ratified the Treaty. Status Table to the Convention of 1 July 1985 on the Law Applicable to Trusts and their Recognition, [www.hcch.net](http://www.hcch.net) (accessed on 20 Dec. 2012).

<sup>75</sup> *B. Akkermans/E. Ramaekers*, supra fn. 72.

<sup>76</sup> Case C-167/01 *Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd* [2003] ECR I-10155; Case C-208 *Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC)* [2002] ECR I-9919; Case 353/06 *Grunkin v Paul* [2008] ECR I-7639.

<sup>77</sup> On some of the potential consequences of this see *B. Akkermans*, supra fn. 9, pp. 510 et seq.

<sup>78</sup> On this observation see Vice-President of the European Parliament *D. Wallis* MEP at the meeting of the Committee on Civil Liberties, Justice and Home Affairs (LIBE), Legal Affairs (JURI) and Women's Rights and Gender Equality (FEMM) of the European Parliament hearing Commissioner-Designate Viviane Reding, 12 Jan. 2010, *de auditu*.

<sup>79</sup> On the right of *usufruct* see *B. Akkermans*, supra fn. 9, pp. 408 et seq.

mandatory requirement for a right of *usufruct*.<sup>80</sup> In other words, the Dutch *numerus clausus* provides another definition of the right of *usufruct* giving it a unique content in relation to, for instance, the German or French *numerus clausus*.

It is precisely at this point that difficulties with the explanation provided by the Commission may arise. A *usufruct* created in a succession situation in Dutch law, whereby the object is to be transferred to the right holder of the *usufruct* in another Member State will bring the same problems of recognition as mentioned above. A transformation into a German or French *usufruct* will reinstate the duty to maintain and preserve the object. Here, however, the Commission is very clear: the host Member State will have to accept the foreign property right. If this includes a new type of property right it will result in extension of the *numerus clausus* at least at some level.<sup>81</sup> When it includes a property right known in the receiving Member State, but with a different content, it will result in an extension of the *numerus clausus* at some level.<sup>82</sup>

Although this forced recognition will have a high impact on the law of the Member State, it does not necessarily cause major problems. After all, it will only be in relation to this very specific case that a foreign property right will have to be accommodated. However, because it concerns an EU case, EU law also has a say on this. Under the *acte clair* and *acte éclairé* doctrine of the European Court of Justice all cases exactly like and more or less similar will not have to be put in front of the European Court anymore and the national court is expected to follow the decision of the European Court of Justice.<sup>83</sup> Therefore, all similar cases, i.e. the recognition of a foreign property right will fall under the potential forced recognition case law of the European Court of Justice. This will create a larger impact on the property laws of the Member States, but will still not create much legal uncertainty as nationals of that Member State will still be able to choose from the national catalogue of property rights only.<sup>84</sup> However, and herein lies the true effect of European Union law, the European Court of Justice will not automatically leave this situation alone. When persons from another Member State or nationals of a Member State with a sufficient connection to another Member State are able to use a property right not known to the national *numerus clausus*, and nationals of a Member State without such a connection are not, this leads to a situation of reverse discrimination.<sup>85</sup>

---

<sup>80</sup> Art. 3:215 BW; see *B. Akkermans*, supra fn. 9, pp. 266 et seq.

<sup>81</sup> This cannot be seen as a full extension of the *numerus clausus* as the Member State must recognise this new type of property right in a cross-border situation only, the right will not be open for nationals of that Member State. Whether this reverse discrimination is allowed is another question. The European Court of Justice has recently hinted at the prohibition of reverse discrimination; see Case C-448/98, *Criminal Proceedings against Jean-Pierre Guimont* [2000] ECR I-10663; Case C-302/97 *Klaus Konle v Republik Österreich* [1999] ECJ I-3099.

<sup>82</sup> The same exception as above applies here.

<sup>83</sup> Case C-283/81, *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982] ECR 3415.

<sup>84</sup> *B. Akkermans*, supra fn. 9, pp. 523 et seq.

<sup>85</sup> *B. Akkermans/E. Ramaekers*, supra fn. 72.



Until recently, reverse discrimination was an acceptable consequence of the case law of the ECJ. However, in cases such as *Pistre*, *Guimont*, and *Krantz*, the ECJ has begun to challenge this.<sup>86</sup> It is here that property lawyers must pay close attention. In these cases the Court has accepted to answer questions that were purely internal situations. Purely internal situations are cases where there is no connecting factor to another Member State. In *Krantz*, for example, an Austrian national sought to acquire ownership of a piece of land in Austria. Traditionally, the ECJ has refrained from answering these questions, as there is no connection to European Union law. However, the fact that the Court answers these questions now, brings a serious challenge to the acceptance of the reverse discrimination doctrine. Moreover, cases such as *Grunkin-Paul*, where the citizenship of the European Union provides argumentation to the Court to strike down restrictive national law, underline the pressure on reverse discrimination cases.<sup>87</sup>

This development sheds light on a process that is often denied by private international lawyers: private international law, in particular European Union private international law is able to, and will often lead to, substantive harmonisation.<sup>88</sup> Property law is no exception to this. It is an area of law that has, until now, been mostly left alone by EU law. The proposal for a Regulation on Succession and Wills changes this fundamentally. The proposal gives rise to many questions, but, most of all, the exception offered by the European Commission in its own explanation to Art. 1, brings property law unarguably under the scope of the law governing the internal market.<sup>89</sup>

### 3. MATRIMONIAL PROPERTY LAW

In 2006 the European Commission published a Green Paper on conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition.<sup>90</sup> The Green Paper is aimed to work towards a proposal for a Regulation dealing with matrimonial property law, also known as the Rome IV Regulation. Matrimonial property law, in the view of the Commission concerns the property relationship between spouses during and after a

---

<sup>86</sup> Joined Cases C-321/94, C-322/94, C-323/94 and C-324/94, *Criminal Proceedings Against Pistre and others* [1997], ECR I-2343; Case C-448/98 *Criminal Proceedings against Jean-Pierre Guimont* [2000] ECR I-10663; Case C-302/97 *Klaus Konle v Republik Österreich* [1999] ECJ I-3099.

<sup>87</sup> Case C-353/06 *Grunkin and Paul* [2008] ECR I-7639.

<sup>88</sup> See further, K. Boele-Woelki, *Unifying and Harmonizing Substantive Law and the Role of Conflict of Laws*, The Hague: Martinus Nijhoff Publishers, 2010.

<sup>89</sup> This has, of course, been the case for a very long time already; see, for example, the statement by the European Court of Justice in the Golden Share cases; for example in Case C-367/98 *Commission v Portugal* [2002] ECR I-4731, para. 28, the ECJ held that Art. 345 TFEU "merely signifies that each Member State may organise as it thinks fit the system of ownership of undertakings whilst at the same time respecting the fundamental freedoms enshrined in the Treaty".

<sup>90</sup> Green Paper on Conflict of Laws in Matters Concerning Matrimonial Property Regimes, including the question of jurisdiction and mutual recognition, 17 July 2006, COM (2006) 400 final.

marriage.<sup>91</sup> Although this mainly concerns private international law, like in case of wills and succession, these international family law rules have the potential to bring substantive harmonisation effects. When people get married and do not make further arrangements, the law of the Member State of marriage will decide on the property relationship between the spouses, also known as the matrimonial property regime.<sup>92</sup> When spouses in a marriage conclude a marriage contract, defined by the Green Paper as a contract concluded prior to the celebration of the marriage with a view to organising the property relationships between the spouses, the matrimonial property regime will be much more complicated.<sup>93</sup> There is a difference between the law of the Member State. For example, a Dutch couple will co-own all assets brought into the marriage from the moment of civil marriage.<sup>94</sup> In other legal systems, the matrimonial property regime is more nuanced and usually there will be a division of assets and a community of assets, i.e. a joint ownership solution, for those things that are commonly owned, such as the matrimonial home. As stated above, a marriage contract may change this completely. Moreover, there may be complex legal relationships between the spouses, such as trust relations whereby one spouse is trustee for the other.<sup>95</sup>

When persons exercise their freedom of movement rights and establish themselves in another Member State they bring this complex matrimonial property regime, created under the law of another Member State, into a new Member State. As a result the new Member State will have the choice to recognise the property relations from the sending Member State, or to impose its own rules. When property rules are concerned, the Green Paper recognises this, the *lex rei sitae* will impose the local property law rules.<sup>96</sup> However, the spouses to a marriage contract have chosen a specific solution that suits their needs. Once recognised in one Member State, this brings the question of mutual recognition in another Member State and, in case of non-recognition in the receiving Member State, a question of violation of the free movement of persons.<sup>97</sup> The effects will be similar as described above in case of wills and succession: a Member State will not be easily allowed to refuse recognition of a foreign property law relationship.

The Green Paper, however, goes well beyond this. This is the intention of a Green Paper setting forth policy options for the future. However, the Green Paper suggests the possibility to allow party autonomy as regards the applicable law, with some restrictions to connecting factors, but also the substantive decisions this brings with it.<sup>98</sup> If this would become reality, party autonomy could receive preference over the *lex rei sitae* as suggested in cases of wills and succession. The results would

---

<sup>91</sup> Green Paper Matrimonial Property Law, p. 5.

<sup>92</sup> Green Paper Matrimonial Property Law, p. 2.

<sup>93</sup> Green Paper Matrimonial Property Law, p. 2.

<sup>94</sup> Art. 1:93 BW.

<sup>95</sup> See, for example, *Gissing v Gissing* [1971] AC 886.

<sup>96</sup> Green Paper Matrimonial Property Law, p. 5.

<sup>97</sup> See, for instance, Case C-148/02, *Garcia Avello* [2003] ECR I-11613; Case C-353/06 *Grunkin and Paul* [2008] ECR I-7639.

<sup>98</sup> Green Paper Matrimonial Property Law, p. 6.

be interesting and would certainly include substantive effects on the property law of the Member States, including potential harmonising effects through an enlargement of the *numerus clausus*.<sup>99</sup>

#### 4. OTHER

The objective of this contribution is to highlight the need for further research into European property law. Its submission is that European property law is too often still comparative property law. I have tried to show through some examples that there is already a large body of European Union property law, both directly adopted by the European legislature, but certainly also through indirect effect of adopted and to be adopted legislation. It is here that the European Court of Justice plays a role as a motor for the development of European property law.

Some of these research results, perhaps also the way in which they are presented, will be perceived as going beyond what is normally accepted amongst property law scholars. However, the effect of the internal market and EU law on property law was already signaled more than 15 years ago. In her doctoral thesis Eva-Maria Kieninger drew attention to the free movement of goods and property security rights on movables.<sup>100</sup> In these 15 years, the work of the European Union has included direct and indirect making of European property law.

The examples provided above, especially of indirect making of European property law dealing with greenhouse gas emission trading, succession and wills and matrimonial property law offer valuable perspectives. There are, however, more instances of indirect making of European property law. Much more research is needed to map the landscape of potential European property law.<sup>101</sup> What are the consequences of the EU environmental policy, in particular soil protection, on the right of ownership and the property law systems of the Member States?<sup>102</sup> The inclusion of maintenance obligations in family law will have effect on the

---

<sup>99</sup> The rest of the Green Paper is outside the scope of this contribution, but is certainly very interesting. It opens up questions on how to deal with other forms of cohabitation, such as registered partnerships and normal cohabitation (living together). It does not deal with questions of recognition of same sex marriage. For a discussion of the property law aspects of the possible proposal for a regulation on matrimonial property law see *J. H. M. van Eerp*, *Matrimonial Property Regimes and Patrimonial Aspects of Other Forms of Union: What Problems and Proposed Solutions?* (Proposal for a Rome IV Regulation), Advice to the Legal Affairs Committee of the European Parliament (JURI), 30 Oct. 2010, de auditu.

<sup>100</sup> *E. M. Kieninger*, supra fn. 63, 1996.

<sup>101</sup> Some work has been done by *P. Sparkes*, *European Land Law*, Oxford: Hart Publishing, 2007; at Maastricht University *E. Ramaekers* LL.M. is preparing a PhD thesis on European Property Law that will include an overview of existing European Property Law. Her thesis is expected in Feb. 2013.

<sup>102</sup> Directive 2004/35/EC of the European Parliament and of the Council of 21 Apr. 2004 on environmental liability with regard to the prevention and remedying of environmental damage, OJ L 143, pp. 56-75; see also Proposal for a Directive of the European Parliament and of the Council establishing a framework for the protection of soil and amending Directive 2004/35/EC, COM (2006) 232 final.

movement of property between Member States, but in how far and how much will this affect property law?<sup>103</sup>

More research is needed and cooperation to do this is essential. The scope of European Union law is simply too large to do it all alone. Moreover, through cooperation we will also be able to investigate the effects a certain measure of EU law will have on national property law a lot better. Through cooperation we can map existing and future European property law, track future initiatives and perhaps play a role in the development of a truly European property law.

#### IV. CONCLUSION

I have tried to sketch some relevant European developments in property law. This does not only concern the existing European Union property law, i.e. direct making of European property law, such as the return of cultural objects or retention of title devices, but also indirect making of European property law in case of emission rights, wills and succession and matrimonial property regimes. It is in particular the indirect making of property law that I have tried to emphasise. Increasingly more legislation is adopted that has an effect on the law of property. This creates a body of property law that remains invisible to most. Moreover, it creates a body of European property of which the democratic legitimacy may be challenged, as it was not adopted by a legislative procedure in which the property law aspects were seriously dealt with.

Perhaps this is the same problem that has confronted the Research Group on the existing EC Contract Law, better known as the Acquis Group that managed to uncover a substantive body of contract rules on the basis of the EU consumer contract law *acquis*.<sup>104</sup> To the surprise of perhaps many this included rules on non-discrimination, not necessarily a private law subject at first sight. Nonetheless, the rules on non-discrimination and their effect on the contract formation process form an important contribution of the Acquis group to European Private Law, the Draft Common Frame of Reference in particular.

The growing body of European Union property law, especially the undercover, i.e. indirect, rules are in great need for more attention. Perhaps a thorough analysis of these will allow us to move towards the uncovering of an EU property law *acquis*? Moreover, it perhaps offers the opportunity to build on European Union

---

<sup>103</sup> Council Regulation (EC) No. 4/2009 of 18 Dec. 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, OJ L 7, pp. 1-79.

<sup>104</sup> H. Schulte-Nölke/C. Twigg-Flesner/M. Elbesr, *EC Consumer Law Compendium – Comparative Analysis*, München: Sellier European Law Publishers, 2008; *Research Group on the Existing EC Private Law (Acquis Group)*, Contract I. Pre-Contractual Obligations, Conclusion Contract, Unfair Terms, München: Sellier European Law Publishers, 2007; *Research Group on the Existing EC Private Law (Acquis Group)*, Contract II. General Provisions, Delivery of Goods, Package Travel and Payment Services, München: Sellier European Law Publishers, 2009.

property law theory that is badly needed if we ever want to develop towards a true European Property law.<sup>105</sup> It is certain that cooperation is crucial to achieve this.<sup>106</sup> The study of European private law has grown beyond the roots where great comparative scholars discovered the similarities and differences between legal systems into a complex system of study where law, politics and economics must work together. A research agenda that is focusing on moving property law forward, rather than focusing on national differences, but instead paying attention to true European developments, seems crucial to achieve this.<sup>107</sup>

---

<sup>105</sup> See in this sense *S. van Erp*, Deconstruction and reconstruction of European property law: a research agenda, in: E. Ritaine-Cashin (ed.), *Legal engineering and comparative law/L'ingénierie juridique et le droit comparé. Rapports du colloque du 25e anniversaire de l'Institut Suisse de Droit Comparé du 29 août 2008 à Lausanne, Zurich/Basel*: Schultess, 2009, pp. 105-121; *S. van Erp*, European Property Law: A methodology for the future, in: R. Schulze (ed.), München: Sellier European Law Publishers, 2011, pp. 227 et seq.

<sup>106</sup> See *J. Smits*, European Legal Education: Rethinking the Denationalisation of Law Schools, in: A. W. Heringa/B. Akkermans (eds), *Educating European Lawyers*, Antwerp: Intersentia, 2011, pp. 43 et seq.; *L. Del Duca*, Cooperation in Internationalizing Legal Education in Europe – Emerging New Players, 20 *Penn State International Law Review* 2001, pp. 7 et seq.; *B. Akkermans*, Challenges in Legal Education and the Development of a New European Private Law, 10 *German Law Journal* 2009, pp. 803-814.

<sup>107</sup> On a proposal for a research agenda see *S. van Erp*, supra fn. 106, pp. 105-121.

# COMPARATIVE PROPERTY LAW: COLLECTIVE RIGHTS WITHIN COMMON LAW AND CIVIL LAW SYSTEMS

Alison Clarke\* and Christine Godt\*\*

## I. INTRODUCTION

The starting point for any discussion about comparative property law between a common lawyer and a civil lawyer must be the fundamental difference between our concepts of ownership. Where the civil law sees ownership as an absolute and unitary concept, for most common lawyers it more closely approximates to a 'bundle of rights'.<sup>1</sup> The difference between the two concepts is radical and, some would say, characteristic of the differences between the two types of legal system. Civil law ownership is central to a concept which shaped the structures of the emerging market economy in the 19th century. Rooted in the Kantian idea of property as bastion of individual freedom (detached from feudal obligations), it turned out to be a suitable point of departure for a legal thinking that had resort to a scientific understanding of a "legal logic" and was in quest of principles and coherent structures. In contrast, in common law systems the idea of ownership as a unitary concept has a secure and central role in the non-legal world,<sup>2</sup> but it has

---

\* Professor of Law, School of Law, University of Surrey, United Kingdom.

\*\* Professor of Law, Carl von Ossietzky University of Oldenburg, Germany.

<sup>1</sup> *U. Mattei*, Basic Principles of Property Law: A Comparative Legal and Economic Introduction, Westport/CT/London: Greenwood Press, 2000, pp. 77-78; *S. van Eep*, Comparative Property Law, in: M. Reimann/R. Zimmermann (eds), Oxford Handbook of Comparative Law, Oxford: Oxford University Press, 2006, pp. 1055, 1060. The 'bundle of rights' view of ownership is generally but by no means universally accepted in the common law world. Its modern genesis is usually taken to be *T. C. Grey's*, The Disintegration of Property, in: J. R. Pennock/J. W. Chapman (eds), Property: NOMOS XXII, New York: NYU Press, 1980, p. 69, whereas its antithesis, the absolute dominium analysis, is generally attributed to Blackstone, who in two William Blackstone, Commentaries 2 describes property as "that sole and despotic dominium which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe". But as pointed out by, amongst many others, *C. Rose*, Canons of Property Talk, or, Blackstone's Anxiety, 108 Yale Law Journal 1998-1999, p. 601, not even Blackstone himself regarded this as unqualifiable; and see also *M. Davies*, Property: Meanings, Histories, Theories, Oxford: Routledge-Cavendish, 2007, pp. 18-21, making a similar point from a different perspective. *G. S. Alexander* charts the twentieth century shift from this to the "disaggregated, more explicitly social 'bundle of rights' conception", in *Commodity and Propriety: Competing Visions of Property in American Legal Thought 1776-1970*, Chicago/London: The University of Chicago Press, 1997, pp. 319-329 and pp. 381-382.

<sup>2</sup> A mismatch noted by, amongst others, *S. R. Munzer*, A Theory of Property, Cambridge: Cambridge University Press, 1990, p. 16; *J. Waldron*, The Right to Private Property, Oxford: Clarendon Press, 1988, p. 27; see also *J. R. Nash*, Packaging Property: The Effect of Paradigmatic Framing of Property Rights, 83 Tulane Law Review 2008-2009, p. 691, whose study on the reaction of newly enrolled students provided with laptops challenges the strength of the hold the absolute dominium paradigm has, at least on US laypeople, and

little basis in legal reality. It is one of the first things that a law student has to unlearn. For common law lawyers, ownership – when it exists at all – lies within a pragmatically developed spectrum of proprietary relationships, each of which has its own configuration of rights and duties distributed between the parties to the relationship. The concept of ‘absolute’ ownership exists, in the sense that all the proprietary rights in respect of a resource *may* be concentrated in the hands of a single rights-holder, to whom the rest of the world owes duties not to intervene, but this need not happen. Even when it does, although the relationships that then arise in respect of that resource differ from other proprietary relationships that could equally well arise, the difference is one of degree only, not one of kind.<sup>3</sup> This ability to fragment ownership of a resource and distribute the constituent rights and duties between different right-holders allows the common law to achieve a more transparent balance of power in relation to the resource than the civil law can. It also, however, has a price. We have already noted the mismatch in the common law world between what lawyers think property is and what everyone else – everyone else sometimes including economists – thinks it is. This provides fertile ground for misunderstanding. Further, and not unconnectedly, there is an inevitable tension between fragmentation and *numerus clausus*, an issue we pursue below.

However, the emphasis in this Chapter is not on this fundamental difference between our property systems but rather on an important characteristic which we share and which divides us from much of the rest of the world. Transcending our conceptual differences we share a central focus of individualism. Whether we are talking about civil law unitary ownership or common law fragmented property rights, the basic unit of rights-holding is the individual, whether in human or in corporate form. Both civil law and common law also accommodate with little difficulty varying forms of state ownership and co-ownership<sup>4</sup>, and also forms of group rights-holdings where an individual property owner is bound by contract or property rules to hold the resource on behalf of others. But it is individualism which is the central organising concept. For differing reasons, both common law and civil law have come to have considerable difficulties in accommodating the idea of collective rights, where the rights-holder itself is a community of people, whether determinate or indeterminate, defined by reference to some common

---

suggests that the paradigm by which property rights are framed – i.e. ownership as either absolute dominium (what he calls the “discrete asset” paradigm) or as a bundle of rights – has an effect upon whether and how much lay people accept interference with and regulation of those rights (more inclined to do so if provided with a bundle of rights paradigm).

<sup>3</sup> For the distinction between ‘property’ and ‘ownership’ see *A. Clarke/P. Kohler*, *Property Law: Commentary and Materials*, Cambridge: Cambridge University Press, 2005, p. 180; *J.W. Harris*, *Property and Justice*, Oxford: Clarendon Press, 1996, pp. 140–142; *C.P. Rodgers*, *Nature’s Place? Property rights, Property Rules and Environmental Stewardship*, 68 *Cambridge Law Journal* 2009, pp. 552–554; *D. Lametti*, *The Concept of Property: Relations through Objects of Social Wealth*, *Univ. of Toronto L J* 2003, 325–378 (pointing out also the general tendency to equate ‘property’ with ‘private property’).

<sup>4</sup> See further below.



characteristic such as kinship, locality or community.<sup>5</sup> It is true that both the civil law and English common law emerged (in very different ways) out of feudalism, in which collectivism was inherent. But once each had discarded its feudal past, civil law and common law responses to collective property rights have tended to be wholly negative, sometimes denying them recognition altogether, sometimes simply ignoring them.<sup>6</sup> In the case of English common law, even when the legitimacy of a few residual collective property rights was reaffirmed in the modern law by first the Commons Registration Act 1965 and then the Commons Act 2006, it was done in such a way as to isolate these rights from the mainstream of property rights, as we see later.<sup>7</sup>

However, developments over the last few years have demonstrated that such responses are no longer sustainable. The parallel processes of privatisation and globalisation have brought individual property rights and collective property rights into closer juxtaposition. This internationalisation calls into question central dogmas in property theory about the form and function of property rights, and how property rights function to achieve societal goals. Specifically, it raises two questions. First there is an initial question of immediate social, economic and political importance: in situations where individuals and communities each have legitimate claims on the same resource, can those claims each be given legal recognition on equal terms? This in turn leads to a second and more ambitious enquiry: might more complex property rights systems that successfully accommodate the claims to scarce resources of both individuals and communities actually have positive advantages over monolithic private property rights systems, whether of the civil law or of the common law variety? In particular, might these complex property systems, giving equal weight to collective and individual interests, actually be better suited also to serving the public interest in those resources?

The limited object of this paper is to highlight three areas in which these questions are raised. In the first two of them (Sections IV. and V.) the questions arise because of the emergence or re-emergence of collective property claims within a private property or state property framework. The first of these, outlined in Section IV., is the recognition of local collective rights to use or control natural resources. The second (Section V.) is the recognition of indigenous and minority land rights in countries which have, or aspire to have, an economic system geared towards freely marketable property rights. The third area, the development of property rights in

---

<sup>5</sup> See further below; on community v individualism see *L. Green, Legality and Community*, 5 Oxford Journal of Legal Studies 1985, p. 463, reviewing *T. O'Hagan, The End of Law?*, Oxford: Basil Blackwell, 1984; *J. S. Auerbach, Justice without law? Resolving Disputes without Lawyers*, New York: Oxford University Press, 1983; see also *T. E. Scrutton, Commons and Common Fields*, Ontario: Batoche Books, 2003 (originally published 1887), p. 7.

<sup>6</sup> The English Land Registration Acts 1925 and 2002 provide good examples of the latter; the appraisal by the Supreme Court of the Northern Territory of Australia of the nature of the relationship between the indigenous peoples of that Territory and their land in *Milirrpum v Nabalo Property Ltd* (1971) 17 FLR 141 illustrates the former.

<sup>7</sup> Section III. below.

China (Section VI.), is one we select because here the situation is reversed. In China the government is seeking to find a place for private property rights within a communist system which will allow private property to flourish without prejudicing the integrity of the communist system.

However, before expanding on these three areas there are some introductory matters. First, we need to look more closely at the reality of the apparent distinction between civil law unitary ownership and common law fragmentation. We do this by examining, in Section II., how far the *numerus clausus* principle operates as an effective bar to the broader recognition of collective rights in German and in English domestic law. In Section III. we then explain more fully what we mean by collective or communal rights, distinguishing them from co-ownership and also from what we loosely called ‘group’ ownership, where there are collective interests but they are represented by a single individual. We also outline in Section III. the present scope of collective ownership and collective property rights in German and English domestic law.

## II. *NUMERUS CLAUSUS* IN THE CIVIL LAW AND COMMON LAW

At first sight the *numerus clausus* principle might seem to preclude, or at least severely hamper, any attempt by civil law and common law property systems to enlarge their recognition of collective property, especially in the novel areas noted in Sections IV.-VI. A central dogma for both civil law property and common law property is the existence of a *numerus clausus* principle,<sup>8</sup> even if within the civil law its effect is to underpin the idea of unitary ownership, whereas in the common law it can more easily be seen as a principle limiting the scope of fragmentation of ownership. However, whilst comparative lawyers may still stress this difference, reality has swept away categorical differences. The “Anwartschaftsrecht” is by far the best known example of “relational property” outside the German *numerus clausus*. The German Supreme Court (“Reichsgericht” [RG] at that time) did not accept it and therefore it was not adopted as “a right” in the Civil Code (BGB; Bürgerliches Gesetzbuch); only the right to retain property was codified, as a category of contract law. Thus the property implications were downplayed. However, as to be expected, the topic soon re-emerged, and the Reichsgericht accepted the expectation to get property as a property interest in the context of the “Sicherungsübereignung” (timely limited transfer of property transfer as security)

---

<sup>8</sup> B. Rudden, Economic Theory v. Property Law: The Numerus Clausus Problem, in: J. Eekelaar/J. Bell (eds), Oxford Essays in Jurisprudence: Third Series, Oxford: Oxford University Press, 1987, p. 1; H. Hansmann/R. Kraakman, Property, Contract, and Verification: The numerus clausus problem and the divisibility of rights, 31 Journal of Legal Studies 2002, pp. 373-420; S. Hepburn, Carbon Rights as New Property: Towards a Uniform Framework, 31 Sydney Law Review 2009, pp. 239-271; T. Merrill/H. Smith, Optimal Standardization in the Law of Property: The Numerus Clausus Principle, 110 Yale Law Journal 2000, pp. 1-71; H. Smith, Community and Custom in Property, 10 Theoretical Enquiries in Law (5) 2009, pp. 5-41.

soon after the BGB was issued.<sup>9</sup> The post war Supreme Court (“Bundesgerichtshof” [BGH]) followed suit.<sup>10</sup>

As for the common law, whilst the *numerus clausus* undoubtedly operates to some extent,<sup>11</sup> it is rarely articulated judicially,<sup>12</sup> and Parliament does not appear to regard itself as bound by it at all, or even to be aware of its existence.<sup>13</sup> Nevertheless, common law courts are called upon with surprising frequency to decide whether or not to recognise new property rights, whether by acknowledging new ways of fragmenting the ‘ownership’ bundle, or by recognising proprietary rights in hitherto unpropertised things. They do not often decide in favour of recognition,<sup>14</sup> but it says something for the comparative weakness of the *numerus clausus* principle that they agonise over the decision at some length and that the reasons they give for *not* recognising the new interest are overwhelmingly pragmatic.<sup>15</sup> Cases concerning the proprietary nature of a particular right are rarely decided by explicit reference to the *numerus clausus* principle.

More importantly, in the common law the tolerance of fragmentation has, if anything, increased rather than decreased. At one time it was commonplace to say that fragmentation of ownership applied only to land and that ownership of goods was unitary and indivisible.<sup>16</sup> If that was ever true,<sup>17</sup> it is certainly not a sustainable

---

<sup>9</sup> RG, decision of 8 Nov. 1904, RGZ 59, 146.

<sup>10</sup> BGH, decision of 27 March 1968, BGHZ 50, 45– *Fräsmaschinenfall*.

<sup>11</sup> As *B. Rudden*, *Economic Theory versus Property Law: The Numerus Clausus Problem*, in: J. Eekelaar/J. Bell (eds), *Oxford Essays on Jurisprudence*, Oxford: Oxford Univ Press, 3<sup>rd</sup> ed., 1987, p. 234, points out there is a definitive list of property interests recognised in English law, and it is remarkably similar to most civil law systems’ lists.

<sup>12</sup> The rare exception is in the seminal case of *Hill v Tupper* (1863) 2 H&C 121, 159 ER 51.

<sup>13</sup> New rights introduced by Parliament which have the essential characteristics of property rights even though not explicitly described as such by statute include statutory tenancies for holding over tenants, first introduced by the Landlord and Tenant Act 1913, and rights of spouses and civil partners to occupy their matrimonial/civil partnership home owned by their spouse/partner, first introduced by the Matrimonial Homes Act 1967 after the House of Lords refused to recognise such rights as property rights in *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175.

<sup>14</sup> The most far-reaching case is *Tulk v Moxhay* (1848) 2 Ph 774 (negative obligations towards neighbouring land held to be enforceable not only in contract but also in property, by the owner for the time being of the benefitted land, as against the owner for the time being of the obligor’s land). The most striking modern examples are *R. v. Kelly* [1999] QB 621, Court of Appeal (deciding that a hospital had property rights in preserved body parts stored in its laboratories, and therefore an unauthorised taker was guilty of theft) and *Yearworth v North Bristol NHS Trust* [2009] EWCA Civ 37 (men had property in their sperm stored by a hospital, and therefore could bring an action based on damage to property against the hospital when the storage system failed and the sperm was destroyed).

<sup>15</sup> *Hunter v Canary Wharf Ltd* [1997] AC 655 (no property right to receive television signals); *Bradford Corporation v Pickles* [1895] AC 587 (no property in groundwater); *Rhone v Stephens* [1994] 2 AC 310 (positive obligations towards neighbouring land are enforceable in contract only, not as property rights).

<sup>16</sup> It was said to follow from the fact that the doctrine of estates did not apply to goods, from which it was concluded that ownership of goods could not be divided into time slices. *R.*

proposition now. So for example, after strong resistance, it is now accepted that bailments of goods are proprietary.<sup>18</sup> Similarly, it was once said that the rule that a contractual right to acquire a property interest in an asset in the future confers on the right holder an immediate proprietary interest in the asset, was a special rule applicable only to land. However, the courts have now confirmed that it is a general property rule *prima facie* applicable to all assets except goods, and that the contrary rule applies to goods only because of the special provisions of the Sale of Goods Act 1979.<sup>19</sup>

So, whilst the *numerus clausus* principle does form some sort of barrier in the way of progress towards a broader recognition of collective rights in both the German and the English systems, it is by no means insuperable in either.

### III. COLLECTIVE PROPERTY IN GERMAN LAW AND IN ENGLISH LAW

#### 1. WHAT IS COLLECTIVE PROPERTY?

The terms ‘collective property rights’, ‘collective property’ and ‘collective ownership’ are used here to refer to what might be described as limited access communal property.<sup>20</sup> In limited access communal property, ownership-type rights over a resource, or the exclusive right to make a particular use of that resource, are exercisable by (and only by) those who are members of a specified group. In other words, as noted below, each member of the group has a right not to be excluded from the resources, but also a right to exclude everyone else except a fellow member of the group. The group is characteristically defined by reference to the holding of a specific attribute. This attribute is most usually membership of a particular tribe or kinship group, or residence in a particular area, or the holding of a common characteristic, but it might be something else, such as ownership of appurtenant (i.e. benefitted) land. Most (although not all) ‘rights of common’ in English law fall within this last category. In English law a right of common is a right, exercisable in common with others having a like right, to take a natural

---

*Chambers, Conditional Gifts*, in: N. Palmer/E. McKendrick (eds) *Interests in Goods*, London: LLP 2<sup>nd</sup> ed. 1998 429 at p. 430 demonstrates the falsity of the conclusion.

<sup>17</sup> For example, it has always been possible to hold goods on trust, and hence for legal and equitable interests to exist simultaneously, and for the ownership of goods to be split between the mortgagee and the holder of the equity of redemption.

<sup>18</sup> *Yearworth v North Bristol NHS Trust* [2009] EWCA Civ 37; see also *The Pioneer Container* [1994] 2 All ER 250, PC; *Bristol Airport v Powdrill* [1990] Ch 744.

<sup>19</sup> *A. Clarke/P. Kohler*, supra fn. 3, pp. 472-473; confirmed by *International Finance Corporation v DSNL Offshore Limited & Orsin* [2005] EWHC 1844.

<sup>20</sup> *A. Clarke/P. Kohler*, supra fn. 3, p. 39; limited access communal property is sometimes referred to as ‘restricted access’ or ‘closed access’ communal property; see further *M. Davies*, supra fn. 1, pp. 63-76, on limited access commons, contrasting with public domain (open access commons), also tracing the history of enclosure of the commons and discussing the extent to which this represents a move from communalism to individualism, and making parallels with intellectual property; also *J. Cahir*, *The Withering away of Property: The Rise of the Internet Information Commons*, 2 *Oxford Journal of Legal Studies* 2004, pp. 619-641.

resource from someone else's land (the 'burdened' land).<sup>21</sup> Fishing rights, hunting rights and rights of pasture held collectively come within this category.<sup>22</sup> Rights of common may be free-standing ('in gross') or appurtenant (i.e. intended to benefit other land owned by the right-holder). A right of common that is 'appurtenant' is exclusively attached to the ownership of the benefitted land held by the right-holder, rather than attached to the right-holder personally, so that the right-holder cannot dispose of the right of common separately from the ownership of the benefitted land.<sup>23</sup> So, for example, rights to graze sheep on land owned by one person (the 'burdened' land) might be held by a community consisting of the landowners for the time being of all the farms surrounding that land. If their grazing rights are 'appurtenant', none of these farm owners can sell their grazing rights without also selling their farm to the same buyer at the same time. By the same token, any sale of a farm will automatically transfer to the buyer the grazing right.<sup>24</sup>

It is even possible, although unusual, for there to be no eligibility criteria for attaining membership of a limited access community. In these cases the rights to make communal use of the resource are exclusive to members of the group, but anyone can become a member of the group by buying a right, so the holding of the right becomes itself the eligibility criterion. An example in English law would be rights of common that are 'in gross' rather than 'appurtenant', where the rights are all exercisable over the same piece of land, although each of the rights is held by a different person.<sup>25</sup> As already noted, these are rights of common which are free-standing, in the sense that the right-holders are free to sell the right whenever they want, to whoever they want. In other words, everyone in the world is *eligible* to hold a right. The community then consists of all those people *who do in fact hold those rights* exercisable over that land. So, for example, several different people might have rights, exercisable in common with each other, to catch fish in a lake, or graze horses on a field, and those rights might be freely assignable to anyone else. The people who for the time being are the holders of those rights form a community in the sense that they have inter-dependant rights in the shared resource.

These last two categories of limited access communal property – where the criterion for membership of the community is the ownership of neighbourhood land, and where there is no criterion for membership other than acquisition of the

---

<sup>21</sup> *J. Farrand/A. Clarke*, Emmet & Farrand on Title, London: Sweet & Maxwell, looseleaf para 1.127 et seq.; see also *E. H. Burn/J. Cartwright*, Cheshire and Burn's Modern Law of Real Property, Oxford: Oxford University Press, 17<sup>th</sup> ed., 2006, p. 640.

<sup>22</sup> In the case of rights of pasture, the natural resource taken is vegetation on the burdened land, and the taking is via the mouth of the grazing animal.

<sup>23</sup> This is ancient and complex law. Some categories of appurtenant right are 'severable', i.e. the right holder can dispose of the right separately from the ownership of the benefitted land, and once that has been done, each can be traded separately. Other categories are not severable.

<sup>24</sup> See further below.

<sup>25</sup> Another example, discussed in more detail in the text to footnotes 33 and 34 below, is an unincorporated association formed by its members to pursue a common purpose, either self-interested (for example a sports club) or philanthropic (to prevent cruelty to animals).

right to make collective use of the resource – are therefore a curious hybrid of individual and communal property. Each right-holder undoubtedly holds a private property right, even though in the case of a right appurtenant to the ownership of benefitted land, the right cannot be traded separately from the land it benefits. The right is however, *exercisable* in common with other private individuals who hold like rights over the same land or other resource. So, viewed from the perspective of the resource over which these rights are exercisable, the right-holders form a community who share the resource between themselves. The community of appurtenant land owners is, however, very different in nature from the community formed of people who have nothing in common other than their success in participating in a market for the allocation of the resource use right. Both types of community have a collective interest in the sustainability of their shared resource, but the appurtenant landowning community has a stable geographic and probably also social nexus which is more likely to be conducive to self-generation of a workable regulatory framework for the exercise of their collective rights.<sup>26</sup>

Whatever the eligibility criteria, the essential characteristic of limited access communal property is, that the group itself does not have a separate legal identity, nor is there a single ‘representative’ owner who holds the rights on behalf of the others. The right-holder *is* the community, consisting of the present and future members of the group. It follows from this that the community is a fluctuating body of individuals. In the absence of any self-generated governance structure, no-one has the right to speak (or act) for the community as a whole. Even where there are self-generated norms about decision making within the community, there may be uncertainty over the strength of their hold over future members.

Limited access communal property differs from what for these purposes may be called public property in the important respect that members of the limited access community have the right to exclude non-members from the collective resource. In the case of public property (for example, a public right of way exercisable over private land, or public rights of access over private land under the English Countryside and Rights of Way Act 2000 and the Marine and Coastal Access Act 2009) every member of the community still has a right, exercisable in common with other members, to use the resource and not be excluded from it, but no-one can lawfully be excluded from the resource because everyone in the world is a member of the community. Whilst public property is of great importance, it is much easier to integrate it within a civil law or a common law private property rights system,<sup>27</sup> and it will not be considered further here.

---

<sup>26</sup> For a valuable analysis of the difference between the two, see the opposing views of R. Walker LJ in the Court of Appeal decision in *Bettison v Langton* [2000] Ch 54 and Lord Nicholls in his dissenting judgment in the same case when it went on appeal to the House of Lords, *Bettison v Langton* [2001] UKHL 24 (the House, by a majority, upheld the view of R. Walker LJ). Lord Nicholls’ view (that severance of appurtenant rights so that they became freely tradable was undesirable) was vindicated when the effect of the majority decision of the House of Lords was subsequently reversed by Parliament with retrospective effect: see now sections 9-10 of the Commons Act 2006.

<sup>27</sup> If only because the interest of the community is closely aligned with the public interest.

## 2. COLLECTIVE PROPERTY DISTINGUISHED FROM CO-OWNERSHIP AND OTHER GROUP OWNERSHIP STRUCTURE IN GERMAN LAW

Collective property rights in the above sense are an especially tricky issue in Germany. After WW II, collective property forms were sceptically looked at for political reasons (split off of the socialist part of Germany). Only “Genossenschaften” saw a revival in the 1980s. Thus, there is little reflection about collective titles.

German law does however recognise co-ownership and other forms of group ownership structure. Co-ownership is different in kind from collective ownership. Here, several identified people hold one title. In German law, it is rudimentarily codified in § 1008 BGB. In essence, the paragraph builds on a two pillars dogmatic (either §§ 705 et seq. BGB “Gesellschaft”, or § 741 BGB “Gemeinschaft”) and adds some regulation to the second (§§ 741 et seq. BGB) system.

In practice, ‘group ownership’ can be structured in various ways which allocate enforceable rights to the constituent individual members without conferring property rights on them. As long as a “collective” (several people) is represented by one person (who is assigned in trust), and the relationship between the group and the resource can be translated into forms of individualistic assignment, on the surface, there is no problem. However, under the surface, there are problems of who is part of the collective and what can be done if the person in trust violates his/her duties.

Even though German law may not recognise collective property (in our sense) within its domestic law, it has no choice but to accommodate it, by some means or other, when it comes into contact with other legal regimes where such rights are recognised. In particular, problems occur when traditional (indetermined group) property rights conflict with formal rights recognised in the same resource. This may arise in an acute form in relation to land use rights of farmers, and traditional knowledge holders and patents.

Western countries are able to acknowledge the position of the collective through a conflict of laws approach under specific conditions.<sup>28</sup> One of them is that the Western country has signed international conventions acknowledging rights and those rights are granted in concrete terms in the country of origin.<sup>29</sup> The dogmatic point of departure could be the (individual) right to autonomy.

---

<sup>28</sup> C. Godt, Enforcement of Benefit Sharing Duties in User Countries Courts, in: E. Chege Kamau/G. Winter (eds), *Genetic Resources, Traditional Knowledge and the Law: Solutions for Access and Benefit-Sharing*, London/Lifting: Earthscan, 2009, pp. 419-438.

<sup>29</sup> For example, under the UN Declaration on the Rights of Indigenous Peoples 2007.



### 3. COLLECTIVE PROPERTY DISTINGUISHED FROM CO-OWNERSHIP AND OTHER GROUP OWNERSHIP STRUCTURES IN ENGLISH LAW

The recognition of collective property rights is more complex in English law, although not a great deal more extensive. The basic principles are not dissimilar from those operating in German law. So, English law recognises co-ownership, i.e. where several identified people hold a single title, in the forms of ownership in common and joint ownership. The operation of co-ownership is dominated by trusts law, which vests title to the resource in a small number of trustees, requiring them to hold it for the benefit of the beneficial co-owners.<sup>30</sup> Since in English law governance by trustees follows the 'benevolent dictatorship' model (trustees are required by law to act in the best interests of the beneficiaries, not necessarily in accordance with their wishes), co-ownership is not always an appropriate vehicle for collective interests in resources.<sup>31</sup>

Also like German law, English law recognises group ownership in corporate form. English company law provides a range of corporate forms, some specifically intended for the regulation of common-interest communities, such as commonhold associations (regulating condominium management under the Commonhold and Leasehold Reform Act 2002), co-operatives and mutual benefit societies, now governed by the Co-operative and Community Benefit Societies and Credit Union Act 2010.<sup>32</sup> These forms are, however, heavily influenced by the classic English limited liability trading company form,<sup>33</sup> which again is not always an appropriate vehicle for collective interests.<sup>34</sup>

English law has no easy property solution for groups who have a collective interest and wish to make collective use of a resource, but who choose not to incorporate. Such groups, referred to by lawyers as unincorporated associations and by laypeople as clubs, are very numerous in practice: most non-commercial sports and recreational clubs take this form. They are perceived by all but lawyers as entities, but in law they are not entities and they have no legal status separate from that of

---

<sup>30</sup> Since 1925, a trust is automatically imposed whenever interests in land are co-owned (Law of Property Act 1925, sect. 34 and 36, as amended). The relationship between trustees and beneficiaries of interests in land is currently regulated by the Trusts of Land and Appointment of Trustees Act 1996. A trust is not required for co-ownership of anything other than land, but is frequently used in practice; see *R. Smith*, *Plural Ownership*, Oxford: Oxford University Press, 2005; *J. Hill/E. Bowes-Smith*, *Joint Ownership of Chattels*, in: N. Palmer/E. McKendrick (eds), *Interests in Goods*, London: Lloyds of London Press, 2<sup>nd</sup> ed., 1998, Chapter 10.

<sup>31</sup> *A. Clarke*, *Creating New Commons: Recognition of Communal Land Rights within a Private Property Framework*, in: J. Holder/C. O'Conneide (eds), *59 Current Legal Problems 2006*, Oxford: Oxford University Press, 2005, pp. 319-357.

<sup>32</sup> When brought into force, this will bring together disparate statutory regimes governing 'industrial and provident societies' (mainly mutual and/or not-for-profit societies), and other mutual, co-operative and community purpose organisations.

<sup>33</sup> Now regulated by the Companies Act 2006.

<sup>34</sup> *A. Clarke*, *supra* fn. 29.

their individual members.<sup>35</sup> They have names, but they cannot hold property rights in their own name. The resources which they regard as ‘belonging’ to them (their premises, their bank accounts etc.) have to be vested in an individual member of the association (perhaps the secretary or chair or treasurer) who is then bound, by a complex of contract and trust rules, to use them for the purposes of the association. These rules have been evolved by the courts over the last century and a half, and no-one pretends they are satisfactory.<sup>36</sup>

However, unlike German law, English law does recognise some forms of collective property right, even if there are not very many of them. They are generally of feudal origin or derive from ancient or not-so-ancient custom. They exist today because the English property law system results largely from evolution rather than design. The feudal structure of English property law has been significantly changed by statute over the years<sup>37</sup> but it has never been formally abolished, unlike in Scotland,<sup>38</sup> and at no time since feudal times has there been a comprehensive review and systematisation of types of property right.<sup>39</sup> The range and structure of private ownership-type rights was re-modelled by the 1925 property legislation, but this left particular use rights<sup>40</sup> largely untouched, especially those that could be held collectively. In particular, the collective ones were not brought within the land registration system: under the Land Registration Act 1925 they were neither registrable nor discoverable from the Land Register, and the same is true under the 1925 Act’s successor, the Land Registration Act 2002.<sup>41</sup> They fall within a residual class of property rights in land, overriding interests, which are enforceable against registered owners even though outside the registration system.<sup>42</sup> In the middle of the twentieth century an attempt was made to have all the collective ones registered, but under newly created regional registers, operated by local

---

<sup>35</sup> Except for limited purposes such as taxation: *Conservative Central Office v Burrell* [1982] 1WLR 522.

<sup>36</sup> *Re Horley Town Football Club, Hunt v McLaren* [2006] EWHC 2386; *Hanchett-Stamford v Att Gen* [2008] EWHC 330; *A. Clarke/P. Kohler*, supra fn. 3, pp. 599-605.

<sup>37</sup> Most significantly by the Law of Property Act 1925 and the other 1925 property statutes.

<sup>38</sup> The feudal system was abolished in Scotland in 2004 by the Abolition of Feudal Tenure etc. (Scotland) Act 2000 (SSI 2003/456), sect. 2 of which converted a *dominium utile* of land into “the ownership of the land”. The Law Commission for England and Wales set out to do the same for English and Welsh law, launching a Feudal Land Law project in its 9th Programme of Law Reform (2005, Law Com 293, HC 353) to investigate the removal of the “several residual but significant” feudal elements of the law (paras 3.10-3.13). However, the project was deferred, first to the 2008 10<sup>th</sup> and then to the 2011 11<sup>th</sup> Programme, because of pressure on resources from other law reform projects. Finally in its 11<sup>th</sup> Programme the Commission reported that it was to be deferred yet again, this time apparently indefinitely, because “other proposed law reform projects offer the potential for greater public benefit than work on feudal land law”, 11<sup>th</sup> Programme of Law Reform, 2011 Law Com 330 H 1407 para 3.3.

<sup>39</sup> The current system of land registration, introduced by the Land Registration Act 1925, is primarily concerned with registration of land titles, not interests in land.

<sup>40</sup> I.e. in general terms, servitudes and usufructs.

<sup>41</sup> The same fate was shared by the interesting and arcane surviving relics of the manorial system of land holding described in *C. Jessel, The Law of the Manor*, Chichester: Barry Rose Law Publishers Ltd, 1998, pp. 427-437, which are largely individual rights, still held by the lord of the manor, where one still exists.

<sup>42</sup> See now Land Registration Act 2002, sched. 3 and sched. 1; *A. Clarke/P. Kohler*, supra fn. 3, pp. 554-566.

government, which had no connection with, and operated quite differently from, the national land registration system.<sup>43</sup> This was done by the Commons Registration Act 1965. The decision to create special dedicated registers for these rights is made all the more remarkable by the fact that these rights are, for the most part, exercisable over land in which private property rights also exist, and these private property rights over the same land *are* registrable in the national land register. This arises because the collective rights governed by the Commons Registration Act 1965 and now the Commons Act 2006 are not ownership-type rights. They are rights to use land and resources for particular purposes which are exercisable over land which is usually privately owned.<sup>44</sup> So, the ownership title is registrable in the national land register, where all other private property rights over the land will also appear<sup>45</sup>, but reference must be made to the quite separate regional registers to discover these collective rights. This is of some significance because, as explained below, the existence of these collective rights severely curtails the owner's own use rights over the land.

Specifically, the Commons Registration Act 1965 provided for the registration of two different kinds of collective land right, and for the registration (in these special regional registers) of the land over which these rights were exercisable. The first category of rights consists of the rights of common referred to above (both appurtenant rights and rights in gross), i.e. the right of a private individual to take a specified natural resource from land owned by someone else, the right being exercisable in common with others having a like right. These rights are now registrable in the regional Commons Registers. The land over which rights of common are exercisable is then given a special status – 'common land' – and made registrable as such, again in the regional Commons Register. As already noted, this is in addition to, and separate from, registration of the ownership title to that land in the national Land Registry. As an added complication, once the land acquires the status of 'common land', it also becomes *prima facie* subject to the public rights of access for open-air recreation regime which was introduced for the whole of the country by the Countryside and Rights of Way Act 2000 and in some cases to public rights of way.<sup>46</sup> The second category of ancient collective right made registrable under the Commons Registration Act 1965 is a form of recreational right acquired by prescription by inhabitants of a locality or neighbourhood over land that is privately or publicly owned. Once the local inhabitants have been able

---

<sup>43</sup> As already noted, the national Land Registry is a registration of title system; these regional registers of collective rights are registers of land, not registers of titles to land.

<sup>44</sup> The land is sometimes owned by a local government authority, sometimes by private individuals.

<sup>45</sup> Apart from the private property rights which also come within the overriding interest category (now not an extensive class: see Land Registration Act 2002, sched. 3 and sched. 1).

<sup>46</sup> Public rights of access apply to all open land in Britain, although with severe limitations: for a detailed comparative account see *J. L. Anderson*, *Britain's Right to Roam: Redefining the Landowner's Bundle of Sticks*, 19 *Georgetown International Environmental Law Review* 2007, p. 375; for public rights of way over common land see Law of Property Act 1925, sect. 193 and sect. 194, now repealed and replaced by the Commons Act 2006, sect. 38-44.

to prove they have used that land as of right (meaning *nec vi, nec clam, nec precario*<sup>47</sup>) for ‘lawful sports and pastimes’ for the requisite period (twenty years) they become entitled to have the land registered with another special status – as a ‘town or a village green’. Registration is in the regional Registers of Town and Village Greens. Once the land is registered as a town or village green, the local inhabitants become entitled to use it for *any* ‘lawful sports and pastimes’, not just for the purposes for which they used the land over the past twenty years.<sup>48</sup>

In some ways, these collective recreational rights are very different from the collective rights of common. No member of the collective has an individual private right over the land, still less a tradable right. The collective is defined by reference to habitation in a locality or neighbourhood, so membership is not only fluctuating but indeterminate. Further, there is no statutory or common law procedure for extinguishing these recreational rights once they have become established. This means that they are in practice perpetual, and since the membership of the collective rights holding group is indeterminate, there is no way in which the collective can bind itself to agree to extinguish, sell or surrender the rights. There are however two important respects in which the collective rights of common and the collective recreational rights do resemble each other. First, as already noted, the land over which the rights are exercisable – common land, and land which is a town or village green – never becomes collectively owned. It remains throughout owned by its pre-existing private owner. Secondly, it becomes a criminal offence for anyone to cause damage to the land or to undertake any act which interrupts the use and enjoyment of the land in exercise of the collective rights.<sup>49</sup> This imposes a further significant limitation on the exercise of the private landowner’s rights.

For most of the twentieth century these collective rights were considered to be of little importance. The Commons Registration Act 1965 resulted from a Royal Commission<sup>50</sup> which had been set up to look into the means by which long established common land might be preserved, following decades of decline accelerated by severe disruption during the second world war, when many common lands were temporarily requisitioned for military purposes or dug up for food production. The Royal Commission was concerned with preserving the

---

<sup>47</sup> Meaning “not by force, nor stealth, nor the licence of the owner” (Lord Hoffmann in *R v Oxfordshire County Council Ex parte Sunningwell Parish Council* [2000] 1 AC 335, pp. 350–351). This requirement causes the courts continuing difficulties: see also *R (Beresford) v Sunderland City Council* [2003] UKHL, *R (Lewis) v Redcar and Cleveland Borough Council* [2010] UKSC 11 and *R. (on the application of Barkas) v North Yorkshire County Council and Scarborough Council* [2012] EWCA Civ 1373. The problems are discussed in *J. Farrand/A. Clarke supra* fn. 21 at para 1.132.

<sup>48</sup> Confirmed by the House of Lords in *Oxfordshire County Council v Oxford City Council* [2006] UKHL 25.

<sup>49</sup> Inclosure Act 1857, sect. 12; encroachment on a green also becomes a public nuisance: Commons Act 1876, sect. 29, and for common land see also *ADM Milling Ltd v Tewkesbury Town Council* [2011] EWHC 595.

<sup>50</sup> The Royal Commission on Common Land 1955–58 (1958), Cmnd 462 (the Jennings Report).

national heritage, for historical, cultural and environmental reasons.<sup>51</sup> It did not pay serious attention to the possibility that anyone might want to create new collective rights in the future. Consequently it recommended that all surviving commons and town and village greens and all collective rights over them should be registered by a cut-off date in 1970, and that legislation should then clarify the nature of the rights and provide a regulatory system for the registered rights and control of the resources over which they were exercisable. What actually happened was that the Commons Registration Act 1965 achieved the first objective – registration of all pre-existing rights – but did not attempt the others. To make matters worse (or better) the 1965 Act stimulated a rejuvenation of these collective rights and also left it open for new rights to be created in the future, not just by deliberate grant in the case of rights of common, but also, in the case of the town and village green recreational rights, by twenty years' user as of right<sup>52</sup> after the 1970 registration cut-off date. By the early 1990s (i.e. 20 years later) it became commonplace for projected developments of undeveloped or open derelict land to be met by applications made by local people for the registration of the development land as a town or village green, on the basis of twenty years of recreational use made of the land by local inhabitants since 1970.<sup>53</sup> There was nothing in the 1965 Act to allow for the up-dating of the registers to cover these new rights, still less anything to govern the post-registration relationships between these new collective users and the underlying private owners. The up-dating problem will be largely removed by the Commons Act 2006, which when fully implemented will eventually replace the 1965 Act and will also introduce some default provisions for the governance of common land, to be used when pre-existing self-regulation systems fail.<sup>54</sup> But none of this legislation has even begun to address the question of the co-existence of the collective and the private within these systems, and within the broader private rights context in which these collective rights are nested. This has been left to the courts to work out in the future on a case by case basis, with little guidance as to how these collective rights are supposed to operate within their private law framework. The modern experience of collective rights in domestic English law is, therefore, not propitious.<sup>55</sup>

---

<sup>51</sup> Many commons and town and village greens were – and are – classified as Sites of Special Scientific Interest and Areas of Outstanding Natural Beauty.

<sup>52</sup> I. e. satisfying the requirement of user *nec vi, nec clam, nec precario* explained in footnote 47 above.

<sup>53</sup> The number of successful applications for registration is small but not insignificant. In 2008 an estimated 196 applications were made, and in the same year 73 applications were determined, of which 23 were successful (para 4.1.4 of Department for Environment Food and Rural Affairs, Consultation on the Registration of Town and Village Greens, July 2011, available from [www.defra.gov.uk](http://www.defra.gov.uk) (accessed on 31 Oct. 2012). A DEFRA commissioned survey published by the Countryside and Community Research Institute in 2009 found that just under half of applications made between 2004 and 2009 were “directly linked in some way to planning applications or allocation of sites for development in the local authority’s local plan” (para 4.2.1 2011 DEFRA Consultation).

<sup>54</sup> For a detailed and illuminating account see *C. P. Rodgers/E. A. Straughton/A. J. L. Winchester/M. Pieraccini*, *Contested Common Land: Environmental Governance Past and Present*, London/Washington D.C.: Earthscan, 2011.

<sup>55</sup> Further legislation is proposed to increase the difficulty of registering land as town and village greens: 2011 DEFRA Consultation, setting out the proposals. This is seen as part of a broader

#### IV. RECOGNITION OF COLLECTIVE RIGHTS TO USE OR CONTROL NATURAL RESOURCES

The juxtaposition of collective and private property rights comes most pressingly into focus in the current debate about the type of property rights regime which might be most conducive to promoting inclusive economic growth and sustainable development of land and other natural resources such as water, fisheries and forestry.<sup>56</sup> It is no longer taken as an absolute, by economists and policy makers, that efficient use and exploitation of land and natural resources demands either centralised control or privatisation of the commons allowing market forces to operate to achieve maximum efficiency. The many and various problems arising out of centralised control have long been realised, not least because of the examples provided by communist regimes. However, privatisation was, until comparatively recently, established wisdom within bodies such as the World Bank and other development agencies, who sought to impose homogenous systems of private ownership of land and tradable private property rights in natural resources in developing countries as a means of stimulating economic growth.<sup>57</sup> These early development initiatives ignored or sought to eliminate altogether collective resource use rights. In this they were strongly influenced by two conceptual developments. The first was Garret Hardin's *Tragedy of the Commons* thesis,<sup>58</sup> more fully developed by Harold Demsetz,<sup>59</sup> that only private ownership and/or public control of land and natural resources could effectively avert the inevitable over-exploitation of and under-investment in natural resources that, they argued, must inevitably follow whenever collectively used resources became scarce. The second was Hernando de Soto's *The Mystery of Capital*,<sup>60</sup> arguing that creation of wealth in developing countries could be achieved by conferring formal property rights on *de facto* land users with no formal rights. The property rights he had in mind were rights approximating to civil law private ownership rights which, crucially, would

---

project to reform planning laws to facilitate development, politically highly contentious: for the opposing views see the respective websites of DEFRA, the relevant government department ([www.defra.gov.uk](http://www.defra.gov.uk)) and organisations such as the National Trust ([www.nationaltrust.org.uk](http://www.nationaltrust.org.uk)) and the Open Spaces Society ([www.oss.org.uk](http://www.oss.org.uk)) (all accessed on 31 Oct. 2012).

<sup>56</sup> For only the more recent of the extensive range of studies see for example *R. Barnes*, *Property Rights and Natural Resources*, Oxford: Hart Publishing, 2009; *A. Scott*, *The Evolution of Resource Property Rights*, Oxford: Oxford University Press, 2008; *L. Godden/M. Tehan* (eds), *Comparative Perspectives on Communal Lands and Individual Ownership*, Oxford: Routledge, 2010; *A. McHarg/B. Barton/A. Bradbrook/L. Godden* (eds), *Property and the Law in Energy and Natural Resources*, Oxford: Oxford University Press, 2010; *B. van Koppen/M. Giordano/J. Buttenworth* (eds), *Community-based Water Law and Water Resource Management in Developing Countries*, Wellingford: CAB International, 2007.

<sup>57</sup> See the narrative in *R. Dyal-Chand*, *Exporting the Ownership Society: A Case Study on the Economic Impact of Property Rights*, 39 *Rutgers Law Journal* 2007-2008, p. 59.

<sup>58</sup> *G. Hardin*, *The Tragedy of the Commons*, 162 *Science* 1968, pp. 1243-1248.

<sup>59</sup> *H. Demsetz*, *Towards a Theory of Property Rights*, 57 *American Economic Review* 1967, pp. 347-359.

<sup>60</sup> *H. de Soto*, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else*, New York: Basic Books, 2000; see also *H. de Soto*, *The Other Path*, New York: Basic Books, 1989.

give the right-holders tradable rights which would allow them to attract investment and participate in a market economy. De Soto's compelling argument led to, amongst other things, the initiation of land titling programmes in a number of developing countries, many of which failed to take into account the complex pattern of collective resource use which they sought to replace. The failure of many of these earlier initiatives<sup>61</sup> coincided with, and to some extent stimulated, critiques of both analyses. As legal and economic theorists have pointed out, history simply does not support Hardin's assertion that the 'tragedy' is indeed tragic (in the sense of being an inevitable outcome) once one distinguishes between open access and limited access collective rights, a distinction Hardin failed to make.<sup>62</sup> And meanwhile scholarship on legal pluralism and path dependence has cast doubt on whether it is ever actually feasible to transform the informal property rights of the poor into tradeable private property rights, still less whether it would decrease poverty overall and whether the results would be culturally and politically acceptable to the people involved.<sup>63</sup> Attention has moved to what has been described as a polycentric approach to resource management and development, in which collective resource use has a key position. The principal apologist for this modern approach, Elinor Ostrom, argues that development of natural resources which is both sustainable and achieves a socially acceptable maximisation and distribution of wealth, needs to incorporate localised collective use and control of the resource, building on the idiosyncratic pattern of self-regulation historically evolved by the local collective users themselves in response to their particular conditions.<sup>64</sup> This is particularly but not uniquely relevant for developing countries

---

<sup>61</sup> Chronicled by, amongst others, *R. Dyal-Chand*, *A Poor Relation? Reflections on a Panel Discussion Comparing Property Rights to Other Rights Enumerated in the Bill of Rights*, 16 *William & Mary Bill of Rights Journal* 2008, p. 849; *ibid*, *Exporting the Ownership Society: A Case Study on the Economic Impact of Property Rights*, 39 *Rutgers Law Journal* 2007, p. 59; *M. Trebilcock/P.-E. Veel*, *Property Rights and Development: The Contingent Case for Formalisation*, 30 *University of Pennsylvania Journal of International Law* 2008-2009, p. 397.

<sup>62</sup> *A. R. Poteete/M. A. Janssen/E. Ostrom*, *Working Together: Collective Action, the Commons and Multiple Methods in Practice*, Princeton: Princeton University Press, 2010, Chapter 2; for the survival of successful commons in strikingly diverse social and economic contexts: see *G. Stevenson*, *Common Property Economics: A General Theory and Land Use Application*, Cambridge: Cambridge University Press, 1991 (Swiss grazing pastures); *M. Heller*, "Why Aren't Oysters Extinct?", in: *M. Heller*, *Gridlock Economy: How Too Much Ownership Wrecks Markets, Stops Innovation, and Costs Lives*, New York: Basic Books, 2008, pp. 166 et seq.; see also *A. Sinden*, *The Tragedy of the Commons and the Myth of a Private Property Solution*, 78 *University of Colorado Law Review* 2007, pp. 533-612.

<sup>63</sup> *M. Trebilcock/P. E. Veel/P. Ho/M. Spoor*, *Whose land? The political economy of land titling in transitional economies*, 23 *Land Use Policy* 2006, p. 580; *R. Dyal-Chand*, *supra* note 61; *D. Benjamin Barros* (ed.), *Hernando de Soto and Property in a Market Economy*, Ashgate: Farnham, 2010; see also *F. K. Upham*, *From Demsetz to Deng: Speculations on the Implications of Chinese Growth for Law and Development Theory*, 41 *New York University Journal of International Law and Politics* 2008-2009, p. 551, pointing out that, in the case of China at least, transformation of use rights/informal rights into secure private property rights was manifestly not necessary in order for China to achieve economic growth.

<sup>64</sup> *E. Ostrom*, *Governing the Commons: the Evolution of Institutions for Collective Action*, Cambridge: Cambridge University Press, 1990; see also *E. Ostrom*, *Coping with Tragedies of the Commons*, 2 *Annual Review of Political Science* 1998, p. 493; *A. R. Poteete et al* 2010



which have complex land tenure systems derived from diverse legal orders (some of statutory origin, others customary, often with regional variations), not all of which are fully integrated or even fully recognised within the legal system of the country as a whole, and where a significant number of people, many of them women and/or from disadvantaged groups within their society, are economically dependent on land but have no formal rights in it. Current analysis of the relationship between land tenure and development confirms that in regions where these conditions apply, inclusive economic growth and environmental sustainability are most likely to be achieved through a recognition and legitimization of this complex of formal and informal land rights and land usages in which collective use is likely to figure prominently,<sup>65</sup> and on the adoption of an inclusive bottom up rather than top down approach to resource management, on the lines of the Ostrom polycentric approach.

The legal challenge that then arises is how to accommodate these collective rights within a legal system which might also want to locate ownership of the resource, or of the land on which it is situated, or of the means of production, regulation or exploitation,<sup>66</sup> in a private individual or in the state. There are formidable difficulties in devising institutions which will allow collective resource users to negotiate and co-operate in sharing the resources on fair terms with private owners, public interest bodies and state bodies. Who is to be entitled to speak on behalf of the collective and make decisions binding on it? What weight is to be given to their local interest as against, for example, the national interest? How to avoid the stultifying effect of an anticommons,<sup>67</sup> where effective use of resources is snagged by the need to obtain the consent of too diverse a body of right-holders? How can an unwieldy body like a non-corporate collective group participate on equal terms in an allocation system that depends, for example, on applying or bidding for a use licence, or operating in a market where use rights are traded?

## V. RECOGNITION OF INDIGENOUS AND MINORITY LAND RIGHTS

The difficulties outlined in the previous section are exacerbated where there are ethnic and/or cultural differences between the collective users and the private owners. This is a particular problem for countries with a comparatively recent history of colonisation by civil law or common law states. In these countries the

---

(supra note 62) and *C. P. Rodgers et al*, *Contested Common Land*, London/Washington: Earthscan, 2011, pp. 11-16.

<sup>65</sup> *UN-Habitat*, *Secure Land Rights for All*, 2008; *C. Toulmin and J. Quan* eds, *Evolving Land Rights, Policy and Tenure*, DFID/IIED/NRI, 2000; *R. Meinzen-Dick and E. Mwangi* *Cutting the Web of Interests: Pitfalls of Formalizing Property Rights*, 26 *Land Use Policy* 2008, p. 36; *K. Deininger*, *Innovation in Land Rights Recognition, Administration and Governance*, World Bank, 2010.

<sup>66</sup> For example, through establishing markets in emission rights or water extraction rights to cap levels of emission or consumption.

<sup>67</sup> *M. Heller*, *Gridlock* (supra note 62), pp. 33-41; see also *M. Heller*, *The Tragedy of the Anticommons: Property in Transition from Marx to Markets*, 111 *Harvard Law Review* 1998, p. 621.

coloniser's law typically was superimposed on an indigenous legal culture that was predominantly communal and practiced by a population that was culturally and ethnically alien to the colonisers. The indigenous resource use rights were traditionally not recognised by the colonising state, except (if at all) in so far as they resembled the private property rights recognised under the coloniser's legal system.<sup>68</sup> In former common law colonies collective indigenous rights were the worst casualties. The first stage in the modern recognition and protection of these indigenous rights was the recognition of the validity of the claims – essentially, that indigenous peoples had to be recognised as having property rights in natural resources, defined by reference to their traditional customary use of them.<sup>69</sup> But in most countries by the time this had been recognised, private common law rights had already long been established over the very same resources, and there was also a growing awareness of a strong public interest in the sustainable development of those resources.<sup>70</sup> How, now, are these competing interests to be reconciled?

It is not surprising that a civil law coloniser bringing with it the concept of unitary ownership should have found the collective nature of indigenous cultures so alien. It is more surprising that the same seems to have been true of common law colonisers. At the time of common law colonisation – the 18<sup>th</sup> and 19<sup>th</sup> centuries – communal or collective property was still a significant force in English common law as it then applied in England. However, it does not seem to have figured in the model of the common law that was exported to the colonies.<sup>71</sup> The common law model the colonisers took with them was one of private property rights issuing out of Crown ownership. If they had looked more closely – or more objectively – at the way the indigenous populations made use of natural resources the colonisers would not have found it so very difficult to find equivalents in contemporary English collective property rights. But the common law colonisers did not seem to make that connection, whether out of ignorance of English law, or because of an inability to see past the racial and cultural differences between themselves and the indigenous peoples, or simply a disinclination to recognise the indigenous populations as having any rights enforceable against them. For whatever reason, in those countries collective resource use was and remains associated with dispossessed

---

<sup>68</sup> This was the approach taken by Justice R. Blackburn in the Australian case *Milirpump v Nabalco Property Ltd* (1971) 17 FLR 141, supra footnote 6: it was formally abandoned by the Australian courts in *Mabo v Queensland (No. 2)* (1992) 175 CLR 1.

<sup>69</sup> In Australia this was achieved by the High Court of Australia in *Mabo v Queensland (No. 2)*, supra fn 68 and the Native Title Act 1993; for international law recognition of the same principle see now UN Declaration on Recognition of Indigenous and Minority Peoples Rights 2007.

<sup>70</sup> On the inter-relation between indigenous rights and ecological management see for example *H. Leake*, ed, *Bridging the Gap: Policies and Practices on Indigenous Peoples' Natural Resource Management in Asia*, United Nations Development Programme, 2008.

<sup>71</sup> Although, see *G. S. Alexander*, *Commodity and Propriety: Competing Visions of Property in American Legal Thought 1776-1970*, Chicago/London: Chicago University Press, 1997; *R. C. Ellickson*, *Property in Land*, 102 *Yale Law Journal* 1993, p. 1315, and *S. Banner*, *Possessing the Pacific: Land, Settlers, and Indigenous People from Australia to Alaska*, Cambridge: Harvard University Press, 2007, for examples of early American settlements organised on communal lines, and their gradual conversion into private property communities.

and oppressed indigenous or minority populations, separated from the private property owning majority by ethnic and cultural differences. Once there is this cultural and ethnic divide between the collective users and the individualistic private property user, it is no longer a question merely of integrating the communal and the private property rights within a single property rights framework. The challenge becomes one of recognising and operating plural normative systems, allowing what are essentially different legal systems to operate in parallel, in which the communal and the private property rights of different cultural and/or ethnic groups co-exist on equal terms, each within its own distinctive culture, but all exercisable over, and competing for access to, the same resources.<sup>72</sup>

## VI. CHINESE PROPERTY RIGHTS: PRIVATE PROPERTY RIGHTS WITHIN A SYSTEM OF COLLECTIVE AND STATE OWNERSHIP

Other states – notably Japan, China, and some former communist states – have more recently adopted property systems based on the civil law model, more or less voluntarily. But this has not always extended to a full acceptance of individualised property rights. For present purposes, the most interesting example is China. The People’s Republic of China adopted a civil code modelled on the German system in 1949. However, there was no comprehensive Code covering property law until the passing of the Property Rights Law in 2007. This legislation, also consciously modelled on German law, was controversial within China and had a long gestation period, during which German academic lawyers acted as consultants in the legislative process.<sup>73</sup> It seems that, despite pre-existing historical ties with the German civil law system, adopting the German model for the new Property Rights Law was by no means a foregone conclusion. It has been said that in formulating the 2007 law, China saw itself as having a choice between adoption of a US-style common law system, which would have facilitated alignment with the common law influenced Hong Kong and Singapore systems, or a German-style civil law system, aligning itself with Japan and Taiwan.<sup>74</sup> In any event, for many westerners (civil law

---

<sup>72</sup> T. G. Svensson, *Interlegality, a Process for Strengthening Indigenous Peoples’ Autonomy: The Case of the Sámi in Norway*, 51 *Journal of Legal Pluralism and Unofficial Law* 2005, pp. 51-52, contrasting legal pluralism with ‘interlegality’. As S. van Erp, *Comparative Property Law*, in: M. Reimann/R. Zimmermann (eds), *Oxford Handbook of Comparative Law*, Oxford: Oxford University Press, 2006, p. 1044 points out, the way in which indigenous land claims can be fitted into Western systems of property law in post-colonial states is in essence a question of comparative property law; see also M. Davies, *supra* fn. 1, pp. 34-35.

<sup>73</sup> Prof. Dr. Gebhard M. Rehm, Professor of Civil Law, Comparative Law and Private International Law, University of Hamburg, and Prof. Dr. Hinrich Julius, Professor at the University of Applied Sciences, Hamburg and head of the legal cooperation office of the (then) Deutsche Gesellschaft für technische Zusammenarbeit (now: Gesellschaft für Internationale Zusammenarbeit), working on behalf of the German Ministry of Economic Cooperation and Development, the authors of ‘The New Chinese Property Rights Law: An Evaluation from a Continental Perspective’, 22 *Columbia Journal of Asian Law* 2009, p. 177.

<sup>74</sup> Y.-C. Chang, *Property Law with Chinese Characteristics: An Economic and Comparative Analysis*, 2011, available at SSRN: <http://ssrn.com/paper=1945147> (accessed on 31. Oct. 2012); he suggests that civil law won because of the obvious difficulties of transplanting the bottom-up common law type system, but also because civil law systems were seen to lend

and common law) the most striking feature of the 2007 Law is that it is stated to give “equal protection” to private property – that is, protection that is equal to that given to public and collective property. However, this protection does not manifest itself as an explicit recognition of private ownership for land users. Instead, in some categories of land use individuals are being given increasingly secure rights of use, control and regulation, not necessarily all concentrated in the hands of the same individual.<sup>75</sup> In this respect it is beginning to look more and more like a common law fragmentation of ownership system pragmatically developing within a civil law framework. However, notwithstanding the enhanced role of private property, the feature that distances the developing Chinese system from both its civil law roots and its common law characteristics, is the persistent significance of the collective. Collectives of varying forms have significant roles, sometimes as residual owners,<sup>76</sup> sometimes as holders of control and re-distribution rights,<sup>77</sup> sometimes as holders of use rights or rights to profits etc.<sup>78</sup> Should we be seeing this as a relic of communism, which will decline in importance as China abandons socialism in favour of a market economy (as many Chinese commentators fear<sup>79</sup>), or is collectivism an inherent part of a system under which individuals are willing to accept curtailments of their individual preferences in the interests of the community

---

themselves more successfully to China’s highly centralised power structure (*ibid* at text surrounding footnote 5).

<sup>75</sup> *Ibid*, text surrounding footnotes 82–83.

<sup>76</sup> Broadly, rural land is divided into administrative and natural villages, and each village operates as the collective owner of the land within its administrative boundaries. The “collective economic organisation of the village or the villagers’ committee” exercises the “right of ownership” on behalf of the collective: Art 60 of the 2007 Property Act. For further details see *P. Ho*, *Institutions in Transition: Land Ownership, Property Rights and Social Conflict in China*, Oxford, Oxford University Press, 2005 and *S. Qiao* *Governing the Post-Socialist Transitional Commons: a Case from Rural China*, Paper 122 Yale Law School Student Scholarship Papers, 2012, available at [http://digitalcommons.law.yale.edu/student\\_papers/122](http://digitalcommons.law.yale.edu/student_papers/122) (accessed on 14 Feb. 2013).

<sup>77</sup> E.g. Art 59 of the 2007 Law; also, until comparatively recently the collective was entitled to re-distribute use rights in farming land, broadly on social welfare grounds. Although this was formally prohibited by legislation in the 1990s it is reportedly still widespread in practice and also widely tolerated as a social welfare measure: *M. Trebilcock/P.-E. Veel*, *supra* fn. 61, pp. 429–430.

<sup>78</sup> Notable here is the Household Responsibility System (HRS), introduced in the 1980s and reportedly highly successful in improving agricultural productivity. It involves the partition of some collectively owned land and its allocation to individual households for a fixed term, the household being responsible for management and entitled to keep any surplus produce after meeting quotas: see the account in *M. Trebilcock/P.-E. Veel* *supra* fn. 61, p. 48 and in *Q. Long*, *Reinterpreting Chinese Property Law*, 19 *Southern Californian Interdisciplinary Law Journal* 2009–2010, pp. 55 et seq. The duration and security of farmers’ rights under the HRS Farmers was confirmed and strengthened by the Property Law 2007, but the holder of the farmer’s right remains the household, not the individual.

<sup>79</sup> See the widely reported and publicised letter of 12 Aug. 2005 to the Chairman of the National People’s Congress from Professor Gong Xiantian of Beijing University, protesting that the principles embodied in the then draft Law diverged from the fundamental viewpoints and principles of Marxism and of the socialism of the Chinese Communist Party: *G. M. Rehm/H. Julius*, *supra* fn. 73, p 183. For an example of westerners voicing the same, but as a hope rather than a fear, see ‘China’s Next Revolution: Property Rights in China’, *The Economist*, 10 March 2007.

and in the interests of the protection of their local environment, relying on trust rather than on individual legal entitlement?<sup>80</sup> And if China is evolving a model for the way in which private property rights can be nested within a collective system, does this have lessons for common law and civil law systems which are trying to develop a model in which collective and private property rights can co-exist?

## VII. CONCLUSION

Recent English experience of rejuvenated collective recreational rights illustrates the dangers of underestimating the difficulties arising when a modern common law system tries to accommodate collective rights, even where there is no cultural difference between the collective right-holders and the private right-holders, and so legal pluralism is not an issue. Within this limited context the English courts are beginning to develop concepts of co-operative use which might be useful in resolving the difficulties, but progress is slow, much remains unresolved and the issues will never be more than small scale.

The real challenge for civil law and for common law systems arises where collaboration between collective right-holders and private right-holders becomes a matter of necessity, either to promote sustainable development of scarce natural resources and inclusive economic growth, or in order to give proper cultural recognition to the collective right-holders. It is to these areas that comparative property lawyers must turn.

---

<sup>80</sup> See *F. K. Upham*, From Demsetz to Deng: Speculations on the Implications of Chinese Growth for Law and Development Theory, 41 *New York University Journal of International Law and Politics* 2008-2009, p. 551; *M. Trebilcock/P.-E. Veel* supra fn. 61, pp. 434-435; on collective rights generally in Chinese property law, see *P. Ho*, *Institutions in Transition: Land Ownership, Property Rights and Social Conflict in China*, supra fn. 76; *P. Ho* (ed.), *Development Dilemmas: Land Reform and Institutional Change in China*, London/New York: Routledge, 2005.



# THE DUTCH AND GERMAN NOTARIAL SYSTEMS COMPARED

Christoph U. Schmid\*

## I. INTRODUCTION

Civil law notaries, also called Latin notaries, constitute a distinctive feature of the continental European legal system going back to Roman law, as they have an important role in providing non-contentious, „preventive justice‘ (*vorbeugende und vorsorgende Rechtspflege*). Unlike lawyers, notaries act as independent and impartial advisors, and their advice typically extends to all legal issues raised by the transaction in question. Unlike public notaries in the Anglo-Saxon world, civil law notaries are not only competent to take oaths and certify signatures, but their involvement is mandatory by law in many fields of real estate, family and company law. Unless enshrined in notarial deeds, important transactions such as conveyances, mortgages, last wills,<sup>1</sup> marriage contracts or the establishment of, or structural changes in, companies are not valid. However, the scope of such mandatory intervention (and thus also the ‘consumer protection function‘ of notaries) varies greatly in different legal systems. Whereas, for example in conveyancing, Slovenian law requires only the notarial certification of signatures on the deed of conveyance, in Dutch law the deed of conveyance itself must be drafted by the notary,<sup>2</sup> and in German law, mandatory notarial intervention extends to the draft of the sales contract,<sup>3</sup> too.

The current continental European notarial systems go back to the famous French revolutionary ‘Loi contenant organisation du Notariat‘ of 25 Ventôse an XI (16 Mar. 1803). This law established the double nature of notaries as liberal professionals and holders of a public office; moreover, it provided for the appointment of notaries on a *numerus clausus* basis by the Ministry of Justice and established fixed fees which must not be altered by the parties. Other restrictive regulations concern subjective requirements of access to the profession (generally in the form of a law degree and an ensuing training stage), strong limitations on inter-professional cooperation with other liberal professionals, business structures (companies being normally excluded), and advertising (typically forbidden

---

\* Professor of Law, ZERP/Bremen; the author wishes to thank Tobias Pinkel, research fellow at ZERP, for his advice on European law.

<sup>1</sup> In Germany, however, there is an exception that handwritten last wills are also valid, § 2247 (1) BGB (Bürgerliches Gesetzbuch): The testator may make a will by a declaration written and signed in his own hand. Translation provided by the Langenscheidt Translation Service (online available at [http://www.gesetze-im-internet.de/englisch\\_bgb/englisch\\_bgb.html](http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html) [accessed on 20 Nov. 2012]).

<sup>2</sup> It should however be noted that parties may of course opt for having the sales contract drafted by a notary as well, which is customary in the Amsterdam region.

<sup>3</sup> Under the German principle of abstraction, the sales contract is separate and prior to the conveyance though both transactions may be recorded in the same deed.



altogether), as well as a duty to provide services, high professional and deontological standards, professional self-organisation and regulation through chambers of notaries and, last but not least, mandatory indemnity insurance. The performance of this system, which is of course characterised by significant national variations, is difficult to assess. Whilst legal certainty is guaranteed all over Europe, high prices, inefficiencies such as long waiting periods for appointments and execution of deeds, and generally a lack of service orientation of notaries have often been criticised, in particular in Southern European countries. In the European Union, the professional regulation of notaries, especially the restrictive rules on *numerus clausus* and fixed fees, have increasingly come under attack from competition law rules. Indeed, similar arrangements would not be acceptable in other economic areas on account of their anti-competitive effect. However, apart from expert studies<sup>4</sup> (rebutted by competing studies commissioned by notarial associations,<sup>5</sup> in particular the Conseil Européen du Notariat Latin, and informal recommendations) not much has happened up until now.

As regards the compatibility of the Latin notary system with the European market freedoms, especially the freedom of establishment and the freedom to provide and receive services, which are also affected by restrictive professional and other regulations, the crucial question is whether the notarial system is covered by the ‘official authority’ exception contained in Art. 51 TFEU (ex Art. 45 TEC). This question was answered by the ECJ on 24 May 2011 in an infringement procedure brought by the European Commission against several Member States<sup>6</sup> who insisted on national clauses, according to which only nationals may become notaries.<sup>7</sup> The

---

<sup>4</sup> ZERP et al., Conveyancing Services Market, Dec. 2007, Study COMP/2006/D3/003; id., Conveyancing Services Market, COMP/2006/D3/003, Summary of the comparative legal and economic study into the EU conveyancing services market; online available at [http://ec.europa.eu/competition/sectors/professional\\_services/studies/studies.html](http://ec.europa.eu/competition/sectors/professional_services/studies/studies.html) (accessed on 20 Nov. 2012).

<sup>5</sup> P. L. Murray, Real Estate Conveyancing in 5 European Union Member States: A Comparative Study, 2007, online available at <http://www.cnue-nouvelles.be/en/000/actualites/murray-report-final.pdf> (accessed on 20 Nov. 2012).

<sup>6</sup> Already on 12 Oct. 2006, the commission took the second step in the infringement procedure according to Art. 226 TEC (now Art. 258 TFEU) against Germany and 15 further EU Member States by delivering a reasoned opinion. In February 2008, the Commission started proceedings against Germany (C-54/08), Austria (C-53/08), Luxemburg (C-51/08), France (C-50/08), Belgium (C-47/08), and Greece (C-61/08). On 29 Jan. 2009 the Commission started further proceedings against the Netherlands (C-157/09) which had previously declared to open up their notarial system to other EU citizens but had failed to do so in the meantime. Furthermore, the Commission started an infringement procedure against all new Member States with the only exception of Cyprus, where non-citizens may become notaries; cf. COM IP/09/152 „Nationality requirements for notaries: Commission takes the Netherlands before the Court of Justice to ensure compliance with non-discrimination principle’ of 29 Jan. 2009. For a detailed review of the proceedings and the arguments raised in these cf. already C. Schmid/T. Pinkel, Die Zulässigkeit nationaler Einschränkungen der Grundfreiheiten für juristische Dienstleistungen im Grundstücksverkehr vor dem Hintergrund des Verfahrens Kommission: Deutschland (EuGH C-54/08), *Hanse Law Review* 2009, pp. 129-161; online available at <http://www.hanselawreview.org/pdf8/Vol5No2Art01.pdf> (accessed on 20 Nov. 2012).

<sup>7</sup> Cf. e.g. ECJ, decision of 24 May 2011, C-54/08, not yet published in ECR.

Court decided that Latin notaries, in the way they exist also in the German legal system, are not ‘connected, even occasionally, with the exercise of official authority’ in the meaning of Art. 51 TFEU *in toto*.<sup>8</sup> Therefore, every restriction of the European market freedoms needs to be justified. In this context, the ECJ also decided that ‘the fact that notarial activities pursue objectives in the public interest, in particular to guarantee the lawfulness and legal certainty of documents entered into by individuals, constitutes an overriding reason in the public interest capable of justifying restrictions’.<sup>9</sup> However, restrictions contained in professional regulation also need to be proportional, which has yet to be decided by the ECJ in future cases. It is, however, likely that the Latin notary system will need to undergo relatively strong changes, just as what happened with the professional regulation concerning lawyers following the *Reyner* decision<sup>10</sup> more than 30 years ago. Unlike other Latin notary countries, the Netherlands introduced ambitious liberalisation measures already in 1999. Significantly, fixed fees and *numerus clausus* have been abolished, and other restrictive regulation has been relaxed. For that reason, the new ECJ jurisprudence will probably generate fewer consequences in this country. Against the background of these developments, the two founding countries of the Hanse Law School provide interesting test cases for comparing two different versions of the Latin notarial system: the traditional German and the reformed and liberalised Dutch system.

## II. THE GERMAN SYSTEM<sup>11</sup>

The current German notarial system is regulated in the Federal Notarial Law of 16. Feb. 1961 (*Bundesnotarordnung – BNotO*), which succeeds the former *Reichsnotarverordnung* of 1937. This law foresees uniform characteristics of the notarial office especially as regards subjective access requirements, professional organisation, ethics and disciplinary sanctions.

### 1. GENERAL FEATURES

Generally, notary candidates must have passed the second legal ‘state exam’ and acquired professional experience as notarial candidates or advocates of at least 3 years. However, according to the recent ECJ-ruling in *Commission v Germany* (C-54/08), the Directive 2005/36/EC on the recognition of professional qualifications

---

<sup>8</sup> *Ibid.*, para. 116: ‘In those circumstances, it must be concluded that the activities of notaries as defined in the current state of the German legal system are not connected with the exercise of official authority within the meaning of the first paragraph of Article 45 EC.’ The ECJ has not yet taken a decision in C-157/09 against the Netherlands, but it is quite obvious that the outcome will be the same.

<sup>9</sup> *Ibid.*, para. 98.

<sup>10</sup> ECJ, decision of 21 June 1974, C-2/74, *Reyners v Belgium* ECR1974, 631.

<sup>11</sup> On the German system of notaries *H. Schippel/U. Bracker* (eds), *Bundesnotarordnung, Kommentar*, 8th ed., 2006; *C. Schmid/T. Pinkel*, *Die Regulierung rechtlicher Dienstleistungen bei Grundstücksgeschäften zwischen Wettbewerbs- und Verbraucherschutz*, *Hanse Law Review* 2007, pp. 6-10, online available at <http://www.hanselawreview.org/pdf5/Vol3No1Art01.pdf> (accessed on 20 Nov. 2012). The following section is mainly based on those sources. To make reading as easy as possible, references thereto will not be made.

of 7 Sept. 2005 (Professional Qualifications Directive) applies to notaries as well.<sup>12</sup> Yet the Court added that ‘[i]n view of the particular circumstances of the legislative procedure and the situation of uncertainty which resulted thereof’, Germany was not in breach of the TEU for not transposing the directive into national law.<sup>13</sup> It is, therefore, unclear at which point a private person will be able to invoke the application of the Directive. At any rate, in the near future, notaries, who are fully qualified under the law of another Member State, will need to be allowed to establish themselves in Germany after passing an ‘aptitude test’ within the meaning of Art. 3 (1) (a) Professional Qualification Directive, provided that this requirement will be implemented under national law. Otherwise, foreign notarial qualifications would need to be recognised automatically after the implementation deadline of the Directive. As regards objective access limitations, a strict *numerus clausus* exists (§ 4 BNotO). For the creation of notarial positions, the state ministries of justice usually take as reference the number of notarial acts and in some cases also the population in the district where the position is supposed to be created. Minimum numbers for creating new notarial positions usually range between 250 and 400 acts per year for advocate-notaries and between 1,500 and 1,800 per year for single-profession notaries. This rule is clearly a limitation of the market freedoms to the extent that fully qualified notaries from other Member States would not be able to use their rights of establishment if they were not assigned one of these notarial positions. According to the Cassis formula, this limitation would need to be justified by overriding reasons in the public interest, which has already been acknowledged by the ECJ in its recent judgement.<sup>14</sup> Furthermore, it would also need to pass the proportionality test,<sup>15</sup> which is far less clear. In our view, it appears to be quite unlikely that a restriction on the number of notaries is necessary to achieve the goal ‘to guarantee the lawfulness and legal certainty of documents entered into by individuals’<sup>16</sup> or another overriding reason in the public interest. Instead, less restrictive measures, such as high subjective requirements for notaries should be sufficient. Up until 24 May 2011, only German citizens could become notaries in Germany (§ 5 BNotO). However, since the ECJ has decided that the duties and responsibilities of German notaries are not connected with the exercise of public authority in the meaning of Art. 51 (1) TFEU (ex Art. 45 (1) TEC), § 5 BNotO must no longer be applied to citizens of the European Union.<sup>17</sup> In conveyancing, the sales contract may be authenticated also by a foreign notary, whereas the transfer of title to real property (§ 925 BGB) can be recorded only by a German notary.<sup>18</sup> As regards ‘market conduct’, neutrality is the most fundamental

---

<sup>12</sup> ECJ, decision of 24 May 2011, C-54/08, not yet published in ECR, para. 140. Accordingly the ECJ decided that the statement in recital 41 that the directive was ‘without prejudice to the application of Article 45 EC ‘concerning notably notaries’ had no influence on the question, whether or not it shall apply to the activities of notaries. Recital 41 of the directive, however, was the only argument against the application of the directive to notaries.

<sup>13</sup> *Ibid.* para. 142.

<sup>14</sup> ECJ, decision of 24 May 2011, C-54/08, not yet published in ECR, para. 98.

<sup>15</sup> So the general rule laid down by the ECJ, decision of 31 March 1993, C-19/92, *Kraus*, ECR 1993 I-01663, para. 32.

<sup>16</sup> ECJ, decision of 24 May 2011, C-54/08, not yet published in ECR, para. 98.

<sup>17</sup> On this cf. already C. *Schmid/T. Pinkel*, *supra* fn. 6, pp. 132-133.

<sup>18</sup> On the possibility to justify these restrictions in details *ibid.*, pp. 150-154.

duty of a German notary (§§ 1, 14 (1) BNotO). Neutrality also translates into notarial instruction duties (*notarielle Belehrungspflichten*). Furthermore, the German notary has a duty to provide services in vital fields of activity such as authenticating documents, certifying signatures or administering oaths (§ 15 (1) BNotO). Thus, the notary cannot deny these services. For other functions, such as executing the contract or accepting to handle an escrow account (§§ 23, 24 BNotO), the notary may refuse to act. As these rules do not appear to restrict the fundamental market freedoms, they will not need to be justified.

Professional standards are regulated not only by the German Notarial Law (BNotO – *Bundesnotarordnung*) but also the law on notarial authentication (BeurkG – *Beurkundungsgesetz*). Generally, most details are clarified by self-regulatory guidelines enacted by the local chamber of notaries (*Richtlinien der Notarkammer*) or regulations by the local ministry of justice (DONot – *Dienstordnung für Notare*). Indemnity Insurance is compulsory. It is currently fixed at 1 million €, i.e., 1,000,000 – € insurance by the notary himself (§ 19a BNotO) and an additional 500,000 – € by the chamber of notaries (§ 67 (3) no. 3 BNotO). An insurance against intentional breaches of professional duty (*‘vorsätzliche Handlungen’* – which are excluded from the general indemnity insurance) with a mandatory minimum coverage of 250,000 – € must be contracted by the respective chamber of notaries (§ 67 (3) no. 3 BNotO). Plus, the chambers together maintain an additional reimbursement fund for damages exceeding the insurance coverage (*‘Vertrauensschadensfonds’* – § 67 (4) no. 3 BNotO).

Moreover, continuing education is mandatory for the profession (§ 14 (6) BNotO); some of the chambers’ self-regulatory guidelines set targets of around 15 hours per year. Advertising restrictions are severe. Any advertisement contrary to the public office is forbidden by statute (§ 29 (1) BNotO).<sup>19</sup> Control by the judicial administration was previously quite strict. However, the courts have in some cases struck down sanctions applied by the judicial administration and thus somewhat relaxed the prohibition on advertising within the last years. A disciplinary control of conduct is exercised by the president of the intermediate court of the notary’s district (*Landgerichtspräsident* – § 92 BNotO). To this end, all notarial deeds and other practices are checked by a judge appointed by the president of the intermediate court in intervals of 3 to 5 years (§ 93 BNotO). Notarial fees are – together with court fees in non-contentious matters – uniformly regulated in the *Kostenordnung* (*Gesetz über die Kosten in Angelegenheiten der freiwilligen Gerichtsbarkeit* – *KostO*) of 1957, last amended in 2006. This regulation contains fixed fees for all notarial activities, from which derogation is not permitted. These fees are based on a percentage of the transaction value, but they are degressive for high value transactions.

---

<sup>19</sup> Since foreign service providers or newly established notaries will have more difficulties to find consumers for their services if advertisement is forbidden, this rule is also to be regarded as a restriction of the fundamental freedoms of the EU. In this case, however, a justification seems to be somewhat reasonable.

At the level of European law, the ECJ already decided in the *Cipolla* and *Meloni* cases<sup>20</sup> that fixed fees qualify as a limitation to market freedoms as they limit the possibility of accessing foreign markets by undercutting domestic competitors' prices. Whether the justifications accepted by the ECJ in these cases – above all preventing a race to the bottom in terms of quality of legal services – may be transferred to notaries as well is an open question.<sup>21</sup>

## 2. THE SPLITTING OF THE NOTARIAL PROFESSION

Beyond these general features, due to their origins in the different territories prior to German unification, a division into three basic types of notaries has survived up until today: single profession notaries, advocate-notaries and state-employed (civil servant) notaries. Bavaria and Baden-Württemberg even managed to negotiate a guarantee of their existing notarial systems in art. 138 Basic Law (Grundgesetz). Against this background, the reform of notarial law at federal level in 1961 was not successful in establishing a uniform regime. The existing division leads to a significant and unfortunate splitting of large parts of professional regulation. That notwithstanding, it was declared constitutional by the Constitutional Court in 1964,<sup>22</sup> and there have been no further challenges since that time.

### a) SINGLE PROFESSION NOTARIES

Single profession notaries (§ 3 (1) BNotO) exercise the notarial office as their only profession and indeed are not allowed to exercise any other professional activity. This system may be found predominantly in South and East German regions,<sup>23</sup> which together account for about 50% of the total German population (of about 80 million), with the overall number of single profession notaries in Germany amounting more than 1,600. Single profession notaries are appointed according to needs-based criteria by the regional Ministries of Justice, and they are usually recruited among the 5% of the best candidates taking the professional exam.<sup>24</sup> The recruitment of top lawyers as notaries is usually successful, which may be ascribed not only to the specific features of the notarial profession including its high social

---

<sup>20</sup> ECJ, decision of 5 Dec. 2006, C-94/04 and C-202/04, *Cipolla v Portolese, Macrino, Capoparte v Meloni*, ECR 2006 I-11421

<sup>21</sup> On the possibility of justifying this restriction for notaries in details see already *C/T. Pinkel*, supra fn. 6, pp. 155-159.

<sup>22</sup> BVerfG, decision of 7 Apr. 1964, BVerfGE 17, 306, 317.

<sup>23</sup> Specifically, this system may be found in the following German regions (Bundesländer): Bavaria (Bayern), parts of North Rhine-Westphalia (Nordrhein-Westfalen – i.e. in the districts West of the Rhine formerly governed by French law), Rhineland-Palatinate (Rheinland-Pfalz), Hamburg, Saarland and Baden-Württemberg (in the Württemberg area only, where they exist alongside the other two types) and in the 'new regions' Brandenburg, Mecklenburg-Western Pomerania (Mecklenburg-Vorpommern), Saxony (Sachsen), Saxony-Anhalt (Sachsen-Anhalt) and Thuringia (Thüringen), which belonged to the communist German Democratic Republic (GDR) before German reunification in 1990.

<sup>24</sup> Please note that in Germany, there are no different concours for single legal professions as in most other European countries, but the ranking in the professional exam (*Zweite juristische Staatsprüfung*) determines the access to these.

prestige but also to the high and stable income perspectives guaranteed by regulatory privileges such as exclusive rights, *numerus clausus* and fixed fees. Compared to advocate-notaries, far fewer single profession notaries are appointed in relation to population and territory, a limitation which is justified with the objective of ensuring adequate incomes to all notaries in the region. In some regions including Bavaria, the regional notarial chamber organises a system of cross subsidisation within the profession: Each notary is guaranteed the income of a district court judge. In the event that a notary does not reach this income in his business, the notarial chamber pays the difference out of the contributions of all notaries in the region. However, the number of notaries actually using this scheme is very low (usually below 5 per year). Still a considerable number of notaries, particularly in less affluent rural regions as for example the region bordering on the Czech Republic, are said to be underemployed.

Before being appointed as a notary, the recruited candidates have to pass a training period of several years (currently between 3 and 6) as notary associates (*Notarassessoren*) in the office of a notary. The precise length of the period depends on the number of notaries needed to fill vacant offices at a particular moment in time and on the number of candidates on the waiting list, with senior candidates being preferred to junior candidates. Generally, vacant notarial offices are offered first to eligible incumbent notaries, then to notary candidates. As a result, a typical notarial career in Bavaria would start in a small notarial office e.g. in the border region, lead, after a minimum of five years of holding that office, to a small or midsize town and may, normally not before the age of 45 years, reach its apex in the larger towns, in particular the Munich region.

The reputation of single profession notaries is usually high, and they are generally presumed to provide good quality services with liability actions brought against them being very rare.

## b) ADVOCATE NOTARIES

The second type of notaries are advocate-notaries. They exercise the notarial profession as an additional office alongside their main activity as advocates (§ 3 (2) BNotO). However, there is no provision fixing a share of advocate and notary activities in their overall activities. Advocate-notaries exist predominantly in Northern and Western German regions,<sup>25</sup> which account for about 35% of the total German population (of about 80 million), with the overall number of advocate-notaries in Germany amounting to 7,265. The considerably higher number of advocate-notaries (per population and territory) as compared with single profession notaries is due to the fact that there is no need to ensure that advocate-notaries are able to earn their living based solely on notarial activities. Also, the regions in which advocate-notaries exist pursue a more liberal admission policy. Admission as an advocate-notary presupposes at least 5 years of professional activity

---

<sup>25</sup> Specifically, advocate-notaries exist in Berlin (including the former GDR district of 'East Berlin'), Bremen, Hesse (Hessen), Lower Saxony (Niedersachsen), North Rhine-Westphalia (Nordrhein-Westfalen, with the exception of the districts West of the Rhine formerly governed by French law), Schleswig-Holstein and again parts of Baden-Württemberg (in the Württemberg area only, where they exist alongside the other two types).

as a lawyer of which at least 3 years must have been spent in the district of the notarial office.

Advocate-notaries were introduced first by Prussia in the 18<sup>th</sup> century. This happened without any regulatory concept of the legislator but as a mere expedient to provide an additional source of revenue to the financially suffering profession of legal advisors (*Justizkommissare*) – who were only admitted to do out-of-court business – a profession which has long since merged with advocates.

The model of advocate-notaries is ascribed the advantage that court experience may help assess the contents and risks of notarial deeds and agreements. Its disadvantage lies in potential conflicts of interest between the notarial and the advocate function of advocate-notaries. It is true that there is a formal distinction between both functions: When advocate-notaries perform their notarial function, they do so as regular notaries (governed by the same regulation as single profession notaries), which also means that they do not represent one or both parties but act as neutral intermediaries among them. The two distinctive functions are also protected by incompatibility rules ensuring that an advocate-notary who has acted in a specific matter as advocate or notary must not subsequently act in the same matter in the other function (see art. 14 BNotO). That notwithstanding, potential conflicts of interests may arise, e.g. when a seller of land takes the buyer to the advocate-notary whom he usually consults as advocate in business or family matters. Though few such conflicts seem to reach the level of litigation, other legal professionals and experienced business actors in Germany are, according to our experience, sceptical about this potential conflict of roles and prefer single-profession notaries.<sup>26</sup>

Finally, advocate-notaries are allowed to exercise a set of other liberal professions including patent agents, tax advisors, auditors and accountants (art. 8 (2) BNotO). This creates a strangely different legal situation as compared with single profession notaries who are not allowed to exercise any other professional activity.

### c) STATE EMPLOYED NOTARIES

The third type of notaries to be found only in the region of Baden-Württemberg is that of state-employed notaries, who are civil servants receiving a fixed salary. They are not subject to the federal notarial law (art. 114, 115 BNotO), though a number of its basic provisions are applied to them by analogy. There are 630 state-employed notaries in Baden-Württemberg, the population of which amounts to 13% of the overall German population.

For historical reasons, the notarial system in Baden-Württemberg is not uniform but again split between the areas of Baden and Württemberg. Differences between the two areas exist in respect of subjective admission requirements and competences. Unlike in other regions, state-employed notaries in Baden-Württemberg also perform court functions in non-contentious matters (*freiwillige*

---

<sup>26</sup> The leading German commentaries on notarial law point to this potential conflict of roles as well, see e.g. *H. Schippel/U. Bracker* (eds), *supra* fn. 11.



*Gerichtbarkeit*, going back to the Roman law concept of *iurisdictio voluntaria*), including those of the probate court (*Nachlassgericht*), the land register (*Grundbuchamt*), and in part also the guardianship court (*Vormundschaftsgericht*); in addition, state-employed notaries are also competent for compulsory auctions (*Zwangsversteigerung*) and receivership (*Zwangsverwaltung*).

Whilst in Württemberg single profession and advocate-notaries can also be admitted alongside state-employed notaries, only the latter category was previously permitted. As a result, a shortage of notarial services exists in Baden. This often affects the execution of notarial deeds, which most state-employed notaries claim to be unable to carry out due to the lack of sufficient staff and which, consequently, is left to the parties themselves. This unsatisfactory situation amounted to a ‘failing monopoly’ and gave rise to a regulatory reform in 2005. The reform included an amendment of art. 115 BNotO, according to which single profession notaries (not advocate-notaries) are now also admitted in Baden. Subsequently, 25 new posts have been advertised, but the appointment of new single profession notary is happening only slowly due to competitors’ complaints still pending before administrative courts. Another problem attaches to notary fees, which are levied for the state budget. The European Court of Justice decided in 2002<sup>27</sup> that in company law matters this situation is incompatible with European tax law.<sup>28</sup> According to the Court, only work and cost-based and not value-based fees may be levied, as the latter constitute hidden taxes.

The system of state-employed notaries is often criticised. Indeed, though no official enquiries exist on this subject, it may be deemed likely that due to their multiple competences, lower qualification levels in some cases and the lack of staff, state-employed notaries perform less well than the other types of notaries. Against this background, the Deregulation Commission appointed by the Federal Government strongly argued for the abolition of state-employed notaries already in 1992, but this call did not have any follow-up.<sup>29</sup> Following these manifold criticisms, it has recently been decided to abolish state-employed notaries as of 2017.

Notwithstanding the rather poor performance of state-employed notaries, the ECJ ruling in *Commission v Germany* (C-54/08) does not apply to them as they are not self-employed. Therefore, they are not subject to the freedom of establishment and the freedom to provide and receive services. It is, however, unclear whether EU citizens can rely on the freedom of movement of workers according to art. 45 TFEU (ex art. 39 ECT) in order to gain access to the profession. Due to the additional court functions of state-employed notaries in non-contentious matters, it might be possible for Germany to successfully invoke art. 45 (4) TFEU according

---

<sup>27</sup> Case ECJ, decision of 21 March 2002, C-264/00, *Gründerzentrum*, ECR 2002 I-03333.

<sup>28</sup> Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital (OJ, English Special Edition 1969 (II), p. 412), as amended by Council Directive 85/303/EEC of 10 June 1985 amending Directive 69/335/EEC concerning indirect taxes on the raising of capital, OJ L 156, pp. 23–24.

<sup>29</sup> Deregulierungskommission (ed.), *Marktöffnung und Wettbewerb*, 1991, p. 113.

to which the freedom of movement of workers ‘shall not apply to employment in the public service’.

### 3. COMPARATIVE EVALUATION

Comparing the three models, single profession notaries are likely to offer the best quality for the same fees, which are fixed at federal level. This is due to their specialisation in notarial matters and due to their recruitment among the top graduates of the professional exam, for whom the notarial profession is attractive. Many single profession notaries in larger cities have a considerable number of assistants, including lawyers, who prepare the deeds they have to read out to clients. In these cases, the duty of giving professional advice is not always fulfilled adequately. Conversely, single profession notaries in rural areas sometimes complain to be underemployed. Also, many single profession notaries do not seem to be challenged by the amount of routine work performed, which is particularly true in the area of conveyancing. Given the fact that the top 5% of lawyers, among whom single profession notaries are recruited, would be needed more urgently in universities, higher courts and ministries, society at large is paying a certain price for single profession notaries, as the Deregulation Commission plausibly noted in 1992.<sup>30</sup> This assessment is confirmed in the economic part of this study.

Compared to single profession notaries, advocate-notaries are far more numerous as the admission policy of the regions in question is more liberal. This also means that gains from notarial activities are distributed more evenly and that, in sum, more jobs for assistants and secretaries are made available. Particularly in complex matters, advocate-notaries are sometimes said to perform less well on average than single profession notaries. This seems to be confirmed by the reported preference of business clients in corporate law in Northern Germany for specialised single profession notaries based in Hamburg as compared with advocate-notaries in the neighbouring regions. Finally, conflicts of interest between the adversarial and the notarial function of advocate-notaries are not excluded.

Lastly, the system of state-employed notaries practised in Baden-Württemberg is generally defective. This is particularly true for the Baden area where a shortage in notarial services exists due to the relatively low number of state-employed notaries and their lack of civil servant staff. Also, notarial fees levied for the state budget constitute a hidden tax, which has been found incompatible with European tax law in the field of corporate law. As a result, it is likely that citizens and enterprises in Baden would profit most from the deregulation of the notarial profession in Germany.

---

<sup>30</sup> *Ibid.*, p. 459.

### III. THE DUTCH SYSTEM

As mentioned earlier, many regulatory features of notary law have been changed in the 1999 reform of the Dutch Law on Notaries.<sup>31</sup> Under the new system, professional regulation is also adopted through self-regulation by the Dutch Notarial Organisation (KNB). This Organisation, in which membership is compulsory for all notaries and junior notaries, has now become a public body within the meaning of article 134 of the Constitution, whereas previously it was a simple professional association. This change of status was introduced because the Government wanted to transfer legislative power from the State to the Organisation in order to promote self-regulation. The role of the KNB is to promote good professional practice. Its regulations require the prior approval of the Minister of Justice. In practice, its regulations cover the following main areas: promotion of the profession; professional ethics, control of quality, neutrality and integrity; professional and legal (scientific) support; continuing (post-academic) education and training; electronic (ICT) facilities and support; ensuring the transparency of fees.

#### 1. GENERAL FEATURES

Subjective requirements consist of a (specialised) university degree in notarial law, a 3-year part-time professional training course and six years practice (as opposed to three years before 1999) as a ‘candidate notary’ under the supervision of a notary. As regards objective requirements, the *numerus clausus* has widely been abolished. Notaries are appointed by royal decree,<sup>32</sup> as under the old act, and may apply for appointment to an existing post that has fallen vacant, which may be a single-practitioner post (notary’s office) or an office in association with others. Additionally, under the new system, a notary can take the initiative to create a new office which did not exist before. In order to establish a new office, the reform introduced the requirement to submit a business plan.<sup>33</sup> This shall contain a market survey, a description of the office organisation, a forecast of results, and a financing plan. The business plan shall cover a minimum period of three years<sup>34</sup> and is assessed by a committee of experts consisting of three members. The chairman and one of the members should have experience in business economics, and the other member should be a notary. At present the requirement of Dutch nationality applies, and only Dutch citizens may become notaries and judges. Moreover, a conveyance deed cannot be drawn up and executed by a foreign notary. However,

---

<sup>31</sup> This part builds on, in part explicitly, the contributions by *A. van Velten/D. Plaggemars*, Case Study on the Netherlands, in: ZERP et al., *Conveyancing Services Market*, Dec. 2007, Study COMP/2006/D3/003; for a more recent summary, see *L. Verstappen*, *The Dutch Situation on Regulation of Notaries*, in: N. Zeegers/H. Bröring (eds), *Professions under Pressure: Lawyers and Doctors between Profit and Public Interest*, Den Haag: Boom Juridische uitgevers, 2008.

<sup>32</sup> Sect. 3 Notaries Act.

<sup>33</sup> Sect. 6 Notaries Act.

<sup>34</sup> Art. 2 of the Notary’s Business Plan Decree of 9 Apr. 1999.

the nationality requirement for notaries no longer applies to EU citizens after the ECJ decision discussed above.

As regards interprofessional cooperation, collaboration with two other professions (attorneys-at-law and tax consultants) was permitted before the reforms (for which rules were laid down in guidelines drawn up by the KNB), but a new statutory basis is now provided by Section 16 of the Notaries Act. According to this provision, ‘a notary may enter into a collaborative association with practitioners of another profession, provided that his independence and impartiality are not and cannot be influenced by this.’ Under the Interdisciplinary Collaboration Regulation 2003,<sup>35</sup> the possibility of collaboration is limited to attorneys-at-law (i.e. members of the Dutch Bar), tax consultants (i.e. members of the Order of Dutch Tax Consultants), and practitioners of the professions just referred to who work abroad, provided that they are subject to disciplinary law in the same way as these and have adequate professional liability insurance. In addition, the regulation contains provisions designed to ensure the independence and impartiality of Dutch notaries in multidisciplinary practices of this kind. In particular, a notary acting as the adviser of only one party is not allowed to sign the deed without consent of the other party. Notaries are not allowed to provide the services of an advocate, a bank or a real estate agent (contrary to France).<sup>36</sup> Moreover, there are no restrictions on business structure, which means that even limited liability companies are allowed. As regards geographical location, a notary is always appointed within a certain municipality. Whereas he or she is not allowed to establish a branch office or to hold clinics outside this municipality,<sup>37</sup> a notary is now free to exercise professional activities throughout the whole national territory. Clients therefore now have a wider choice of notaries, and for example, deeds for foreign clients can now be executed at Schiphol Airport by every Dutch notary. As has been decided by the ECJ in the case of advocates,<sup>38</sup> the restrictions on establishing branch offices are most likely in breach of the freedom of establishment and therefore inapplicable in cross-border situations.

Regarding market conduct, the Dutch notary, too, acts on behalf of both parties, with independence, impartiality and neutrality being his or her core duties. These duties also translate into notarial instruction duties (information of parties involved or '*Belehrung und Beratung*'). Moreover, the Dutch notary has a duty to provide services in core functions such as authenticating documents (family law, real estate, company law) and certifying signatures or administering oaths. Professional standards include the duty to inform the parties on the results of the various checks and on the consequences of certain contractual arrangements including their

---

<sup>35</sup> Regulation of the KNB of 18 June 2003, approved by the Minister of Justice on 18 Sept. 2003.

<sup>36</sup> For example, this rule restricts the freedom of a German *Anwaltsnotar* to establish a branch of his notarial office in the Netherlands. This rule is, therefore, within the scope of application of the fundamental freedoms only applicable in as far as it can be justified.

<sup>37</sup> Sect. 13 Notaries Act.

<sup>38</sup> ECJ, decision of 12 July 1984, C-107/83, *Ordre des Avocats au Barreau de Paris v Klopp*, ECR 1984, 2971.

alternatives. Conduct control is exercised by the local disciplinary chambers of notaries and by the BFT (Financial Supervision Office). A ‘designated client account’ was introduced with guarantees for the safety of clients’ money deposited with the notary. Compulsory indemnity insurance has a guaranteed amount of 25 million €; 1,000,000 – € insurance by each notary individually, and additional 24,000,000 –€ by the KNB (collective insurance). Continuing education of at least 40 hours per two years is mandatory for each notary and candidate notary and is administrated by the KNB. Special legal advertising restrictions are inexistent, with the ordinary law against unfair competition applying to notaries as well. In its Professional Rules of Conduct Regulation<sup>39</sup> approved after the 1999 reform, the KNB has permitted practitioners to use advertising, provided that in doing so they observe a standard of care befitting the profession. Such publicity may not involve a comparison of the notary’s services with those of one or more other notaries, unless representative and verifiable elements are compared and the publicity is not misleading. The Dutch Competition Authority believes the professional rules on publicity should still be further relaxed.

Alongside the abolition of *numerus clausus*, the abolition of fixed fees was the most important element of the 1999 reform. In a first step, a scheme had been adopted to reduce the fixed fee rates (scale charges) for conveyancing practice and family law practice in stages over a period of three years (from 1999 to 2003). The fees in company law practice were already free of restriction. Maximum fees for people of limited financial means were introduced for family law practice. The results of this fee deregulation were considered and described in the Final Report of the Notarial Profession Monitoring Committee.<sup>40</sup> The findings of this study were so positive that the Government completely abandoned the system of fixed rates as of 1 July 2003, while maintaining the maximum rates in family law practice for people with limited financial means.

## 2. THE IMPACT OF THE REFORM OF 1999

Assessing the impact of the reform is most interesting as regards its two major components: the abolition of *numerus clausus* and fixed fees. Following the first measure, the number of notaries has not increased dramatically up until now. Thus, 721 business plans for existing and new notarial posts were lodged in the period from the introduction of the new Notaries Act (1 Oct. 1999 to 1 Jan. 2006). Only 22 of the 721 plans were not approved, and there has not been any trend to protect established notarial offices. In 1999, when the new Notaries Act and its deregulation provisions came into force, there were 1,332 notarial posts. After the reform, notarial post number 1,500 was filled only in January 2007. Moreover, the physical accessibility of notaries has been slightly improved as the number of

---

<sup>39</sup> Regulation of the KNB of 21 June 2000, approved by the State Secretary for Justice on 15 Sept. 2000.

<sup>40</sup> Final report of the Notarial Profession Monitoring Committee, period 1999-2003, Feb. 2003.

inhabitants per notarial office has fallen by 8.7% from 12,365 (in 1998) to 11,284 (in 2003)<sup>41</sup>.

In relation to fee deregulation, the Dutch Government made the following assessment:

‘There is fee rate differentiation and cost-price-related charging. The costs of conveyancing in particular have fallen, sometimes by over 30%. The continuity and accessibility of the notarial profession have not been jeopardised by abandoning the system of fixed fee rates for property transactions. Many politicians had expected that this would have had the effect of reducing fee rates right across the board. But this expectation has been borne out only partially. Notaries have begun working in a more cost-conscious way, but partly as a result, fee reductions have been evident only in conveyancing work (and then mainly for the benefit of commercial clients), while fees in family law practice have risen. The charge for a will has actually almost doubled. It seems as though private clients – as weak market participants – have benefited only slightly from the abolition of fixed rates. However, the position of people of limited means has been protected by the statutory maximum fees. The government agrees with the Hammerstein Committee that the present level of fee rates does not warrant a return to the system of fixed rates. The aim of the biennial Notarial Profession Trends Report is to identify any problems in good time. This form of monitoring is in keeping with the transitional stage in which the notarial profession still finds itself.’<sup>42</sup>

The former fixed fee system was characterized by cross-subsidisation between various notary services. Fixed rates for most conveyancing deeds were set at excessively high values, and these gains were in turn used to subsidise the mostly unduly low rates for family and inheritance law work. After the fixed fee system was abandoned, fee rates fell in cases where they were substantially in excess of the actual underlying economic value of the service, especially in conveyancing, and rose in cases where they had been set below the economic value, especially in family and inheritance law. Further important effects of the reform include the amelioration of client-orientation of notary offices and an enhancement of speed of the transaction. Conversely, despite expectations and fears often voiced, the quality of notarial work does not seem to have suffered to any measurable extent.

In sum, the Dutch reform is considered to be mostly a success story, though deregulation made re-regulation in several quality-related fields of notarial activity necessary, so as to maintain the overall quality of notarial work.<sup>43</sup>

#### IV. OVERALL EVALUATION

Despite the Dutch reform, both the German and Dutch systems are still part of the family of Latin notary systems. Their prominent core feature of a neutral

---

<sup>41</sup> Hammerstein Committee Report 2005.

<sup>42</sup> Almost literal quote from the 2006 Government position.

<sup>43</sup> *L. Verstappen*, *supra* fn. 32.

professional acting for both parties distinguishes them from competing systems such as the Anglo-Saxon lawyer system and, at least in the field of conveyancing, the Scandinavian agent system.

However, within the family of Latin notary systems, the Dutch system seems to be superior to the German one. This is especially true with a view to the anachronistic and inefficient splitting of the profession in Germany, which is in urgent need of reform. But also when single profession notaries are compared, the Dutch model still seems to be preferable. If, as is the case, the availability of notarial services at adequate and fair conditions and prices is ensured on the whole national territory, there seems to be nothing wrong in clients having to pay the true market value of the services which they request. Indeed, cross-subsidisation, as is still occurring under the German system of fixed fees, is never a sufficiently targeted and fair system of redistribution. The same is true for an artificial limitation of the number of notaries below what the market allows. Indeed, in a macro-economic perspective, a liberalisation of notarial services as under the Dutch system also leads to more jobs and growth in the sector.<sup>44</sup>

Finally, apart from the 'nationality clause' which must not be applied to Union Citizens in the future and other minor issues, all Dutch regulation seems to be compatible with the European market freedoms.<sup>45</sup> Conversely, this is probably not the case for core regulatory features of the German system such as fixed tariffs and *numerus clausus*. Therefore, in order to establish a modernised notarial system in Germany, which is in line with EU law, the Dutch experience would seem to provide a most valuable starting point.

---

<sup>44</sup> See G. Lee, Case Study on Germany in: ZERP et al., Conveyancing Services Market, Dec. 2007, Study COMP/2006/D3/003.

<sup>45</sup> It is true that many regulatory features of the Dutch notary system restrict the market freedoms in the meaning of the *Kraus* judgement of the ECJ (supra fn. 16). However, since the notarial services are of great importance and in the public interest, as has been recognized by the ECJ in the ruling *Commission v Germany*, C-54/08 (supra fn. 7), discussed in this contribution, most of these restrictions seem to be proportional at least at first glance.





# LA PROTECTION CONSTITUTIONNELLE DES DROITS FONDAMENTAUX EN FRANCE ET EN ALLEMAGNE : LA MONTÉE EN PUISSANCE DES JURIDICTIONS CONSTITUTIONNELLES

Götz Frank\* et Gilles Lebreton\*\*

Depuis une soixantaine d'années, la France et l'Allemagne proclament leur attachement aux droits fondamentaux de la personne humaine dans leurs Constitutions respectives. Rien ne permet aujourd'hui de douter de la sincérité de cet attachement, même si la crise économique et financière soumet l'humanisme de ces deux États à rude épreuve, en les obligeant plus que jamais à voler au secours des personnes les plus vulnérables.

En Allemagne, le système de protection des droits fondamentaux a été mis en place très rapidement, grâce à la Loi fondamentale du 23 mai 1949. D'emblée, la Loi fondamentale reconnaît l'existence d'une liste impressionnante de droits fondamentaux, dont son premier article affirme qu'ils sont «inviolables et inaliénables», et qu'ils „lient les pouvoirs législatif, exécutif et judiciaire“. Pour assurer leur respect, elle exige en outre la création d'une Cour constitutionnelle, accessible par trois modes de saisine différents : sur recours constitutionnel, ouvert à «quiconque estime avoir été lésé par la puissance publique dans l'un de ses droits fondamentaux» (article 93.1.4a) ; „sur demande du gouvernement fédéral, d'un gouvernement de Land, ou d'un tiers des membres du Bundestag“, en cas de doute sur la «compatibilité (...) du droit fédéral ou du droit d'un land avec la (...) Loi fondamentale» (contrôle „abstrait“ de l'article 93.1.2) ; et sur saisine d'un tribunal si celui-ci „estime qu'une loi dont la validité conditionne sa décision est inconstitutionnelle“ (contrôle „concret“ de l'article 100). Cette Cour constitutionnelle, qui siège à Karlsruhe, s'est très convenablement acquittée de sa tâche. Son œuvre de protection des droits fondamentaux est en effet saluée tant en France qu'en Allemagne.<sup>1</sup> Aucune institution humaine n'étant parfaite, on peut toutefois se demander si la Cour n'a pas parfois fait preuve d'un excès d'audace, en imposant à l'État certaines obligations positives comme si elle s'érigait en „super-législateur“. Cette interrogation sera examinée dans la seconde partie du présent travail (cf. II).

En France, le système de protection des droits fondamentaux s'est mis en place de façon plus lente. Dans sa version initiale, la Constitution du 4 octobre 1958 proclamait certes, dans son préambule, l' „attachement“ du peuple français „aux

---

\* Professeur de droit, Carl von Ossietzky Universität Oldenburg.

\*\* Professeur de droit, Université du Havre.

<sup>1</sup> Cf. par exemple *J. Gicquel et J-É. Gicquel*, Droit constitutionnel et institutions politiques, Montchrestien, Paris, 2010, pp. 337-340 ; et *G. Lebreton*, Libertés publiques et droits de l'homme, Sirey Université, 2008 pp. 218 et 219.

droits de l'homme“, mais cette formule vague ne donnait pas clairement valeur constitutionnelle (ni même valeur juridique) aux deux textes qui les reconnaissent : la Déclaration des droits de l'homme et du citoyen du 26 août 1789 et le Préambule de la Constitution du 27 octobre 1946.<sup>2</sup> D'autre part et surtout, elle créait certes pour la première fois en France une véritable juridiction constitutionnelle – le Conseil constitutionnel – mais refusait de lui confier la compétence de protéger les droits de l'homme. Ce refus était particulièrement décevant dans un pays qui aime se présenter comme „la patrie des droits de l'homme“. Tant et si bien que par sa célèbre décision *Liberté d'association* du 16 juillet 1971, le Conseil constitutionnel s'est lui-même arrogé cette compétence, en attribuant au passage une valeur constitutionnelle aux deux textes de 1946 et de 1789. Ce coup d'audace, qui semblait brutaliser deux fois la Constitution, a été immédiatement approuvé par l'opinion publique, puis confirmé par plusieurs révisions constitutionnelles qui ont renforcé le rôle de gardien des droits fondamentaux du Conseil constitutionnel. La dernière en date, celle du 23 juillet 2008, illustre de façon particulièrement spectaculaire ce renforcement progressif. Elle crée en effet une „question prioritaire de constitutionnalité“ qui mérite d'autant plus d'être évoquée qu'elle s'inspire du „contrôle concret“ allemand, et qu'elle amène à s'interroger sur l'étendue de cette montée en puissance du Conseil constitutionnel. Tel sera l'objet de la première partie du présent travail (cf. I.).

## I. LE CONSEIL CONSTITUTIONNEL FRANÇAIS ET LA “QUESTION PRIORITAIRE DE CONSTITUTIONNALITE”

En créant la „question prioritaire de constitutionnalité“, la révision constitutionnelle du 23 juillet 2008 a bouleversé le système français de protection des droits fondamentaux. Il s'agit sans aucun doute de la plus importante révision de la Constitution de 1958 depuis celle du 6 novembre 1962 (relative à l'élection du président de la République au suffrage universel direct). C'est ce qui explique qu'elle ait été abondamment commentée.<sup>3</sup> Inscrite dans l'article 61-1 de la Constitution, complété par la loi organique no. 2009-1523 du 10 décembre 2009, la „question prioritaire de constitutionnalité“ (QPC) poursuit deux objectifs : permettre au justiciable de faire valoir les droits qu'il tire de la Constitution ; et assurer la prééminence de la Constitution dans l'ordre juridique français.

### 1. PERMETTRE AU JUSTICIABLE DE FAIRE VALOIR LES DROITS QU'IL TIRE DE LA CONSTITUTION

Dans des termes très proches de ceux de l'article 100 de la Loi fondamentale allemande, l'article 61-1 permet à tout justiciable, quelle que soit sa nationalité,

<sup>2</sup> Sur la différence des philosophies qui inspirent les „droits de l'homme“ français et les „droits fondamentaux“ allemands, cf. G. Lebreton (dir), *Regards critiques sur l'évolution des droits fondamentaux de la personne humaine en 1999 et 2000*, Paris: L'Harmattan 2000.

<sup>3</sup> Cf. par exemple dossier RDP 2009 pp.565 à 684 ; dossier AJDA 2010 pp.74 à 96 ; et P. Bon, RFDA 2009 pp.1107 à 1124.

d'invoquer l'inconstitutionnalité d'une loi „à l'occasion d'une instance en cours devant une juridiction“ administrative ou judiciaire, dès lors qu'il estime que cette loi “porte atteinte aux droits et libertés que la Constitution garantit“.

Pour éviter l'encombrement du Conseil constitutionnel, cet article soumet toutefois l'invocation du justiciable à un double filtre. D'abord, la juridiction devant laquelle la QPC est soulevée a le pouvoir d'apprécier la pertinence de celle-ci : si elle ne lui paraît pas pertinente, par exemple parce que la loi contestée a déjà été déclarée conforme à la Constitution par le Conseil constitutionnel, ou parce que sa constitutionnalité est évidente, elle n'en tient pas compte et poursuit son procès ; si au contraire elle lui paraît pertinente, parce qu'elle porte sur une loi dont la constitutionnalité paraît douteuse, elle suspend le cours de son procès (on dit qu'elle „surseoit à statuer“ ) et saisit de cette QPC la juridiction suprême dont elle dépend, c'est-à-dire soit le Conseil d'État (s'il s'agit d'une juridiction administrative comme par exemple un Tribunal administratif ou une Cour administrative d'appel) soit la Cour de cassation (s'il s'agit d'une juridiction judiciaire comme par exemple un Tribunal de grande instance ou une Cour d'appel). Le Conseil d'État ou la Cour de cassation procède alors à une deuxième appréciation de la pertinence de la QPC: ce n'est que si cette pertinence est à nouveau reconnue que la QPC fait l'objet d'un „renvoi“ par cette juridiction suprême au Conseil constitutionnel ; dans le cas contraire, le Conseil d'État ou la Cour de cassation écarte la QPC et indique à la juridiction d'origine qu'elle peut reprendre le cours de son procès.

On voit ici que le succès de la nouvelle procédure dépend entièrement de la bonne volonté du Conseil d'État et de la Cour de cassation. Ces deux hautes juridictions doivent en effet accepter de renvoyer les QPC au Conseil constitutionnel (et donc résister à la tentation de se substituer à lui) au moindre doute sur la constitutionnalité des lois concernées. C'est heureusement ce qu'elles semblent disposées à faire. Le Conseil d'État lui a par exemple renvoyé, par un arrêt du 14 avril 2010, une QPC sur l'inégalité des pensions de retraite versées aux anciens soldats selon qu'ils sont de nationalité française ou étrangère; et la Cour de cassation en a fait autant, par plusieurs arrêts du 31 mai 2010, à propos d'une QPC relative au respect de la liberté individuelle et des droits de la défense par la procédure pénale de la garde à vue.<sup>4</sup>

Le grand bénéficiaire de la réforme est évidemment le justiciable. Certes, il ne bénéficie pas encore, comme son homologue allemand, du droit de saisir directement le Conseil constitutionnel : l'équivalent du „recours constitutionnel“ n'existe pas en France ; le président de la République François Mitterrand avait pourtant envisagé de proposer sa création dans son discours du 14 juillet 1989, mais il avait ensuite renoncé à ce projet, qu'aucun de ses successeurs n'a repris. Avec la QPC, le justiciable se voit néanmoins reconnaître un nouveau droit : le droit de contester à l'occasion d'un procès la constitutionnalité d'une loi. Or il s'agit d'un droit d'autant plus important qu'on l'attendait depuis vingt ans : en

---

<sup>4</sup> Cass. 31/5/2010, *Recueil v Dalloz* 2010 p.1356.

1990, un projet de révision constitutionnelle, initié par le président Mitterrand, avait en effet déjà tenté d'introduire l'équivalent de la QPC ; mais il avait échoué pour des raisons purement politiques, à cause de l'obstruction du Sénat (majoritairement „de droite“ alors que F. Mitterrand était classé „à gauche“). Du coup, le justiciable dispose désormais d'un véritable choix stratégique pour contester une loi. Il peut contester sa constitutionnalité par la voie de la QPC, et chercher ainsi à la déférer devant le Conseil constitutionnel, selon la procédure à deux filtres précédemment décrite. Mais il peut aussi préférer se contenter d'invoquer son inconstitutionnalité (notamment sa non-conformité à la Convention européenne de sauvegarde des droits de l'homme), auquel cas c'est en droit français le juge ordinaire (administratif ou judiciaire) et non le Conseil constitutionnel qui est compétent pour trancher le problème.<sup>5</sup> Ce qui signifie que le justiciable peut en quelque sorte choisir désormais le juge de la loi.

Mais au-delà du justiciable, le Conseil constitutionnel apparaît comme le deuxième grand bénéficiaire de la réforme. Car grâce à la QPC de simples justiciables peuvent enfin avoir l'initiative de sa saisine, jusqu'alors réservée aux gouvernants. Son caractère démocratique en sort considérablement renforcé. Désormais, le Conseil constitutionnel n'est plus simplement l'arbitre d'un débat politique qui oppose des parlementaires d'opposition et le gouvernement, les premiers attaquant la loi, le second la défendant. Il devient une vraie juridiction dont la procédure est complètement rénovée, avec procès public et présentation contradictoire des observations des parties, conformément aux exigences du droit à un procès équitable défini par l'article 6 de la Convention européenne, qui lui sont dorénavant applicables. À terme, il sera d'ailleurs nécessaire, si on veut éviter une condamnation de la France par la Cour européenne des droits de l'homme, de modifier la composition du Conseil constitutionnel, en supprimant notamment la disposition qui prévoit que les anciens présidents de la République y siègent de plein droit.

## 2. ASSURER LA PREEMINENCE DE LA CONSTITUTION DANS L'ORDRE JURIDIQUE FRANÇAIS

Jusqu'à la création de la QPC, la prééminence de la Constitution dans l'ordre juridique français était mal assurée. Beaucoup de lois échappaient en effet au contrôle de constitutionnalité. Dès leur promulgation, elles s'appliquaient donc même si elles violaient la Constitution. Aucune juridiction n'était compétente pour sanctionner leur inconstitutionnalité : ni le Conseil constitutionnel qui n'avait pas le pouvoir de contrôler les lois après leur promulgation ; ni les juridictions ordinaires, qui estiment que leur rôle n'est pas de contrôler la constitutionnalité des lois à la place du Conseil constitutionnel.

Si le problème existait avec autant d'acuité, c'est parce que le seul mode de saisine du Conseil constitutionnel qui existait jusqu'en 2008 était celui, très restrictif, prévu par l'article 61 de la Constitution: réservé au président de la République,

---

<sup>5</sup> En vertu d'arrêts célèbres : CC no.54 DC du 15/1/1975 Interruption volontaire de grossesse Cass. ch. mixte 24/5/1975 Société des cafés Jacques Vabre ; et CE Ass. 20/10/1989 Nicolo.

au Premier ministre, au président de l'Assemblée nationale, au président du Sénat, et (depuis une révision de 1974) à soixante députés ou soixante sénateurs, il ne leur permettait en outre d'attaquer les lois qu'„avant leur promulgation“, ce qui exigeait d'eux vigilance et rapidité. Dans ces conditions, on comprend que beaucoup de lois n'aient pas été attaquées à temps. En outre, majorité et opposition convenaient parfois, pour des raisons politiques, de ne pas attaquer des lois pourtant suspectées d'inconstitutionnalité<sup>6</sup>. Enfin, les lois promulguées antérieurement à l'entrée en vigueur de la Constitution de 1958 échappaient elles aussi à toute possibilité de contrôle de constitutionnalité, à l'instar de la célèbre loi du 3 avril 1955 sur l'état d'urgence, alors même qu'elles étaient parfois contraires à celle-ci.

Avec la QPC, cette situation déplorable va prendre fin. Toute loi, quelle que soit sa date de promulgation, a désormais vocation à être „abrogée“ (c'est-à-dire supprimée pour l'avenir) par le Conseil constitutionnel. L'État de droit en sort renforcé : la Constitution va désormais s'imposer à chaque loi, conformément au principe de hiérarchie des normes. Le Conseil constitutionnel aussi, car il va enfin pouvoir échapper à l'humiliation d'être sans cesse contourné, et acquérir la réputation d'efficacité qui lui manquait.

Sa toute première décision rendue suite à une QPC, le 28 mai 2010, confirme la réalité du renforcement de son pouvoir : il y abroge, pour violation du principe constitutionnel d'égalité, les dispositions législatives très anciennes qui édictaient une „différence de traitement fondée sur la nationalité“ entre les titulaires de pensions militaires de retraite.<sup>7</sup>

Reste toutefois un problème en suspens, qui tient au caractère „prioritaire“ de la QPC. Ce mot signifie que si un justiciable soulève simultanément l'inconstitutionnalité et l'inconventionnalité d'une loi, la juridiction saisie est dans l'obligation d'examiner d'abord l'inconstitutionnalité. Ainsi, dans un tel cas de figure, la juridiction ne peut pas refuser de faire remonter l'inconstitutionnalité vers le Conseil constitutionnel au motif que l'inconventionnalité suffirait à résoudre le litige. À cela, il y a deux raisons. La première, c'est que sans cette précaution la réforme risquerait d'être vidée de son contenu, car les droits fondamentaux sont presque tous protégés de façon comparable par des traités et par la Constitution. Et la seconde, c'est que l'inconstitutionnalité produit des effets beaucoup plus radicaux (l'abrogation de la loi par le Conseil constitutionnel) que l'inconventionnalité (le simple refus du juge administratif ou judiciaire d'appliquer la loi).

Mais dans certains cas, ce caractère „prioritaire“ risque d'amener la France à méconnaître ses engagements internationaux, notamment ceux qu'elle a

---

<sup>6</sup> Cela continue : l'opposition vient d'annoncer qu'elle n'attaquera pas la future loi interdisant le port de la burqa. Une QPC sur sa constitutionnalité interviendra probablement aussitôt après sa promulgation.

<sup>7</sup> CC no.2010-1 QPC du 28/5/2010 „Cristallisation“ des pensions militaires de retraite, Recueil Dalloz 2010 p.1354.

contractés dans le cadre de la construction de l'Union européenne. Car en faisant systématiquement prévaloir la Constitution sur ces engagements, la réforme entend assurer un meilleur respect des jurisprudences „souverainistes“ qui rappelaient déjà qu'en droit français la Constitution l'emporte sur les traités<sup>8</sup>. En créant une question „prioritaire“, et non pas simplement „préjudicielle“, de constitutionnalité, la révision du 23 juillet 2008 dévoile en définitive son ambition, qui est de faire du Conseil constitutionnel non pas seulement un meilleur gardien de l'État de droit que par le passé, mais aussi un gardien plus efficace de la souveraineté de l'État.

## II. LA COUR CONSTITUTIONNELLE ALLEMANDE ET LES OBLIGATIONS POSITIVES

En Allemagne comme en France, les droits fondamentaux jouent un rôle toujours prédominant. Leur fonction première est d'être classiquement une source de droit subjectif et dans ce sens, un instrument de défense contre l'État sous ses formes différentes: le gouvernement, l'administration, le parlement et la justice. L'art. 93.1.4.a ouvre à tout justiciable la possibilité d'introduire un recours constitutionnel contre ces pouvoirs publics. S'il y a des moyens de recours devant d'autres tribunaux, il faut d'abord parcourir la voie judiciaire des instances. À côté de leur fonction classique, les droits fondamentaux se sont vus par la suite dotés d'une nouvelle fonction et ils devinrent règle d'interprétation, surtout dans le cadre du droit civil.

La cour constitutionnelle en Allemagne voit dans la loi fondamentale un système de valeurs qui sont, elles-aussi, fondamentales. Dans cet esprit, la loi fondamentale n'est donc plus une loi neutre qui ignore ce système. Au contraire! Elle l'incarne et il devient par là-même un véritable système de référence pour la société où l'homme, dans ce contexte, occupe une place centrale.

Les droits fondamentaux sont donc à la base même des décisions les plus importantes de la cour et de la législation constitutionnelle et celles-ci sont applicables à toutes les parties du droit.

La cour constitutionnelle a développé cette fonction dans la fameuse décision Lüth.<sup>9</sup> Lüth avait dénoncé les activités nazies du cinéaste Veit Harlan et appelé au boycott les propriétaires des cinémas et les spectateurs. Le boycott fut interdit par le tribunal régional de Hambourg. Après un recours déposé auprès de la cour constitutionnelle, celle-ci statua alors en faveur de la liberté d'expression: on voit donc que la proclamation de la liberté d'exprimer son opinion peut obliger le juge civil à cesser de considérer les effets pervers de la liberté d'expression sur des tiers comme un acte contraire aux bonnes mœurs.

---

<sup>8</sup> CÉ Ass. 30/10/1998 Sarran ; Cass. Ass. plén. 2/6/2000 M<sup>elle</sup> Fraisse ; CC no. 505 DC du 19/11/2004 Traité établissant une Constitution pour l'Europe.

<sup>9</sup> BVerfGE 7, 198 (Lüth).



Il n'existait qu'un seul droit fondamental dont le texte imposait manifestement des devoirs au législateur. Ainsi, dans l'article 6.5, la constitution oblige la législation à assurer aux enfants naturels les mêmes conditions qu'aux enfants légitimes. Le parlement de Bonn cessait depuis bien longtemps de remplir son devoir jusqu'au moment où la cour rendit la décision suivante: Si le législateur ne remplissait pas sa mission jusqu'à la fin de la cinquième période législative, il appartenait à la justice d'intervenir pour mettre en oeuvre la disposition de la constitution. A partir de ce moment, l'article 6.5 serait donc devenu dérogatif et la loi fondamentale se serait alors substituée aux règles détaillées du code civil sans même que l'on ait à identifier les normes concernées.

La fonction des droits fondamentaux qui, aujourd'hui, impose beaucoup plus de devoirs au législateur en Allemagne qu'en France s'inscrit dans la théorie de la garantie institutionnelle. D'après cette théorie qui est respectée par la cour constitutionnelle, les droits fondamentaux mettent les pouvoirs étatiques dans l'obligation de respecter et de développer les institutions qui les appliquent. Le devoir – surtout du législateur – est donc de promouvoir ces droits afin que le plus grand nombre d'institutions puisse les exercer.

L'idée de cette théorie a été développée par Carl Schmitt sous la République de Weimar.<sup>10</sup> Depuis un certain temps, on soupçonnait le législateur de Berlin de menacer le droit de propriété. Après la guerre, l'idée a alors été développée dans un nouveau sens. Sur la base du nouveau principe constitutionnel de l'Etat social (art. 20.1), on s'est alors posé la question suivante : que m'apporte la liberté de propriété si je n'ai pas accès à cette propriété ? Les pouvoirs publics ont donc le devoir de me garantir une certaine effectivité. Cette idée est non seulement acceptée en Allemagne pour ce qui est de la pratique des droits fondamentaux dans le cadre de la jurisprudence mais elle est aussi régulièrement reprise dans la littérature sur le droit constitutionnel.

Pourtant, la cour constitutionnelle doit tenir compte de ce que cette idée pourrait impliquer pour l'avenir. Si elle va trop loin, il se posera automatiquement la question de sa légitimité par rapport au législateur. Une décision fameuse qui a valu à la cour le reproche d'être en train de remplacer le législateur est celle qui concerne la répression pénale de l'avortement. Sous le gouvernement Willy Brandt, le parlement de Bonn avait mis fin à cette répression qui était jusqu'alors absolue en faisant adopter une loi qui ne déclenchait la procédure qu'à partir du 4ème mois de grossesse. Un tiers des membres du Bundestag, donc l'opposition, ont alors engagé avec succès une procédure contre cette loi dans le cadre d'un contrôle abstrait en vertu de l'art. 93.1.2. Sur la base de l'art. 2.2 (droit de vie), la cour indiquait en effet que la garantie institutionnelle inclut la protection de la vie prénatale<sup>11</sup>. En outre, cet article imposait aux pouvoirs étatiques de prendre les mesures nécessaires pour assurer cette protection. Comme la cour donnait priorité à la protection de l'embryon devant le droit d'autodétermination de la femme enceinte, elle obligea

<sup>10</sup> C. Schmitt, *Verfassungslehre*, München: Duncker & Humblot, 1928.

<sup>11</sup> BVerfGE *Abtreibungsurteil* 39,1.

donc le législateur à trouver des moyens appropriés pour assurer cette protection. D'après cette décision, une protection suffisante n'était possible que par la voie d'une loi pénale qui ne connaîtrait que quelques exceptions comme les indications médicales et sociales. La conception de cette nouvelle loi était d'ailleurs parfaitement formulée par la cour. Et si on compare la situation en Allemagne avec – pendant cette même période – celle que reflète la décision de la cour constitutionnelle en France du 15 janvier 1975 concernant l'interruption volontaire de grossesse, il apparaît que le conseil constitutionnel avait, lui, refusé de jouer le rôle d'un second Parlement et qu'il s'était simplement contenté de constater la constitutionnalité de la loi qui lui avait été soumise.<sup>12</sup> La cour, en France, est donc bien loin de se conduire comme un „gouvernement des juges“.

Il y a des domaines politiques dans lesquels la cour constitutionnelle en Allemagne peut jouer un rôle très important, même pour une longue période. Un exemple remarquable a été livré par la question de la création d'une radio privée. Comme la publicité, en tant qu'instrument de financement des médias de masse, se concentrait de plus en plus sur les médias audiovisuels publics dans les années 70 et 80, cette question avait pris une importance énorme pour les éditeurs des médias imprimés. N'ayant accès ni à la radio ni à la télévision publiques, certains d'entre eux durent faire face à de véritables problèmes existentiels. D'autre part, la radio et la télévision privées n'étaient alors pratiquement pas permises en Allemagne, ce qui dura jusqu'en 1986. On en trouve la raison dans la jurisprudence de la cour.<sup>13</sup>

Considérons seulement trois importantes décisions reposant sur la garantie institutionnelle de la radio (art. 5.1.2) et qui expliquent cette thèse:<sup>14</sup>

(1) Lorsqu'une deuxième chaîne de télévision a pu être envisagée en Allemagne, le gouvernement Adenauer a créé une Société à responsabilité limitée à cet effet, la Deutschland-Fernseh-GmbH. Il était prévu d'attribuer la moitié de la propriété de la chaîne aux Länder. Ceux-ci ont cependant refusé. Bien au contraire! Ils ont initié avec succès une procédure pour divergences d'opinions sur les droits et obligations de la Fédération et des Länder sur la base de l'art. 93.1.3.<sup>15</sup>

En 1961, la cour a, dans sa décision, développé des idées remarquables sur le contenu de la garantie institutionnelle de la liberté de la radio (qui inclut la liberté de la télévision). Elle voyait dans la radio ainsi que dans la presse un média de masse indispensable en raison du rôle qu'elle exerce dans le cadre de la formation de l'opinion publique grâce à ses bulletins d'informations, ses commentaires et même grâce à ses pièces radiophoniques ainsi que ses émissions de musique. Mais contrairement à la situation de la presse relativement abondante et donc animée par une saine concurrence, elle indiquait dans le même temps que la situation de la

<sup>12</sup> Cf. CC no. 74-54 DC d. 15.1.1975, Interruption volontaire de grossesse.

<sup>13</sup> F. *Fechner*, *Medienrecht*, Mohr Siebeck, Tübingen, 2008, p. 257, M. *Paschke*, *Medienrecht*, Springer, Heidelberg, 2009, p. 211 ff., J. *Petersen*, *Medienrecht*, München: Beck Juristischer Verlag, 2008, p. 34.

<sup>14</sup> G. *Frank*, *Rundfunkorganisationsrecht*, in: Schiwy/Schütz/Dörr (eds.), *Medienrecht*, Köln: Wolters Kluwer, 2010, p. 498 ff.

<sup>15</sup> BVerfGE, *Deutschland-Fernsehen* 12, 205.

radio privée était différente, ceci pour des raisons d'ordre aussi bien technique (limitation des fréquences d'émission) que financier, les frais de son installation étant beaucoup plus élevés. La garantie institutionnelle implique donc le devoir de développer des instruments la protégeant contre une éventuelle prise de contrôle par un grand groupe ou par l'Etat. La radio doit être organisée de façon à ce que tous les groupes sociaux puissent avoir une influence sur le conseil de surveillance; il s'agit donc des syndicats, des églises, des organisations patronales, des associations sportives etc. Et surtout : pour installer une radio privée, il faut d'abord mettre en place une base légale qui concrétise cette garantie institutionnelle.

(2) L'élaboration de cette base légale a duré longtemps. En Allemagne, ce sont les Länder qui ont le droit de légiférer sur la radio et ce n'est seulement qu'en 1968 que le parlement de la Sarre a pour la première fois adopté une loi permettant la création d'une radio privée. Tous les autres Länder sont restés tranquilles. Se reposant sur cette loi, une société a alors demandé une licence auprès du gouvernement de la Sarre. Elle ne l'a pas obtenue. Une procédure devant les tribunaux administratifs qui a duré jusqu'en 1981 a alors été engagée. La question a été ensuite soumise à la cour constitutionnelle dans le cadre d'une procédure de contrôle concret des normes conformément à l'art.100. La cour a finalement rejeté la loi en fondant son argumentation sur l'impérative nécessité de faire bénéficier la radio privée de conditions similaires à celles de la radio publique, principalement celles qu'elle avait déjà formulées dans sa décision de 1961 et qui concernaient les possibilités d'influence sur le conseil de surveillance. Voulant ouvrir de nouvelles perspectives au développement de la radio privée, elle demanda à ce qu'on la fasse bénéficier des effets d'un pluralisme externe. Mais personne ne savait à partir de quel moment on pouvait vraiment parler de pluralisme externe, donc d'un pluralisme garanti par la multiplicité et la diversité des radios privées.<sup>16</sup>

Après cette décision, presque tous les Länder se sont mis à adopter des lois permettant la création de radios privées mais aucune de ces lois n'a pu mettre la radio privée dans des conditions identiques à celles qui régissaient la radio publique. Il n'était d'ailleurs pas difficile de voir que ces lois n'étaient pas conformes à la décision de 1981 de la cour et donc non conformes à la constitution.<sup>17</sup>

(3) Sur la demande d'un tiers des membres du Bundestag et sur la base de l'art 93.1.2, la loi de la Basse-Saxe fut alors soumise au contrôle des normes abstrait de la cour. C'est cette décision rendue en novembre 1986 qui a enfin pu ouvrir la voie à l'expansion de la radio privée.<sup>18</sup>

L'essentiel de ce changement de jurisprudence consiste en ce que la cour reconnaissait maintenant que les conditions devant régir la radio privée ne pouvaient plus être les mêmes que celles de la radio publique. En effet, comme la radio privée est exclusivement financée par la publicité, elle est dispensée de respecter des quotas de diffusion. Plutôt que de tenir compte de la diversité des goûts des groupes sociaux ainsi que le fait la radio publique qui, elle, est financée

---

<sup>16</sup> BVerfGE *FRAG* 57, 295.

<sup>17</sup> BVerfGE *FRAG* 57, 295.

<sup>18</sup> BVerfGE *Niedersachsen* 73, 118.

par des taxes, la radio privée doit axer son action et sa diffusion sur le goût des masses. Mais les concessions formulées par le législateur doivent être relativisées car, d'un autre côté, ces déficits sont compensés par la radio publique qui permet aux auditeurs de bénéficier d'un minimum de programmes diversifiés.

Placée devant un système dualiste de radiodiffusion (radio publique et radio privée), la cour met toujours les deux acteurs sur un pied d'égalité et, dans le cadre de la garantie institutionnelle, applique les mêmes critères de protection. Il se trouve cependant que les obligations positives que la cour allemande a développées sont souvent très proches des décisions qui sont de la compétence du parlement. Cette similitude permet de poser la question de la légitimité de la cour. Le souverain, le peuple, peut réagir quand il n'est pas d'accord avec les décisions de la majorité du parlement. On vote alors pour une autre majorité. Mais ce n'est pas possible pour ce qui est des décisions prises par la cour.

La décision de la cour portant sur la loi de l'avortement illustre parfaitement ce problème de légitimité. La loi a déclenché de vives réactions: des Allemandes ont organisé des manifestations massives où on remarqua la présence de célèbres personnalités. Les femmes ayant déjà avorté ont, dans une ardente campagne d'aveu public, rassemblé leurs signatures afin d'en publier les listes dans les grands journaux. Cette colère publique n'a, certes, pas eu de conséquences politiques mais il a bien alors fallu prendre conscience de l'ampleur du problème de légitimité.

# EINE ALTERNATIVE FÖRDERALISMUSREFORM – DAS KONSENS-REICHSGESETZ ALS MUSTER FÜR DIE BUNDESREPUBLIK?

Gerhard Hoogers\*

## I. EINFÜHRUNG

Die Bundesrepublik Deutschland und das Königreich der Niederlande haben in den letzten Jahren grundlegende Revisionen ihrer Staatsstruktur erlebt. Es besteht dabei ein interessanter Gegensatz zwischen den Änderungen in Deutschland und denen im Königreich der Niederlande. In der Bundesrepublik gab es keine Gebietsreform, lediglich das Verhältnis zwischen Bund und Ländern untereinander wurde reformiert; im Königreich der Niederlande hingegen blieb das Verhältnis zwischen Reich und Ländern weitgehend unverändert, der territoriale Aufbau des Reiches wurde jedoch tiefgreifend umstrukturiert.

In Deutschland wurde am 1. September 2006 durch die 52. Novelle des Grundgesetzes<sup>1</sup> die so genannte *Föderalismusreform* durchgeführt.<sup>2</sup> Sie war die vielleicht wichtigste Reform des Grundgesetzes<sup>3</sup> und führte zu einer grundsätzlichen Änderung der Gesetzgebungskompetenz zwischen Bund und Ländern. Insbesondere das Gebiet der konkurrierenden Gesetzgebung des Art. 72 GG war hiervon betroffen. Die früher einheitlich geregelte Kompetenzverteilung spaltet sich jetzt in drei Bereiche auf: *Kernkompetenzen* (für welche die bisherige Regel des Art. 72 weiterhin gilt), *Bedarfskompetenzen* (bei welchen der Bund nur unter ziemlich strikten Voraussetzungen eine Regelung treffen darf) und *Abweichungskompetenzen* (bei denen die Länder trotz einer bundesgesetzlichen Regelung die Befugnis behalten, eigene Landesgesetze zu erlassen, welche auch vom Bundesgesetz abweichen dürfen).<sup>4</sup> Auch die früher in verschiedenen Bereichen existierende Möglichkeit eines Bundesrahmengesetzes ist entfallen. Das Königreich der Niederlande, welches vom 01. Jan. 1986 an aus drei Ländern zusammengesetzt war (den Niederlanden, den niederländischen Antillen und Aruba) besteht seit dem 10. Okt. 2010 aus vier Ländern: Den Niederlanden, Aruba, Curaçao und Sint Maarten.<sup>5</sup> Ausserdem wurden die drei antillianischen

---

\* Hon. Prof. Dr. Gerhard Hoogers ist wissenschaftlicher Hauptmitarbeiter im Fachbereich Staatsrecht und Völkerrecht der Rijksuniversiteit Groningen. Er ist auch Hononarprofessor an der Carl von Ossietzky-Universität Oldenburg. Der Autor bedankt sich recht herzlich bei Gerhard Jäckel, der diesen Text eingehend korrigiert und kommentiert hat.

<sup>1</sup> Gesetz vom 28. August 2006, BGBl. I, S. 2034.

<sup>2</sup> Eigentlich wurde nur die erste Stufe 2006 durchgeführt: Durch die Verfassungsnovelle vom 29. Juli 2009 (BGBl. I, 2248) ist dann die Föderalismusreform II, die das Finanzverhältnis zwischen Bund und Ländern neu gestaltet, durchgeführt worden.

<sup>3</sup> J. Ipsen, Die Kompetenzverteilung zwischen Bund und Ländern nach der Föderalismusnovelle, NJW 2006, S. 2801-2806.

<sup>4</sup> J. Ipsen, *ibid.*, S. 2803.

<sup>5</sup> Die niederländische Antillen wurden als selbstständiger Teil des Reiches aufgehoben.

Inseln Bonaire, Sint Eustatius und Saba Teil der Niederlande, wodurch – zum ersten Mal in der Geschichte der Niederlande – ein Teil der Niederlande selbst in der Karibik liegt.

Bei diesem wichtigen Unterschied gibt es auch Parallelen. In beiden Ländern ist die verfassungsmäßige Struktur nicht einfacher geworden. In Deutschland ist nicht nur die Regelung der Bundes- und Landeskompetenzverteilung komplizierter geworden, es besteht auch nicht länger ein eindeutiges Verhältnis zwischen Bundesrecht und davon abweichendem Landesrecht: Die Hauptregel aus Art. 31 GG gilt nicht mehr uneingeschränkt sondern wird beeinträchtigt durch Art. 72 Abs. 3 GG. Im Königreich der Niederlande führt die Vermehrung der Anzahl von Ländern von drei auf vier (die auch zum ersten Mal zumindest teilweise alle vier in der Karibik liegen) vermutlich zu einem Anwachsen von Streitigkeiten zwischen Reich und Ländern, sowie den Ländern untereinander, zu deren Lösung momentan noch keine vernünftige Regelung besteht. Auch die notwendige Zusammenarbeit der Länder, beispielsweise auf dem Gebiete der Rechtspflege, Staatsanwaltschaft, Polizei, Währung und dergleichen,<sup>6</sup> musste völlig neu gestaltet werden. Dafür wurde mehrfach eine Rechtsfigur genutzt die es seit 1954 gibt, welche aber bisher ziemlich unbekannt war: Das so genannte Konsens-Reichsgesetz, ein Gesetz des Reichsgesetzgebers zur Regelung von Landesangelegenheiten.

In diesem Beitrag wird untersucht, was im Verfassungsrecht des Königreiches tatsächlich mit dieser, auf den ersten Blick insbesondere aus föderaler Sicht, merkwürdigen Rechtsfigur gemeint ist, und in welcher Weise so eine Regelung zustandekommt. Das soll dem Zweck dienen, zu sehen, ob eine ähnliche Regelung, die es im deutschen Staatsrecht bisher nicht gibt, helfen könnte, die entstandenen Probleme nach der Föderalismusreform einigermaßen aufzufangen. Mit anderen Worten: Könnte ein *Bundeskonsensgesetz* eine Alternative zur Föderalismusreform darstellen und könnte in dieser Hinsicht die deutsche Bundesstaatlichkeit durch eine niederländischen Rechtsfigur bereichert werden?

In den nächsten Paragraphen wird zunächst beschrieben, wie die Verfassungsstruktur des Königreiches grundsätzlich aussieht; anschliessend wird besprochen wie im Rahmen dieser Verfassungsstruktur ein Reichsgesetz zustandekommt. Danach wird das davon abweichende Zustandekommen eines Konsens-Reichsgesetzes erörtert. Diese Abschnitte dienen auch dazu, dem (deutschen) Leser eine (kurze) Einführung in das Staatsrecht des Königreiches zu

---

<sup>6</sup> Das Land der niederländischen Antillen hatte immer eine einheitliche Rechtspflege und eine eigene gemeinsame Währung, den niederländisch-antillianischen Gulden. Nach dem Austreten Arubas 1986 erhielt die Insel ihre eigene Währung (den arubanischen Florin), aber keine eigene Gerichtsbarkeit: Die Rechtspflege wurde weiterhin gemeinsam mit den Antillen geregelt durch eine *Zusammenarbeitsregelung der niederländischen Antillen und Arubas*; hierzu später mehr. Die Gerichtsbarkeit wird nunmehr gemeinsam von Aruba, Curaçao, Sint Maarten und den Niederlanden (für Bonaire, Sint Eustatius und Saba) geregelt: Curaçao und Sint Maarten bekommen vermutlich 2014 auch eine eigene gemeinsame Währung, den karibischen Gulden. Dies und vieles mehr musste neu geregelt werden.

vermitteln, damit die Figur des Konsens-Reichsgesetzes im staatsrechtlichen System des Königreichs klarer dargestellt werden kann. Sie sind aus diesem Grunde auch etwas umfassender gestaltet, als es für die Analyse des eigentlichen Problems notwendig wäre. Abschließend wird untersucht, in welchen Fällen ein Bundeskonsensgesetz seinen praktischen Nutzen haben könnte und wie ein Bundeskonsensgesetzverfahren aussehen könnte.

## II. GRUNDSÄTZE DES VERFASSUNGSRECHTS IM KÖNIGREICH

Das Königreich der Niederlande ist ein Nachbarstaat Deutschlands im nordwestlichen Bereich des europäischen Festlandes. Es ist aber nicht nur ein europäischer Staat; das Königreich der Niederlande umfasst auch sechs Inseln in der Karibik. Diese sechs Inseln spalten sich in zwei Gruppen. Vor der Küste Venezuelas liegen die drei so genannten ABC-Inseln: Aruba, Bonaire und Curaçao, mit einer Gesamtfläche von etwa 950 km<sup>2</sup>. Mehr als 900 Kilometer nordöstlich, in der Nähe von Puerto Rico und Guadeloupe, liegen die drei so genannten S-Inseln: Sint Maarten, Sint Eustatius und Saba, mit einer Gesamtfläche von etwa 100 km<sup>2</sup>. Zusammen haben die sechs 'niederländischen' Inseln in der Karibik ungefähr 320.000 Einwohner.<sup>7</sup> Diese sechs Inseln sind die letzten Überbleibsel des ehemaligen niederländischen Kolonialimperiums, der Anfang des 17. Jahrhunderts entstanden ist und zu Beginn des 20. Jahrhunderts fast zwei Millionen Quadratkilometer umfasste. Die Dekolonialisierung der Nachkriegszeit ging auch an den Niederlanden nicht spurlos vorüber: Niederländisch-Indien wurde am 27. Dez. 1949 die Republik (der Vereinigten Staaten von) Indonesien, und Niederländisch-Neuguinea wurde 1963 an Indonesien übergeben. Die zwei Kolonien in der Karibik, die niederländischen Antillen<sup>8</sup> und Surinam begeherten keine Unabhängigkeit, sondern eine weitgehende und verfassungsrechtlich geschützte Autonomie. Nach langen Verhandlungen erreichte die niederländische Regierung im Sommer 1954 eine Einigung mit Surinam und den Antillen. Am 29. Dezember 1954 trat das *Statuut voor het Koninkrijk der Nederlanden* (Statut für das Königreich der Niederlande, St.KdN.) in Kraft. Obwohl Surinam am 22. Nov. 1975 eine unabhängige Republik wurde, ist das verfassungsrechtliche Band mit den Inseln in der Karibik bis heute bewahrt geblieben.<sup>9</sup> Auch hier haben Neuordnungen stattgefunden: Aruba ist am 01. Jan. 1986 aus den niederländischen Antillen ausgetreten und bildet seitdem einen selbstständigen Teil des Königreichs. Seit 2005 wird an der endgültigen Auflösung der niederländischen Antillen gearbeitet: Am 10. Okt. 2010 wurden die Antillen rechtlich aufgehoben und Curaçao und St. Maarten wurden selbstverwaltete Teile des Reiches, während Bonaire, St. Eustatius und Saba rechtlich Teil der Niederlande selbst wurden. Seit

---

<sup>7</sup> Die Niederlande in Europa haben eine Fläche von etwa 43.000 km<sup>2</sup> und eine Einwohnerzahl von über 16000000.

<sup>8</sup> Dieser Name wurde 1948 eingeführt. Zuvor war der offizielle Name des Überseegebietes *Curaçao en Onderhoorigheden* (Curaçao und seine unterworfenen Gebiete), in dem *Grondwet* kurz 'Curaçao' genannt.

<sup>9</sup> Die Dekolonisation in der Karibik wird umfassend beschrieben in G. Oostindie/I. Klinkers, *Knellende Koninkrijksbanden: Het Nederlandse dekolonisatiebeleid in de Caraïben*, drei Bände, Amsterdam: Amsterdam University Press, 2001.

dem 10. Okt. 2010 besteht das Königreich demnach aus vier Länder: Den Niederlanden (inkl. der Inseln Bonaire, Saba und Sint Eustatius), Aruba, Curaçao und Sint Maarten. Ihre rechtliche Bindung erhalten diese Länder durch das Statut.

Wie sieht nun dieses verfassungsrechtliche Kooperationsverhältnis grundsätzlich aus? Aus deutscher Sicht erscheint vieles vertraut. Das Statut fundiert nämlich eine bundesstaatsähnliche Verfassungsstruktur. Das Königreich hat vier Mitgliedstaaten, die offiziell *Landen* (Länder) heißen. Diese vier Länder haben das Königreich (oft auch einfach *Rijk* – Reich – genannt) mit eigenen Organen über sich. Die Organe des Reiches haben Befugnisse in Bereichen der Gesetzgebung und Verwaltung.<sup>10</sup> Die eigenen Gesetze des Königreichs werden *Rijkswetten* – Reichsgesetze – genannt. Organe des Reiches sind nur befugt zu handeln, wenn es sich um eine Reichsbefugnis – eine *Aangelegenheid van het Koninkrijk* – handelt. Die Reichsbefugnisse werden im Statut limitativ aufgezählt.<sup>11</sup> Was nicht aufgrund des Statuts eine Reichszuständigkeit ist, obliegt der Zuständigkeit der Länder (*Landsaangelegenheden*).<sup>12</sup> Die Reichsebene steht über der Landesebene. Ferner geht das Recht des Reiches dem Recht der Länder hierarchisch vor.<sup>13</sup>

Das Königreich ist dabei ein sehr merkwürdiger Bundesstaat. Obwohl man Ende der 40er Jahre zunächst der Überzeugung war, dass die Umstrukturierung des Reiches eine vollständige neue Verfassung erfordere, entschieden sich die drei Verhandlungspartner schon Mitte 1949 für eine rechtlich weniger invasive Lösung.<sup>14</sup> Dies hatte unterschiedliche Gründe: Von niederländischer Seite aus wuchs die Einsicht, dass eine völlig neue Verfassungsstruktur mit einer selbstständigen Reichsregierung, einem eigenen Reichsparlament (die *Rijksstaten*) und einem obersten Reichsgerichtshof (das *Rijkshof*), eine zu schwergewichtige Reichsstruktur ergäbe, wenn es faktisch eigentlich nur darum ging 350000 Surinamern und Antillianern<sup>15</sup> interne Autonomie und Mitbestimmungsrechte in Reichssachen einzuräumen. Surinam und die niederländischen Antillen fürchteten ihrerseits dass die Ausstattung der Reichsorgane eine zu starke Belastung ihrer eher spärlichen personellen und finanziellen Mittel sein würde, wenn sie zur gleichen Zeit auch ihre eigenen autonomen Staatsorgane errichten müssten. Man einigte sich also 1954 letztendlich auf eine neue Reichsstruktur, die so weit wie möglich die bestehende Verfassungsstruktur beibehalten sollte. Das Statut ist also eine Reichsverfassung-*light*. Es ersetzt nicht das *Grondwet* – die (niederländische)

---

<sup>10</sup> Es gibt auf der Reichsebene keine eigene Gerichtsbarkeit: die Gerichtsbarkeit ist ausschließlich Ländersache. Der *Hoge Raad der Nederlanden* hat aber als gemeinsames Organ der vier Länder Kassationsgerichtsbarkeit in Straf- und Zivilrechtssachen. Für die Niederlande ist der *Hoge Raad* auch höchster Steuergerichtshof, jedoch nicht für Aruba, Curaçao und Sint Maarten.

<sup>11</sup> Meistens in Art. 3 Abs. 1.

<sup>12</sup> Art. 41 Abs. 1 St.KdN. Diese Verteilung in Reichs- und Landesangelegenheiten ist absolut. Entweder ist eine Sache Reichs- oder Landessache. Geteilte oder konkurrierende Zuständigkeiten, wie in der Bundesrepublik, gibt es im Königreich nicht.

<sup>13</sup> Art. 48 St.KdN.

<sup>14</sup> Näheres dazu bei G. *Oostindie/I. Klinkers*, supra. fn. 9., 1. Band, S. 98-155.

<sup>15</sup> Gegenüber den damals schon fast 12 Millionen Niederländern.



Verfassung - die vor dem 29. Dez. 1954 die höchste Regelung des Königreichs war, sondern besagt in Art. 5 Abs. 1 Folgendes:

‘Het Koningschap met de troonopvolging, de in het Statuut genoemde organen van het Koninkrijk, de uitoefening van de koninklijke en wetgevende macht in aangelegenheden van het Koninkrijk worden voor zover het Statuut hierin niet voorziet geregeld in de Grondwet voor het Koninkrijk.’<sup>16</sup>

Mit anderen Worten: Obwohl das *Grondwet*, das vor der Einführung des Statuts als höchste verfassungsrechtliche Regelung des Reiches auch die Befugnisse der niederländischen Organe mit Bezug auf die Kolonien regelte, seitdem in erster Stelle ‘nur’ noch die Verfassung des Landes Niederlande geworden ist, enthält es noch immer Bestimmungen, welche für das Königreich als Ganzes gelten. Stärker noch: Grosse Teile der Reichsverfassung stehen noch immer im *Grondwet*, während das Statut eigentlich nur Ergänzungen und Korrekturen, die notwendig geworden sind damit die Länder in der Karibik Selbstverwaltung und Mitbestimmungsrechte geniessen können, enthält. Das *Grondwet* ist also seit der Einführung des Statuts eine mehrdeutige Regelung. Grosse Teile (wie die Grundrechte und die Regelung der Provinz- und Gemeindestruktur) gelten nur für die Niederlande selbst und bilden damit die niederländische Landesverfassung. Es gibt aber auch Teile - wie die Bestimmungen über die Thronfolge und die Königswürde, aber auch die Bestimmungen über Vertragsschließung und Genehmigung - die ein exklusiver Teil der Reichsverfassung sind. Es gibt sogar Bestimmungen - wie die Artikel über die Gesetzgebung - die Teil der niederländischen Landesverfassung *und* Teil der Reichsverfassung sind.<sup>17</sup>

Nach wie vor umfasst das *Grondwet* demnach teils die niederländische Verfassung und teils die Verfassung des Reiches. Aber dies ist nicht länger von sich aus der Fall, sondern aufgrund des Art. 5 Abs. 1. St.KdN. Auch gegenüber den Reichsbestimmungen des *Grondwets* ist das Statut gemäß Art. 5 Abs.2 St.KdN. die höhere Regelung: ‘De Grondwet neemt de bepalingen van het Statuut in acht’.<sup>18</sup> Wenn eine Reichs- oder amphibische Bestimmung des *Grondwets* geändert wird, muss der verfassungsändernde Gesetzgeber nicht nur die Prozedur der Verfassungsänderung (Art. 137 ff. *Grondwet*), sondern auch das Reichsgesetzgebungsverfahren beachten.<sup>19</sup> Konsequenz dessen ist, dass Bestimmungen einer einheitlichen Regelung eine unterschiedliche hierarchische Struktur haben: Die Reichsbestimmungen des *Grondwets* (inkl. der amphibischen Artikel) sind als Reichsrecht höher als die ‘reine’ Landesbestimmungen, aber nicht aus eigener Kraft, sondern aufgrund des Statuts. Die Reichsbestimmungen des *Grondwets* sind

---

<sup>16</sup> ‘Die Königswürde mit der Thronfolge, die in dem Statut erwähnten Organe des Königreichs, die Ausübung der königlichen und gesetzgebenden Gewalt in Angelegenheiten des Königreichs werden, sofern sie im Statut nicht geregelt werden, im *Grondwet* geregelt.’

<sup>17</sup> Solche Bestimmungen nennt man *amphibische* Verfassungsbestimmungen. Wenn der niederländische Gesetzgeber ein niederländisches Gesetz zustande bringt, gelten die Art. 81 bis 88 des *Grondwets*. Wenn der Reichsgesetzgeber ein Reichsgesetz zustande bringt, gelten diese Artikel auch, jedoch ergänzt von den Statutsbestimmungen der Art. 15 bis 21.

<sup>18</sup> ‘Das *Grondwet* berücksichtigt die Bestimmungen des Statuts.’

<sup>19</sup> Art. 5 Abs. 3 St.KdN.

aufgrund des Art. 5 Abs. 2 St.KdN. dem Statut unterworfen: Zusammen bilden sie die Verfassung des Königreiches.

Die zwar hierarchisch höhere Stelle, aber prinzipiell ergänzende Rolle des Statuts wird auch deutlich wenn man die Organe des Reiches betrachtet. Das Reich hat eigene Organe: Den König, die Reichsregierung, den Ministerrat des Königreiches, den Staatsrat des Königreiches sowie die Gouverneure der drei Westindischen Länder. Diese Organe des Reiches sind den Verfassungsorganen der Niederlande (noch immer) sehr ähnlich. So sagt Art. 42 Abs. 1 des *Grondwets* (eine Landesbestimmung): ‘De regering wordt gevormd door de Koning en de ministers.’<sup>20</sup> Obwohl das Statut darüber keine Bestimmung enthält, wird – wenn man die Artikel 2, 4 Abs. 1 und 7 St.KdN. in ihrer wechselzeitigen Beziehung und im Lichte der Verfassungsgeschichte betrachtet – aus guten Gründen angenommen, dass die Regierung des Reiches auch aus dem König und den (Reichs)Ministern besteht. Wer aber sind diese Reichsminister? Es sind die Mitglieder des Reichsministerrats. Welche sind die Mitglieder des Reichsministerrats?

‘De raad van ministers van het Koninkrijk is samengesteld uit de door de Koning benoemde ministers en de door de regering van Aruba, Curaçao onderscheidenlijk Sint Maarten benoemde Gevolmachtigde Minister.’<sup>21</sup>

Die Minister, die vom König ernannt werden, sind die niederländischen Landesminister. Alle Minister des Landes Niederlande sind also *qualitate qua* auch Minister des Reiches. Die Regierungen der drei übrigen Ländern ernennen je einen beauftragten Minister als Mitglied des Reichsministerrates – zusammen mit dem König bilden diese niederländischen und beauftragten Minister die Reichsregierung.<sup>22</sup> Bei dem Staatsrat des Reiches sieht man etwas Ähnliches. Art. 13 Abs. 1 St.KdN. sagt lapidar: ‘Er is een Raad van State van het Koninkrijk’.<sup>23</sup> Abs. 2 fügt hinzu:

‘Indien de regering van Aruba, Curaçao onderscheidenlijk Sint Maarten de wens daartoe te kennen geeft, benoemt de Koning voor Aruba, Curaçao onderscheidenlijk Sint Maarten in de Raad van State een lid, wiens benoeming geschiedt in overeenstemming met de Regering van het betrokken land. Zijn ontslag geschiedt na overleg met deze regering.’<sup>24</sup>

Es gibt also seit 1954 einen Staatsrat des Königreiches. Dieser hat potenziell die gleiche Zusammensetzung wie der Staatsrat der Niederlande: Nur wenn die Regierungen der westindischen Länder dazu den Wunsch äußern, können vom

<sup>20</sup> ‘Die Regierung setzt sich aus dem König und den Ministern zusammen.’

<sup>21</sup> ‘Der Ministerrat des Königsreichs besteht aus den vom Könige ernannten Ministern und den von der Regierung Arubas, Curaçaos, beziehungsweise Sint Maartens ernannten beauftragten Ministern.’

<sup>22</sup> Die drei beauftragten Minister sind tatsächlich beauftragt – jeder handelt nur im Auftrag der Landesregierung, die ihn ernannt hat (Art. 8 Abs. 1 St.KdN.).

<sup>23</sup> ‘Es gibt einen Staatsrat des Königreiches.’

<sup>24</sup> ‘Wenn die Regierung Arubas, Curaçaos, beziehungsweise Sint Maartens es wünscht, beruft der König ein Mitglied in den Staatsrat, wobei die Berufung in Übereinstimmung mit der Regierung des betreffenden Landes stattfindet. Seine Entlassung ereignet sich im Einvernehmen mit dieser Regierung.’

König Mitglieder aus diesen Ländern in den Staatsrat berufen werden. Bis 1987 ist dies nicht geschehen. Seitdem haben die niederländischen Antillen immer ein Mitglied im Staatsrat des Reiches gehabt. Aruba hat erst seit dem Jahre 2000 ein eigenes Mitglied im Staatsrat.<sup>25</sup> Der Gesetzgeber des Königreichs besteht aufgrund des Art. 4 Abs. 2 St.KdN. in Verbindung mit Art. 81 *Grondwet* gemeinsam aus Reichsregierung und (niederländischen) Staten-General. Die Staten-General – das niederländische Parlament – sind also auch der parlamentarische Teil des Reichsgesetzgebers. Obwohl die beauftragten Minister und die Parlamente der westindischen Länder gewisse Einspruchsrechte haben (worüber noch zu sprechen ist), gibt es keine formellen Vertreter Arubas, Curaçaos oder Sint Maartens mit Stimmrecht in den Staten-General, wenn es sich um ein Reichsgesetzgebungsverfahren handelt. Auch hier sieht man also, dass es eine Vormachtstellung der Niederlande auf der Reichsebene gibt. Die Organe des Reiches sind zwar formell nicht die Organe der Niederlande, sind aber den niederländischen Organe in Zusammensetzung und Vorgehen sehr ähnlich.

Im deutschen Staatsrecht garantiert Art. 28 GG, dass die Länder, obwohl sie selbstständig ihr eigenes Verfassungsrecht gestalten, eine gewisse Homogenität bewahren müssen: Sie sollen eine Verfassungsordnung errichten und erhalten die republikanisch, demokratisch und sozial-rechtsstaatlich im Sinne des Grundgesetzes ist. Das Statut erfordert eine ähnliche verfassungsmäßige Homogenität zwischen den Ländern des Königreiches. Art. 43 Abs. 1 St.KdN. besagt: ‘Elk der landen draagt zorg voor de verwezenlijking van de fundamentele menselijke rechten en vrijheden, de rechtszekerheid en de deugdelijkheid van bestuur.’<sup>26</sup> Art. 46 St.KdN. enthält daneben gewisse Minimum-Voraussetzungen für das Wahlsystem der Länder. Art. 28 Abs. 3 GG besagt: ‘Der Bund gewährleistet, dass die verfassungsmäßige Ordnung der Länder den Grundrechten und den Bestimmungen der Absätze 1 und 2 entspricht.’ Ähnlich besagt das Statut in Art. 43 Abs. 2: ‘Het waarborgen van deze rechten, vrijheden, rechtszekerheid en deugdelijkheid van bestuur is aangelegenheid van het Koninkrijk.’<sup>27</sup> Genauere Ausführungen findet Art. 43 Abs. 2 in den Art. 44, 45, 50 und 51 St.KdN. Art. 44 regelt, dass ein verfassungsänderndes Gesetz auf dem Gebiet der Grundrechte, der Befugnisse des Gouverneurs, der Befugnisse des Parlaments und auf dem Gebiet der Rechtspflege in den Ländern Aruba, Curaçao und Sint Maarten erst nach der Zustimmung der Reichsregierung in Kraft treten kann. Art. 50 besagt, dass die Reichsregierung die Befugnis hat, Gesetzgebung und Verwaltungsmaßnahmen in Aruba, Curaçao und Sint Maarten, die in Widerspruch zu höherem Recht stehen oder die Interessen des Reiches bedrohen, für nichtig zu erklären; Art. 51 betont, dass die Reichsregierung, sobald die Länder Aruba, Curaçao oder Sint Maarten ihrer Rechtspflicht nicht nachkommen, diese Aufgabe durch Reichsverordnung (*Algemene Maatregel van Rijksbestuur*) übernehmen kann. Die starke Identität

<sup>25</sup> Das antillianische Mitglied des Staatsrates ist am 10. Okt. 2010 der Staatsrat für Curaçao geworden: Auch für Sint Maarten ist inzwischen ein Staatsrat ernannt worden.

<sup>26</sup> ‘Jedes Land kümmert sich um die Erfüllung der grundlegenden Menschenrechte, die Rechtssicherheit und die Zuverlässigkeit der Verwaltung.’

<sup>27</sup> ‘Die Gewährleistung dieser Rechte, der Rechtssicherheit und der Zuverlässigkeit der Verwaltung ist eine Angelegenheit des Königreichs.’

zwischen Reichs- und niederländischen Verfassungsorganen macht es recht schwierig, eine dem deutschen System ähnliche Regelung für das Land Niederlande zu treffen. Art. 50 und Art. 51 Abs. 2 St.KdN. regeln beide, dass das *Grondwet* eine parallele Regelung für die Niederlande treffen kann falls diese nötig sei.<sup>28</sup> Art. 45 St.KdN. stellt ein Parallele zu Art. 44 dar: Ein verfassungsänderndes Gesetz der Niederlande auf dem Gebiet der Grundrechte, der Befugnisse der (niederländischen) Regierung, der Befugnisse des Parlaments und auf dem Gebiet der Rechtsprechung muss innerhalb des Reichsministerrats, also in Anwesenheit der drei beauftragten Minister, besprochen werden, obwohl es sich hierbei nicht unbedingt um Reichsbestimmungen des *Grondwets* handelt.

Die drei Länder der Karibik haben aber durch eine andere Bestimmung des Statuts gewisse Einspruchsrechte in der inneren Verfassungsstruktur der Niederlande selbst. Eine Änderung des Statuts findet nämlich durch Reichsgesetz statt; jedoch bestimmt Art. 55 Abs. 2 des Statut, dass der König ein derartiges Reichsgesetz zur Änderung des Statuts nur bekräftigen darf, wenn dieses Reichsgesetz zuerst in Aruba, Curaçao und Sint Maarten durch *Landsverordering* (Landesgesetz) genehmigt worden ist. Das Statut geht dem *Grondwet* vor: das *Grondwet* muss das Statut berücksichtigen. Und da aufgrund des Statuts große Teile des *Grondwets* Reichsverfassung sind, enthält das Statut viele Artikel, die das Bestehen gewisser Organe, wie zum Beispiel das der beiden Kammern der Staten-General, des Staatsrats oder der Regierung, schlicht voraussetzen. Eine Entscheidung, beispielsweise die Erste Kammer der Staten-General aufzuheben oder sogar den Namen des niederländischen Parlaments zu ändern, wäre nicht möglich, ohne zuvor das Statut geändert zu haben: Eine solche Statutsrevision könnte theoretisch von acht Mitgliedern des Sint Maarten'schen Parlaments verhindert werden.<sup>29</sup>

Bemerkenswert sind noch zwei Dinge. Für verfassungsrechtliche Konflikte zwischen Reich und Ländern oder zwischen zwei oder mehreren Ländern untereinander gibt es keine Verfassungsgerichtsbarkeit: Das Statut kennt für einen solchen Fall die Prozedur einer politischen Lösung innerhalb des Reichsministerrats, worüber im nächsten Teil Näheres erläutert wird. Dies wird sich möglicherweise ändern. Wegen der Umstrukturierung des Reiches ist das Statut 2010 geändert worden. Die Neufassung des Statuts enthält u.a. die neuen Art. 12a und 38a. Art. 12a besagt: 'Bij rijkswet worden voorzieningen getroffen voor de behandeling van bij rijkswet aangewezen geschillen tussen het Koninkrijk en de

---

<sup>28</sup> Eine derartige Regelung ist bis heute nicht zustande gekommen.

<sup>29</sup> Die *Staten* von St. Maarten haben 15 Mitglieder. Eine Statutsrevision gemäß Art. 55 Abs. 2 St.KdN. muss von den drei karibischen Parlamenten in zwei Lesungen (innerhalb eines Monats) genehmigt werden und benötigt dann in beiden Lesungen eine einfache Mehrheit. Wird das Reichsgesetz zur Änderung des Statuts von einem karibischen Parlament in der ersten Lesung durch eine Zweidrittelmehrheit genehmigt, dann gilt es schon nach erster Lesung als autorisiert. Lehnen also acht Mitglieder der *Staten* von Sint Maarten in der zweiten Lesung ein derartiges Reichsgesetz ab, kommt es nicht zustande. Folglich wird das Statut nicht geändert und das *Grondwet* kann auch nicht geändert werden: Die Erste Kammer muss beibehalten werden.

landen.<sup>30</sup> Art. 38a besagt: ‘De landen kunnen bij onderlinge regeling voorzieningen treffen voor de behandeling van onderlinge geschillen. Het tweede lid van artikel 38 is van toepassing.’<sup>31</sup> Es sind noch keine Ausführungsregelungen zu diesen beiden Neubestimmungen zustand gekommen oder vorgeschlagen worden, aber es ist nicht undenkbar, dass in gewissen Fällen eine Art Gerichtsbarkeit für Verfassungskonflikte zwischen Reich und Ländern und zwischen Ländern untereinander zustand kommen wird. Wer mit dieser Gerichtsbarkeit beauftragt werden soll – der Staatsrat, der *Hoge Raad*, oder ein völlig neues Organ – ist aber momentan noch völlig unklar.

Bemerkenswert ist auch der Status der Grundrechte auf Königreichsebene. Das *Grondwet* und alle drei *Staatsregelingen* enthalten jeweils umfassende Grundrechtskataloge. Die Grundrechte in den Verfassungen Arubas, Curaçaos und St. Maartens gelten selbstverständlich für die eigenen Landesorgane. Die Grundrechte des *Grondwets* haben aber auch nur Geltung als Teil der niederländischen Landesverfassung: Sie sind weder durch Reichsgesetz zustand gekommen, noch werden sie durch Reichsgesetz geändert. Auch werden sie in Art. 5 Abs. 1 St.KdN. nicht als Teile der Reichsverfassung erwähnt. Das Statut selbst enthält keine Grundrechte. Welchen (nationalen) Grundrechte sind nun Gesetzgebung und Verwaltung auf Reichsebene unterworfen? Eine klare Antwort gibt es nicht.<sup>32</sup>

Wenn man dazu noch bedenkt, dass es keinen eigenen Haushalt des Reiches gibt,<sup>33</sup> die Länder des Königreiches keine Wirtschafts-, Zoll- und Währungsunion bilden und dass Niederländer innerhalb des Reiches keine freie Ansiedlung in allen Ländern genießen, wird klar, dass es sich hier um eine zwar bundestaatsähnliche, aber doch einzigartige Regelung handelt, die seinesgleichen in der Welt sucht. Meist wird die Reichsstruktur (nicht sehr überraschend) einfach als eine Konstruktion *sui generis* definiert.

### III. OBLIGATORISCHE REICHSGESETZE

Wie oben bereits erwähnt, hat das Königreich eigene Befugnisse, die sogenannten *aangelegenheden van het Koninkrijk*. Viele sind es nicht. Das Reich hat aufgrund des Art. 3 Abs. 1 des Statuts gesetzgebende und verwaltende Befugnisse auf den Gebieten der auswärtigen Politik, der Verteidigung, der Nationalität, der Orden, der Fahne und des Wappens des Reiches, der Nationalität und Sicherheit von Seeschiffen (außer Segelschiffe) und der Auslieferung.<sup>34</sup> Auch die schon erwähnten

<sup>30</sup> ‘Durch Reichsgesetz werden für die Behandlung von durch Reichsgesetz angewiesenen Uneinigkeiten zwischen dem Königreich und den Ländern Maßnahmen getroffen.’

<sup>31</sup> ‘Die Länder können durch gegenseitige Regelungen für die Behandlung von gegenseitigen Uneinigkeiten Maßnahmen treffen. Der zweite Absatz von Art. 38 ist anwendbar.’

<sup>32</sup> Dies ist umso merkwürdiger, weil das Statut mehrere Bestimmungen enthält (beispielsweise Art. 34 und 43 Abs. 2) denen deutlich zu entnehmen ist, dass eine Bindung der Reichsorgane an Grundrechte ohne Weiteres beabsichtigt ist. Bis heute wurde in der niederländischen staatsrechtlichen Literatur dieser Unterlassung nur sehr wenig Aufmerksamkeit gewidmet.

<sup>33</sup> Die Kosten des Reiches werden von den vier Ländern gemeinsam getragen.

<sup>34</sup> Zwei bis heute niemals genutzte Befugnisse sind die Aufsicht über die allgemeinen Regeln der Länder über die Zulassung und Ausweisung von Niederländern innerhalb des Reiches

Befugnisse der Art. 44, 50 und 51 sind Reichsbefugnisse, jedoch nur verwaltender Art: Die Änderung des Statuts und die Änderung eines Reichsbestimmungs des *Grondwets* sind Reichsbefugnis - aber nur gesetzlicher Art. Wird eine Regelung zur Ausführung einer Reichsbefugnis ausgefertigt, so kann das in verschiedenen Formen geschehen: in der eines Reichsgesetzes, in der einer Reichsverordnung,<sup>35</sup> in der eines einfachen königlichen Beschlusses<sup>36</sup> und in der einer ministeriellen Reichsregelung.<sup>37</sup> Königliche Reichsbeschlüsse und ministerielle Reichsregelungen können nur zur Ausführung eines Reichsgesetzes oder einer Reichsverordnung erlassen werden. Reichsverordnungen können zur Ausführung eines Reichsgesetzes dienen, können aber gemäß Art. 14 abs. 2 St.KdN. auch ohne den Grundstein eines Reichsgesetzes erlassen werden.<sup>38</sup> Grundsatz des Statuts ist demnach, dass zur Regelung von Reichsbefugnissen auch Bestimmungen des Reiches dienen. Diese Regeln werden nach den Vorschriften des Statuts und des *Grondwets* von den Reichsorganen erlassen. Es gibt aber eine sehr wichtige Ausnahme. Art. 14 Abs. 3 St.KdN. besagt nämlich, dass eine Regelung zur Ausführung einer Reichsbefugnis, die nur in den Niederlanden selbst Geltung haben soll, nicht durch Reichsregelung, sondern durch einfache niederländische Regelung erfolgen darf.<sup>39</sup> Reichsgesetze kommen gemäß der Prozedur der Art. 81 bis 88 des *Grondwets* und Art. 15 bis 21 des Statuts zustande. Sie können ihren Ursprung in der Reichsregierung oder in der Zweiten Kammer der Staten-General haben. Initiiert die Reichsregierung einen Gesetzesentwurf, wird darüber zunächst innerhalb des Ministerrates diskutiert. Wenn es sich um eine rein niederländische Landesangelegenheit handelt, finden die Besprechungen auch im niederländischen Ministerrat statt. Handelt es sich um eine Regelung zur Ausführung einer Reichszuständigkeit, wird darüber im Reichsministerrat gesprochen. Es kann aber

---

und die Satzung von allgemeinen Bedingungen über die Zulassung und Ausweisung von Ausländern.

- <sup>35</sup> *Algemene Maatregel van Rijksbestuur*. AMvRB sind Verordnungen der Reichsregierung, über die der Staatsrat des Königreiches beraten hat und die im *Staatsblad* des Königreiches veröffentlicht worden sind. Sie sind die Reichsgegenstücke der niederländischen *Algemene Maatregelen van Bestuur*. AMv(R)B werden auch manchmal 'große Königliche Beschlüsse' genannt.
- <sup>36</sup> *Koninklijk Rijksbesluit*. Ein Königliches Reichsbeschluss ist ein Beschluss der Reichsregierung, sowie ein AMvRB, aber ohne Pflichtgutachten des Staatsrates. Königliche Reichsbeschlüsse bedürfen auch keiner Veröffentlichung im *Staatsblad*. Ein *Koninklijk Rijksbesluit* ist das Reichsgegenstück eines niederländischen *Koninklijk Besluites*. 'Einfache' Königliche Beschlüsse werden auch manchmal 'kleine Königliche Beschlüsse' genannt.
- <sup>37</sup> *Ministeriële Rijksregeling*. Eine ministerielle Reichsregelung ist eine Regelung eines Ministers zur Ausführung eines Reichsgesetzes oder einer Reichsverordnung. Sie ist das Reichsgegenstück der niederländischen *ministeriële regeling*.
- <sup>38</sup> Im niederländischen Recht ist das nur sehr begrenzt möglich. Art. 89 Abs. 2 des *Grondwets* regelt dies so, dass sogenannte *zelfstandige Algemene Maatregelen van Bestuur* (also ohne gesetzliche Genehmigung) nur dann möglich sind, wenn sie nicht durch Strafrecht gewahrt werden sollen. Diese Verfassungsbestimmung hat aber vermutlich keine Geltung auf Reichsebene.
- <sup>39</sup> Das ist aber umgekehrt nicht der Fall. Eine Regelung zur Ausführung einer Reichsbefugnis, die z.B. nur in Aruba gelten soll, darf nicht durch arubanische *Landsverordening* ausgefertigt werden, sondern muss in der Form eines Reichsgesetzes oder einer Reichsverordnung zustandekommen.

auch der Fall sein, dass nur die niederländischen Mitglieder des Reichsministerrats anwesend sind. Laut Art. 10 Abs. 1 St.KdN. dürfen die eauftragten Minister der Karibischen Länder nur dann im Reichsministerrat anwesend sein, wenn es sich um eine Angelegenheit des Reiches handelt, *die ihr Land betrifft*. Bei einem Reichsgesetzesentwurf wird dies der Fall sein: In anderen Fällen wäre die Regelung schließlich durch niederländisches Gesetz gegeben.

Gehen wir also davon aus, dass eine Gesetzesvorlage zur Regelung einer Reichszuständigkeit im Reichsministerrat diskutiert werden soll, die auch in Aruba, Curaçao und Sint Maarten gelten soll, so wird es sich um einen Reichsgesetzesentwurf handeln und die drei beauftragten Minister werden an den Beratungen teilnehmen. Den drei beauftragten Ministern stehen dabei meistens dreizehn oder vierzehn niederländische Minister gegenüber. Damit ist es für Letzere in der Regel sehr einfach die Beratung zu dominieren, da jeder Minister im Ministerrat, gemäß der Geschäftsordnung des (Reichs)Ministerrats eine Stimme hat.<sup>40</sup> Um dem vorzubeugen, enthält das Statut eine Anzahl spezifischer Befugnisse der beauftragten Minister. Art. 12 Abs. 1 St.KdN. nennt Folgende:

‘Indien de Gevolmachtigde Minister van Aruba, Curaçao of Sint Maarten, onder aanwijzing van de gronden waarop hij ernstige benadeling van zijn land verwacht, heeft verklaard, dat zijn land niet ware te binden aan een voorgenomen voorziening, houdende algemeen bindende regelen, kan de voorziening niet in dier voege dat zij in het betrokken land geldt worden vastgesteld, tenzij de verbondenheid van het land in het Koninkrijk zich daartegen verzet.’<sup>41</sup>

Diese Befugnis nennt man das *Lokalvetorecht*: Ein beauftragter Minister kann das Zustandekommen einer Regelung nicht verhindern; wohl aber die Geltung für sein Land. Es ist dabei aber kein absolutes Vetorecht: Wenn das Reich sich für die Bindung des Landes ausspricht, so erlangt die Regelung dennoch im Land Geltung. Wer entscheidet über diese Frage? Der Reichsministerrat *in pleno*. Kommt es also zu einer Abstimmung über diese Frage, dann kann der beauftragte Minister wiederum überstimmt werden. Deshalb enthält Art. 12 Abs. 2 des Statuts Folgendes:

‘Indien de Gevolmachtigde Minister van Aruba, Curaçao of Sint Maarten ernstig bezwaar heeft tegen het aanvankelijk oordeel van de raad van ministers

---

<sup>40</sup> Das gilt auch für den Minister-Präsident. Nur wenn sich eine Stimmengleichheit ergibt hat er die entscheidende Stimme. In der Praxis wird im Ministerrat eigentlich nie tatsächlich eine Abstimmung abgehalten: Normalerweise entscheidet der Ministerrat durch Konsens, unabhängig davon, ob es sich nun um den niederländischen oder den Reichsministerrat handelt.

<sup>41</sup> ‘Falls der beauftragte Minister von Aruba, Curaçao oder Sint Maarten, unter Verweis auf die Gründe, wegen derer er eine ernsthafte Benachteiligung seines Landes erwartet, erklärt hat, sein Land wäre nicht an eine gesetzliche Regelung zu binden, kann diese Regelung nicht in solcher Weise zustande kommen, dass sie auch in dem betreffenden Lande gilt, sofern nicht die Gebundenheit des Landes innerhalb des Königreiches sich dagegen wehrt.’



over de eis van gebondenheid, bedoeld in het eerste lid (...), wordt op zijn verzoek het overleg (...) voortgezet.<sup>42</sup>

Art 12 Abs. 3 verduidelicht:

‘Het hiervoren bedoeld overleg geschiedt tussen de minister-president, twee ministers, de Gevolmachtigde Minister en een door de betrokken regering aan te wijzen minister of bijzonder gemachtigde.’<sup>43</sup>

Die Beratungen werden also in einem Gremium fortgesetzt, in dem der beauftragte Minister zusammen mit einem Minister seiner eigenen Landesregierung zwei (niederländischen) Ministern gegenübersteht. Die Parität wird aber durchbrochen, weil der Minister-Präsident Vorsitzender der Beratungen ist. Er ist nur bedingt als neutraler Schlichter zu sehen, da er auch niederländischer Minister-Präsident ist. Das Verhältnis 14 (oder 13)-1 wandelt sich also in ein Verhältnis 3-2: Die niederländische Überlegenheit wird damit auch hier nicht wesentlich durchbrochen. Art. 12 Abs. 4 fügt noch hinzu:

‘Wensen meerdere Gevolmachtigde Ministers aan het voortgezette overleg deel te nemen, dan geschiedt dit overleg tussen deze Gevolmachtigde Ministers, een even groot aantal ministers en de minister-president (...).’<sup>44</sup>

Dies bedeutet, dass die beauftragten Minister von Curaçao und Sint Maarten an fortgesetzten Beratungen wegen eines Konfliktes zwischen Aruba und den Niederlanden über einer Reichsgesetzesvorlage teilnehmen können, auch wenn sie daran nicht direkt beteiligt sind. Wenn sie sich dafür entscheiden, hat Aruba immer noch das Recht, einen Landesminister oder Sonderbeauftragten in die Beratungen zu senden, aber dieser hat in dem Fall nur eine beratende Stimme, wohingegen die beauftragten Minister voll stimmberechtigt sind. Weil es nicht unbedingt so ist, dass die beauftragten Minister der karibischen Länder sich über alle Aspekte einig sind, wäre dies in diesem Beispiel also zumindest potentiell nachteilig für Aruba.<sup>45</sup>

Nicht nur während der Beratungen innerhalb des Reichsministerrates haben die drei karibischen Länder Einfluss auf das Zustandekommen eines Reichsgesetzes. Der Staatsrat des Königreichs, der (zumindest potenziell) drei Überseemitglieder hat, wird sich in seinem Gutachten zur Gesetzesvorlage natürlich auch den Interessen Arubas, Curaçaos und Sint Maartens widmen. Nach diesem Gutachten

---

<sup>42</sup> ‘Falls der beauftragte Minister von Aruba, Curaçao oder Sint Maarten ernsthafte Bedenken gegen das ursprüngliche Urteil des Ministerrates in Bezug auf die Gebundenheitsanforderung im Sinne des ersten Absatzes hat (...) werden auf sein Ersuchen die Beratungen (...) fortgesetzt.’

<sup>43</sup> ‘Die hier vorab erwähnten Beratungen finden zwischen dem Minister-Präsident, zwei Ministern, dem beauftragten Minister und einem von der betreffenden Regierung zu bestimmenden Minister oder Sonderbeauftragten statt.’

<sup>44</sup> ‘Wünschen mehrere beauftragte Minister an den fortgesetzten Beratungen teil zu nehmen, dann werden diese Beratungen zwischen diesen beauftragten Ministern eine ebenso große Anzahl von Ministern und dem Minister-Präsident abgehalten (...).’

<sup>45</sup> Weil die karibischen Länder wissen, dass sie auch während der fortgesetzten Beratungen immer noch majorisiert sind, wird diese Regelung nur sehr wenig genutzt: Bis heute erst drei oder vier Mal.



wird die Reichsgesetzesvorlage der Zweiten Kammer zugeleitet (Art. 83 *Grondwet*). Art. 15 St.KdN. fügt hinzu, dass die Vorlage gleichzeitig auch an die Parlamente von Aruba, Curaçao und Sint Maarten gesandt werden muss. Über jeden Gesetzesentwurf, also auch jeden Reichsgesetzesentwurf, wird durch die betroffene Kommission der Zweiten Kammer schriftlich beraten. Art. 16 St.KdN. regelt, dass das Parlament oder die Parlamente (die *Staten* also) des Landes oder der Länder, in der die vorgestellte Regelung Gültigkeit haben wird, auch seine oder ihre Position zur Vorlage schriftlich bekannt geben kann oder können. Die Reichsregierung wird normalerweise auf diese Fragen, Standpunkte oder Bemerkungen in derselben schriftlichen Reaktion antworten, in der sie auf die Fragen und Bemerkungen der Zweiten Kammer reagiert. Erst in den letzten Jahren haben die Parlamente der karibischen Länder begonnen, von der Möglichkeit Gebrauch zu machen, Reichsgesetze zu kommentieren.

Nach der schriftlichen Vorbereitung *in camera* findet die öffentliche Behandlung *in pleno* statt. Der beauftragte Minister, der innerhalb des Reichsministerrates möglicherweise schon versucht hat durch die Art.12-Prozedur die Geltung des Reichsgesetzes für sein Land zu verhindern, hat hier erneut die Möglichkeit, seinen Einfluss auszuüben. Er ist als Beauftragter seiner Landesregierung an die Homogenität des Regierungsstandpunktes nicht gebunden und kann demnach während der öffentlichen Behandlung der Gesetzesvorlage seine Meinung unabhängig von der der niederländischen Ministern äußern. Art. 17 Abs. 1 und 18 Abs. 1 St.KdN. regeln diese Befugnis eindeutig. Er kann im Namen seines Landes (oder zumindest seiner Landesregierung) die Zweite Kammer dazu aufrufen, den Entwurf abzulehnen oder anzupassen. Er kann gemäß Art. 17 Abs. 4 St.KdN. der Kammer auch selbst Änderungsanträge vorschlagen. Der beauftragte Minister handelt im Namen seiner Landesregierung. Deshalb besagt Art. 17 Abs. 2, dass auch die *Staten* des Landes oder der Länder, in denen die Regelung Geltung haben wird, Sonderbeauftragte (in der Regel Mitglieder des eigenen Parlamentes) in die öffentlichen Beratungen entsenden können. Diese können die Meinung des Landesparlaments (oder zumindest der Parlamentsopposition) kundgeben und dazu aufrufen, die Vorlage anzunehmen oder abzulehnen: Auch sie können der Zweiten Kammer aufgrund des Art. 17 Abs. 4 Änderungen vorschlagen. Art. 18 Abs 1 St.KdN. zweite Alt. regelt eine Sonderzuständigkeit des beauftragten Ministers. Er besagt:

‘Indien de Tweede Kamer nadat de Gevolmachtigde Minister zich tegen het voorstel heeft verklaard dit aanneemt met een geringere meerderheid dan drie vijfden van het aantal der uitgebrachte stemmen, wordt de behandeling geschorst en vindt nader overleg plaats in de raad van ministers.’<sup>46</sup>

Durch diese Befugnis kann der beauftragte Minister dafür sorgen, dass die Zweite Kammer die Gesetzesvorlage nicht (umgehend) an die Erste Kammer weiterleiten kann, wenn er (und seine Landesregierung) gegen das Gesetz ist und nicht eine

---

<sup>46</sup> ‘Falls die Zweite Kammer, nachdem der beauftragte Minister sich gegen die Vorlage ausgesprochen hat, diese mit einer Mehrheit kleiner als drei Fünftel der Anzahl der abgegebenen Stimmen genehmigt, wird die Behandlung suspendiert und es finden innerhalb des Ministerrates nähere Beratungen statt.’

sehr große Mehrheit der Zweiten Kammer dafür gestimmt hat. Während der näheren Beratungen innerhalb des Reichsministerrates kann er erneut versuchen, eine Nichtgeltung des Gesetzes für sein Land zu erwirken oder seine Kollegen davon zu überzeugen, den Entwurf zurückzunehmen.<sup>47</sup> Er kann dazu auch erneut die Prozedur von Art. 12 St.KdN. verwenden. Haben die *Staten* seines Landes eigene Sonderbeauftragte in die Behandlung gesandt, so kommt diese Befugnis nur einem dieser dazu angewiesenen Beauftragten zu, und nicht (länger) auch dem beauftragten Minister. Wird eine Gesetzesvorlage von der Zweiten Kammer mit einer Mehrheit von mehr als drei Fünftel genehmigt, oder führen die näheren Beratungen innerhalb des Reichsministerrates nicht zur Zurücknahme der Vorlage, so wird diese von der Zweiten Kammer an die Erste Kammer weitergeleitet. Hat sich der Reichsministerrat in der Zwischenzeit dazu entschieden, dass das Gesetz nicht für das Land des sich widersetzenden beauftragten Ministers eingeführt werden soll (hat z.B. der beauftragte Minister sich in einer Art. 12-Prozedur durchsetzen können), dann kann die Zweite Kammer das Gesetz an die Erste Kammer weiterleiten. Es steht dann fest, dass das Gesetz im Lande des beauftragten Ministers nicht eingeführt werden kann. Die *Staten-General* können daran – in diesem speziellen Fall – nichts mehr ändern. Es ist die einzige Situation im niederländischen Staatsrecht, in der das Parlament in seiner Entscheidung über ein Gesetz einhaltlich durch die Regierung gebunden wird.

Auch in der Ersten Kammer kann der beauftragte Minister 'jegliche Erläuterung geben, die seiner Meinung nach wünschenswert ist'; dasselbe gilt für die eventuellen Sonderbeauftragten. Eine Zuständigkeit wie in Art. 18 Abs. 1 zweite Alt. St.KdN. gibt es während der Behandlung in der Ersten Kammer jedoch nicht mehr. Weder der beauftragte Minister noch die Sonderbeauftragten der *Staten* haben das Recht, an den *Abstimmungen* über die Gesetzesvorlagen teilzunehmen; nur die Mitglieder der Zweiten und Ersten Kammer haben diese Befugnis.

Zusammenfassend kann also gesagt werden, dass den Regierungen (durch ihre beauftragten Minister innerhalb der Reichsregierung) und den Parlamenten der karibischen Länder (durch den schriftlichen Einspruch und die Möglichkeit, Sonderbeauftragte zu bestellen) ein gewisser Einfluss bei dem Zustandekommen von Reichsgesetzen eingeräumt wird; jedoch ist dieser Einfluss nicht sehr groß, geschweige denn entscheidend. Die niederländische Dominanz ist im Gesetzgebungsverfahren des Reiches somit spürbar. Dennoch muss man bedenken, dass die Anzahl der Reichsgesetze minimal ist, da das Königreich nur sehr eingeschränkte Befugnisse hat, wie zuvor schon beschrieben. Eine *wesentliche* Beschränkung der gesetzlichen Autonomie Arubas, Curaçaos oder Sint Maartens ist dies eigentlich nicht: Die Mehrheit der gesetzlichen Regelungen, die in Aruba, Curaçao und Sint Maarten in Kraft sind, sind eigene Landesgesetze, die von den eigenen Landesorganen gemäß den Vorschriften der eigenen Landesverfassung (*Staatsregelung*) zustandegebracht werden.

---

<sup>47</sup> Aufgrund des Art. 86 Abs. 1 *Grundwet* kann die Regierung eine von ihr initiierte Gesetzesvorlage zurücknehmen bis die Erste Kammer die Gesetzesvorlage verabschiedet hat.

## IV. KONSENS-REICHSGESETZE

Es ist in Bundesstaaten nicht unüblich, dass (meistens in der Bundesverfassung) eine Regelung über die Art und Weise, in der die Länder gemeinsame Regelungen über eigene Landesbefugnisse treffen können, besteht. Ein gutes Beispiel dafür ist Art. 15a Abs. 2 des österreichischen Bundesverfassungsgesetzes, durch den die Länder befugt sind, untereinander Vereinbarungen zu schließen, auf die die Grundsätze des völkerrechtlichen Vertragsrechtes anzuwenden sind, sofern nicht die Länder selbst dies durch Verfassungsgesetze anders bestimmt haben. Solche Vereinbarungen werden in Österreich meist *Gliedstaatverträge* genannt. Im deutschen Staatsrecht wird die Befugnis eines Landes, mit einem anderen Land oder mehreren anderen Ländern der Bundesrepublik eine gemeinsame Regelung zu treffen, seit der Reichsgründung als eine selbstverständliche Befugnis angesehen.<sup>48</sup> Dies ist stark mit ihrer Staatlichkeit verbunden und daher nicht näher im Verfassungsrecht des Bundes geregelt. Sie können mit solchen Regelungen entweder nur die Verwaltung eines Landes binden (*Verwaltungsabkommen*) oder alle Staatsorgane oder sogar, durch die Schöpfung allgemein verbindlicher Vorschriften, die Bürger eines Landes (*Staatsverträge*). In den meisten Landesverfassungen gibt es Bestimmungen über die Vertragszuständigkeit: Sie ist normalerweise dem Ministerpräsident<sup>49</sup> oder der Regierung<sup>50</sup> anvertraut. Verträge bedürfen zu ihrer Gültigkeit meistens der Zustimmung des Landtages.<sup>51</sup> Handelt es sich um einen Vertrag mit allgemein-verbindlichen Bestimmungen, die die Bürger des Landes betreffen, so ist ein Landesgesetz zur Umsetzung des Vertrags notwendig.<sup>52</sup>

Auch innerhalb der verfassungsmäßigen Ordnung des niederländischen Königreichs gibt es die Möglichkeit der Zusammenarbeit zweier oder mehrerer Länder. Art. 38 Abs 1 St.KdN. regelt: 'Nederland, Aruba, Curaçao en Sint Maarten kunnen onderlinge regelingen treffen'.<sup>53</sup> Art. 38 Abs. 1 wird meist als eine deklaratorische Regelung gesehen: Die Befugnis der Länder, solche Regelungen untereinander zu treffen, ist als solche selbstverständlich.<sup>54</sup> Sehr viel bemerkenswerter ist aber Abs. 2

---

<sup>48</sup> '(...) Der Verfassungsgeber von 1871 hielt es (...) so wenig wie der von 1919 oder 1949 für notwendig, das Zwischenländerrecht zu regeln. Er ging vielmehr ganz unreflektiert davon aus, daß insoweit die bislang bewährten Vorschriften weitergelten würden. Anders ist die auch für das geltende Verfassungsrecht eigentümliche Gleichgültigkeit gegenüber dem Zwischenländerrecht nicht zu erklären', G. Kisker, Kooperation im Bundesstaat: Eine Untersuchung zum kooperativen Föderalismus in der Bundesrepublik Deutschland, Tübingen: Mohr-Siebeck, 1971, S. 53.

<sup>49</sup> Z.B. Art. 91 Abs. 1 der Brandenburgischen Verfassung.

<sup>50</sup> Z.B. Art. 57 der Verfassung des Landes Nordrhein-Westfalen.

<sup>51</sup> Z.B. Art. 72 Abs. 2 der Bayerischen Verfassung; nicht in allen Landesverfassungen ist aufgenommen, dass der Landtag seine Zustimmung zu allen Staatsverträgen geben muss. So beschränkt die Niedersächsische Verfassung das Zustimmungrecht des Landtages z.B. auf Verträge 'die sich auf Gegenstände der Gesetzgebung beziehen' (Art. 35 Abs. 2 NVerf.).

<sup>52</sup> H. Schneider, Verträge zwischen Gliedstaaten im Bundesstaat, Veröffentlichungen der Vereinigung der Deutschen Staatsrechtler 19, 1961, S. 14.

<sup>53</sup> 'Die Niederlande, Aruba, Curaçao und Sint Maarten können gemeinsame Regelungen zustandebringen.'

<sup>54</sup> W.H. Van Helsdingen, Het Statuut voor het Koninkrijk der Nederlanden: Wordingsgeschiedenis, commentaar en praktijk, Den Haag: Ars Aequi Libri, 1957, S. 467.

des Artikels, in dem es heißt: ‘In onderling overleg kan worden bepaald, dat zodanige regeling en de wijziging daarvan bij rijkswet of algemene maatregel van rijksbestuur wordt vastgesteld’.<sup>55</sup> Mit anderen Worten: Die Länder können sich dafür entscheiden, dem Reichsgesetzgeber oder der Reichsregierung die Zuständigkeit zu übertragen, eine gemeinsame Regelung zur Bestimmung einer Materie, die zu den Landesangelegenheiten zählt, zu verabschieden. Solche Reichsregelungen nennt man *Konsens-Reichsgesetze* oder *Verordnungen*, weil sie nur zustandekommen können, wenn es dazu einen Konsens zwischen den Ländern gibt. Art. 38 Abs. 3 fügt noch hinzu, dass die Länder auf dem Gebiet des Straf- oder Privatrechts auch gemeinsame Regelungen durch Vermittlung der Reichsorgane zustandebringen (lassen) können; aber nur durch den Reichsgesetzgeber (also nicht durch Verordnung der Reichsregierung) und nur ‘indien omtrent deze regelen overeenstemming tussen de regeringen der betrokken landen bestaat’.<sup>56</sup>

Die Möglichkeit per Reichsgesetz für zwei oder mehr Länder eine einheitliche Regelung auf dem Gebiet der Landesangelegenheiten zustande zu bringen, wurde im Statut für Situationen aufgenommen, in denen zwei oder mehr Länder eine einheitliche Regelung allgemeinverbindlicher Art zustande bringen wollen. Eine Regelung aufgrund von Art. 38 Abs. 1 St.KdN. wird normalerweise nicht von den Parlamenten der betroffenen Länder verabschiedet. Das bedeutet, dass diese Regelungen auch nicht die Befugnisse des Landesgesetzgebers berühren können.<sup>57</sup> Eine Regelung durch Reichsgesetz (also aufgrund des Art. 38 Abs. 2 oder 3) ermöglicht jedoch nicht nur, per *Gesetz* einheitliche Regelungen treffen zu können, sondern sorgt auch dafür, dass keine separate Genehmigung durch die Parlamente und eine Transformierung der Regelung auf Landesebene (durch Landesgesetz) notwendig sind. Ein Reichsgesetz hat schließlich ‘automatisch’ Geltung innerhalb der Rechtsordnung der Länder; und zwar als höhere stehende Regelung. In den ersten Jahren nach dem Zustandekommen des Statuts wurde oft

---

<sup>55</sup> ‘In gegenseitiger Beratung kann beschlossen werden, dass eine solche Regelung und deren Änderung durch Reichsgesetz oder Reichsverordnung bestimmt wird’.

<sup>56</sup> ‘(w)enn und insoweit über diese Regelungen zwischen den Regierungen der betroffenen Ländern Übereinstimmung besteht’.

<sup>57</sup> C. Boman, *Het statuut voor het Koninkrijk*, Dewenter: Kluwer, 3. Auflage, 2012, S. 183; nicht immer wurden Regelungen gesetzlicher Art nur durch Reichsgesetz oder durch Verordnung der Reichsregierung erlassen. Die niederländischen Antillen und Aruba haben durch eine Regelung *sui generis* aufgrund des Art. 38 Abs. 1 St.KdN. Ende 1985 eine *Samenwerkingsregeling Nederlandse Antillen en Aruba* (‘Zusammenarbeitsregelung der niederländischen Antillen und Arubas’) erlassen. Diese *Samenwerkingsregeling* diente der notwendigen Zusammenarbeit zwischen Aruba und den niederländischen Antillen nachdem Aruba ausgetreten war. Sie regelte z.B. das Weiterexistieren der gemeinsamen Gerichtsbarkeit und Gerichtsverwaltung. Sie schuf eigene Organe und kannte eine eigene Prozedur für das Zustandekommen gemeinsamer gesetzlicher Regelungen, den *Eenvormige Landsverordeningen* (‘Gleichförmige Landesverordnungen’). Die *Samenwerkingsregeling* hatte eine hierarchische Stellung oberhalb der eigenen Landesverfassungen der niederländischen Antillen und Arubas; *Eenvormige Landsverordeningen* waren höher als die Landesgesetze. Um dies zu ermöglichen, wurde die *Samenwerkingsregeling* in beiden Ländern durch verfassungsänderndes Gesetz genehmigt und außerdem von der Reichsregierung separat gebilligt. Sie hat ihre Geltung am 10. Okt. 2010 verloren.

behauptet, dass es nicht ohne Bedeutung wäre, dass Abs. 2 nur davon spricht, dass die Länder sich über eine Regelung durch Reichsgesetz oder Verordnung einig sein müssen, weil in Abs. 3 davon die Rede ist, dass es zwischen den Regierungen der betroffenen Länder auch eine *materielle* Übereinstimmung geben muss. Das soll bedeuten – so z.B. Van Helsdingen – dass nur bei Regelungen strafrechtlicher oder privatrechtlicher Art der Inhalt der Regelung auf Konsens beruhen muss, weil in allen anderen Fällen ein normales Reichsgesetz zustandekommen kann (wobei die karibischen Länder majorisiert werden können) und es nur notwendig ist, dass alle betroffenen Länder sich zu dieser Alternative bekannt haben.<sup>58</sup> Die Konsequenz dessen wäre, dass eine Regelung, die von einem (karibischen) Land in völliger Selbstbestimmung ausgefertigt werden kann, plötzlich völlig seiner Autonomie entzogen wäre, wenn dieses Land aufgrund des Art. 38 Abs. 2 St.KdN. zustimmen würde, dem Reichsgesetzgeber oder der Reichsregierung die Zuständigkeit zu deren Ausfertigung zu übertragen. Das brachte Van Helsdingen dazu, zu glauben, dass solche Regelungen aufgrund von Art. 38 Abs. 2 St.KdN. eher selten sein würden: Er glaubt auch, dass sie sich wahrscheinlich auf rein technische Angelegenheiten beschränken würden.<sup>59</sup> Die Wirklichkeit sieht anders aus. Schon in den 60er Jahren wurde durch Konsens-Reichsgesetz eine Steuerregelung für das Königreich (*Belastingregeling voor het Koninkrijk, BRK*) zustandegebracht,<sup>60</sup> die seitdem mehrfach geändert worden ist. Dieses Reichsgesetz – obwohl nicht auf dem Gebiet des Privat- oder Strafrechts – beruhte dennoch inhaltlich auf dem Konsens zwischen den Ländern. Diese Praxis wurde bei anderen Reichsgesetzen aufgrund des Art. 38 St.KdN. aufrecht erhalten. Bemerkenswert ist inzwischen, dass es keine offizielle Prozedur im Statut gibt, um festzustellen, zwischen wem und worüber Konsens erreicht werden soll oder erreicht worden ist. In der Lehre ist in den letzten Jahren eine Art Konsens (*sic*) entstanden, der bei den letzten Konsens-Reichsgesetzen auch mehr oder weniger befolgt worden ist.<sup>61</sup> Das Zustandekommen eines Konsens-Reichsgesetzes beruht nach dieser Praxis auf einem dauernden Konsens zwischen – zumindest – den Regierungen der betroffenen Länder. Das bedeutet wiederum, dass die Prozedur des Art. 12 St.KdN. so nicht befolgt werden kann: Ist eine Regelung nach Auffassung des beauftragten Ministers von (z.B.) Curaçao in der vorgeschlagenen Fassung unerwünscht, so bedeutet dies, dass die Regelung für Curaçao nicht verbindlich werden kann. Wird eine Regelung während der parlamentarischen Behandlung in einer Weise von der Zweiten Kammer verändert, die für den beauftragten Minister nicht annehmbar ist, so gilt auch das als ein Durchbruch des Konsenses, der dazu führt, dass die Regelung nicht für das betreffende Land in Kraft treten kann. Es liegt gewissermaßen auf der Hand, dass die Parlamente der karibischen Länder auch eine Stimme bezüglich des Zustandekommens eines Konsens-Reichsgesetzes

---

<sup>58</sup> *Van Helsdingen*, supra fn. 55, S. 469.

<sup>59</sup> *Ibid.*

<sup>60</sup> Rijkswet van 28 okt. 1964, houdende een Belastingregeling voor het Koninkrijk, Stb. 1964, S. 425.

<sup>61</sup> Hierzu ausführlicher: *C. Bonnan*, *ibid.*, S. 186–188; *W. van der Woude/P.P.T. Bovend'Eert*, *Regelgeving in het Koninkrijk, in het bijzonder de consensus-Rijkswet*, in: H.R.B.M. Kummeling/J. Saleh (eds), *Nieuwe verhoudingen in het Koninkrijk der Nederlanden*, Utrecht: Disciplinarygroep voor Staats- en Bestuursrecht, 2007, S. 175–195.

haben, zumal wenn es sich um eine Regelung handelt, die (wenn sie als Landesregelung zustandegekommen wäre), aufgrund des Verfassungsrechts des betroffenen Landes, nur per Gesetz zustandekommen könnte. Dass bedeutet, dass die *Staten* Arubas, Curaçaos oder St. Maartens, wenn sie sich dazu entscheiden, Sonderbeauftragte in die parlamentarischen Beratungen zu senden, sich durch diese Sonderbeauftragten nebst dem beauftragten Minister zu dem Gesetzesentwurf äußern können. Sprechen sich die Sonderbeauftragten mehrheitlich gegen die Regelung aus, so bedeutet dies, dass sie nicht in dieser Fassung und für diesen Geltungsbereich zustandekommen kann.

Die meisten Konsens-Reichsgesetze enthalten auch eine Möglichkeit, die Regelung für das eigene Land zu kündigen. Auch das entspricht gewissermassen der Logik. Ein Land kann gemäß seiner eigenen Verfassung immer eine eigene gesetzliche Regelung aufheben. Lehre und Praxis sind sich bis heute dennoch nicht einig über die Frage, ob diese Möglichkeit einer Kündigung auch dann besteht, wenn ein Konsens-Reichsgesetz keine entsprechende Regelung enthält.

## V. KONSENS-BUNDESGESETZE: EINE MÖGLICHKEIT FÜR DIE BUNDESREPUBLIK?

Durch die Föderalismusreform 2006 hat sich das bundesstaatliche Verhältnis zwischen Bund und Ländern in der Bundesrepublik Deutschland zwar nicht grundsätzlich, aber doch erheblich geändert. Die Länder haben durch die Änderung des Grundgesetzes<sup>62</sup> gewisse neue gesetzgebende Befugnisse bekommen. Zu diesem Zweck wurde die bestehende Befugnis zur Rahmengesetzgebung des Bundes (Art. 75 GG) und gewisse Teile der konkurrierenden Gesetzgebung gestrichen (wodurch diese Befugnisse gemäß Art. 70 Abs. 1 GG in den Gesetzgebungsbereich der Länder zurückfielen)<sup>63</sup> und die Länder haben ein beschränktes Recht zu abweichenden Gesetzgebungszuständigkeiten erhalten.<sup>64</sup> In zwei Bereichen hat die neue Kompetenzverteilung zwischen Bund und Ländern zu deutlichen Komplikationen geführt. Das Streichen der Möglichkeit einer Rahmengesetzgebung hat dazu geführt, dass es in den Bereichen, in denen diese Zuständigkeit existierte (so z.B. das Hochschulwesen), keine Möglichkeit mehr gibt, den Ländern eine einheitliche 'Grundregelung' aufzuerlegen, innerhalb derer Grenzen sie bei dem Erlassen eigener Gesetzen verbleiben müssen; was daher

---

<sup>62</sup> Gesetz zur Änderung des Grundgesetzes vom 28.8. 2006 (BGBl I 2034).

<sup>63</sup> Es handelt sich dabei um die folgenden Bereiche: Strafvollzug und Untersuchungshaftvollzug; Versammlungsrecht; Heimrecht; Ladenschuss, Gaststätten, Spielhallen, Personenschaustellungen, Messen, Ausstellungen und Märkte; Flurbereinigungsrecht; Landwirtschaftlicher Grundstücksverkehr und landwirtschaftliches Pachtwesen, Siedlungs- und Heimstättewesen; Teile des Wohnungswesens; Schutz von verhaltensbezogenen Lärm; und Teile des Beamtenrechts.

<sup>64</sup> Es handelt sich dabei gemäß Art. 72 Abs. 3 GG um eine abweichende Gesetzgebungszuständigkeit in folgenden Bereichen: Jagdwesen (ohne das Recht der Jagdscheine); Naturschutz und Landschaftspflege (unter gewissen Einschränkungen); Bodenverteilung; Raumordnung; Wasserhaushalt (unter gewissen Einschränkungen); und Hochschulzulassung und Hochschulabschlüsse.

(zumindest potenziell) die Gleichheit der Gesetzgebung in Deutschland gefährdet.<sup>65</sup> Verkomplizierend ist aber auch die neue Länderbefugnis des Art. 72 Abs. 3 GG. Diese neue Verfassungsbestimmung durchbricht nicht nur die Hauptregel, dass Bundesgesetzgebung aufgrund des Art. 74 GG eine Sperrwirkung entfaltet; sondern sie besagt, dass auch die Landesgesetzgebung auf einem Gebiete des Art. 72 Abs. 3 GG eben gerade keine Sperrwirkung hat. Bund und Länder sind und bleiben also beide zur Regelung der Materie vollkommen befugt. Das führt dazu, dass die Hauptregel des Art. 31 GG durchbrochen wird. Auf dem Gebiete des Art. 72 Abs. 3 GG bricht Bundesrecht das Landesrecht nicht, sondern es gilt das jeweils neuere Gesetz. Es gibt hier also in dem Verhältnis von Bundesrecht zu Landesrecht keinen Geltungsvorrang des Bundesrechts, aber auch keinen Geltungsvorrang des Landesrechts. Es gibt nur einen Anwendungsvorrang des jeweils jüngeren Gesetzes. Das könnte dazu führen, dass Bund und Länder beide versuchen, die Regelung des anderen Hoheitsbereiches durch eine neue Regelung zu umgehen, was eine Art 'Pingpong-Gesetzgebung' zur Folge hätte. Dass so etwas auch aufgrund der Rechtssicherheit nicht sehr wünschenswert ist, ergibt sich dabei gewissermaßen von selbst.<sup>66</sup> Es gibt auch weitere Probleme. So ist z.B. unklar, wie sich die nicht in Art. 72 Abs. 2 GG erwähnten konkurrierenden Gesetzgebungskompetenzen zur Abweichungsmöglichkeit des Abs. 3 verhalten.<sup>67</sup> Obwohl die Möglichkeit von 'Bundeskonsensgesetzen' vielleicht auch in dem Bereich der Länderverträge gewisse Vorteile haben könnte (man bräuchte dann nicht mehr die Notwendigkeit einer separaten parlamentarischen Genehmigung des Vertrags und einer Transformation in Landesrecht, um den Vertrag auch innerhalb der eigenen Rechtsordnung des Landes anwenden zu können) könnten sich möglicherweise speziell in den beiden oben erwähnten Bereichen Bundeskonsensgesetze lohnen. Wie oben erwähnt ist das vielleicht größte Problem des Entfallens der Rahmengesetzgebungskompetenz die Möglichkeit, einer aus der Sicht des Gleichheitssatzes von Art. 3 GG problematischen ungleichen Behandlung in den verschiedenen Bundesländern. Sie ist gewissermaßen durch die Föderalismusreform 'einprogrammiert': Art. 70 i.V.m. Art. 72 Abs. 3 GG n.F. führen nunmehr zu einer größeren innerstaatlichen Ausdifferenzierung in Deutschland. Ein Bundeskonsensgesetz auf einem Gebiete, in dem die Länder die gesetzliche Selbstständigkeit besitzen, könnte einerseits der Selbstständigkeit der Länder Rechnung tragen (denn der Bundesgesetzgeber handelt

---

<sup>65</sup> Hierzu näher *L. Knopp*, Föderalismusreform: zurück zur Kleinstaaterei?: An den Beispielen des Hochschul-, Bildungs- und Beamtenrechts, 25 Neue Zeitschrift für Verwaltungsrecht 2006 S. 1209-1216.

<sup>66</sup> *H. Wilms*, Staatsrecht I. Staatsorganisationsrecht unter Berücksichtigung der Föderalismusreform, Stuttgart: Kohlhammer, 2007, S. 301.

<sup>67</sup> In Art. 72 Abs. 2 GG werden die Bestandteile der konkurrierenden Gesetzgebungskompetenz erwähnt, die unter die 'Erforderlichkeitsbedingung' fallen: der Bund darf nur gesetzgeberisch tätig werden, wenn und soweit 'die Herstellung gleichwertiger Lebensverhältnisse im Bundesgebiet oder die Wahrung der Rechts- oder Wirtschaftseinheit im gesamtstaatlichen Interesse eine bundesgesetzliche Regelung erforderlich machen.' Das bedeutet, dass der Bund in den anderen, hier nicht erwähnten Bereichen des Art. 74 GG, auch ohne diese Bedingungen gesetzgebungskompetent ist, oder anders gesagt, dass dort eine unwiderlegliche Vermutung der Erforderlichkeit vorliegt. Wie sich dies zur Abweichungskompetenz gemäß Abs. 3 verhält, ist unklar; siehe hierzu ausführlicher *C. Franzius*, Die Abweichungsgesetzgebung, Neue Zeitschrift für Verwaltungsrecht 2008, S. 492 ff.



nur im Namen der Länder und mit deren Genehmigung) und würde andererseits auch eine einheitliche Regelung für das ganze Bundesgebiet darstellen (wenn alle Länder sich an dem Gesetz beteiligen) – oder zumindest für eine bestimmte Anzahl von Ländern. Weil ein Bundeskonsensgesetz ein Bundesgesetz wäre, brauchte man auch nicht die merkwürdige Abweichung von Art. 31 GG durch Art. 73 Abs. 3 GG: ein Bundesgesetz basierend auf Länderkonsens ist hierarchisch höher als landesrechtliche Regelungen und bricht deswegen auch entgegenstehendes Landesrecht, regelt aber inhaltlich Länderbefugnisse und kann nur unter der Bewilligung eines jeden Landes, das an das Gesetz zu binden wäre, zustandegebracht werden.

Wie könnte ein Bundeskonsensgesetzgebungsverfahren aussehen? Zuerst ist es nochmals wichtig zu betonen, dass es sich hierbei um ein Gesetzgebungsverfahren handeln würde, in dem ein Organ des Bundes ein Bundesgesetz zur Regelung einer Materie zustande bringt, die nach dem Grundgesetz nicht zu den Befugnissen des Bundes gehört. Der Bund kann in diesem Falle also nur befugt handeln, weil und soweit die Länder den Bund befugt haben. Ohne Länderermächtigung könnte der Bund hier nichts tun.<sup>68</sup> So wie im niederländischen Staatsrecht, müsste auch im deutschen Staatsrecht eine Regelung zur Ermöglichung einer solchen Ermächtigung zustande gebracht werden. Klar ist, dass der Schwerpunkt des Verfahrens nicht bei dem Bundestag, sondern bei dem Bundesrat liegen sollte. Interessant wäre zu bedenken, dass es in diesem Gesetzgebungsverfahren nicht unbedingt notwendig wäre, dass alle Länder sich im Bundesrat am Entscheidungsprozess beteiligen. Sollten z.B. die Länder Bayern, Baden-Württemberg, Thüringen und Sachsen eine gemeinsame Regelung durch Bundeskonsensgesetz zustandebringen wollen, dann ist es durchaus denkbar, dass der Bundesrat dies nur durch die Mitwirkung der Mitglieder eben dieser Länder beschließt. Es ist vorstellbar dass der Bundesrat auch in diesem Falle durch Mehrheit der abgegebenen Stimmen beschließt; ein Land wäre aber nur an ein Bundeskonsensgesetz gebunden, wenn seine eigenen Repräsentanten im Bundesrat dem Entwurf zugestimmt hätten. Art. 51 Abs. 3 GG könnte für dieses Verfahren beibehalten bleiben. Weil es sich hier oft um Zuständigkeiten handelt, die nach Landesverfassungsrecht zu den Befugnissen des Gesetzgebers gehören, wäre es für die Länder empfehlenswert, in der eigenen Verfassung festzulegen, dass die Vertreter des eigenen Landes im Bundesrat, in diesem Falle an Weisungen des Landtages gebunden wären. Dadurch wäre gewährleistet, dass im Bundesrat nicht ohne Ermächtigung vom eigenen Landesgesetzgeber gehandelt wird. Schon die Wahrung des Legalitätsprinzips des Art. 20 Abs. 3 GG erfordert eine solche Regelung. Es liegt auf der Hand, dass Gesetzesvorlagen zu Bundeskonsensgesetzen durch den Bundesrat selbst eingebracht werden können. Vielleicht wäre es zusätzlich denkbar, dass auch der

---

<sup>68</sup> Die ganze Pointe des Konsensreichsgesetzgebungsverfahrens liegt gerade darin, dass der Reichsgesetzgeber nur durch Ermächtigung der Länder handeln kann. Das ist natürlich eine Durchbrechung der verfassungsmäßigen Trennung von Reichs- und Landesebenen, aber eine solche Durchbrechung ist gerade beabsichtigt. Diese beabsichtigte Durchbrechung ist in der föderalen Ordnung des Königreiches, mit seiner strengen Trennung von Reichs- und Landesangelegenheiten, eigentlich wesentlich 'radikaler' als sie im kooperativen Föderalismusystem des Grundgesetzes wäre.



Bundesregierung ein solches Recht zugestanden wird, z.B. in dem Sinne, dass die Länder, die sich an einem Bundeskonsensgesetz beteiligen wollen, die Bundesregierung ermächtigen, eine Gesetzesvorlage beim Bundesrat einzubringen. Ein Gesetzesvorlagerecht des Bundestages i.S. des Art. 76 Abs. 1 GG wäre in diesem Verfahren wohl nicht gut vorstellbar. Normalerweise werden Gesetzesvorlagen der Bundesregierung zuerst dem Bundesrat zugeleitet. Das wäre auch hier logisch. In Abweichung von Art. 76 Abs. 2 GG liegt es auf der Hand, dass der Bundesrat nicht nur Stellung zur Gesetzesvorlage nimmt, sondern auch einen eigenen Beschluss fasst – nach dem oben erwähnten Verfahren. Das wäre auch der Fall, wenn der Bundesrat selbst die Gesetzesvorlage eingebracht hat. Es müsste zuerst selbst ein Beschluss gefasst werden, und erst danach wäre die Gesetzesvorlage beim Bundestag einzubringen. Bundeskonsensgesetze würden also nicht im Sinne des Art. 77 Abs. 1 GG vom Bundestag beschlossen. Vielleicht wäre sogar eine formelle Umkehrung des Art. 77 Abs. 3 GG denkbar. Der Bundestag hätte dann die Möglichkeit, beim Bundesrat Einspruch einzulegen. Um die Selbstständigkeit der Länder in dieser Prozedur zu sichern, wäre dann vielleicht festzulegen, dass dieser Einspruch vom Bundesrat zumindest durch eine einfache Mehrheit in Abweichung von Art. 77 Abs. 4 GG zurückgewiesen werden könnte. Die Möglichkeit der Änderung einer Gesetzesvorlage durch den Bundestag wäre im Bundeskonsensgesetzverfahren denkbar: Streitigkeiten wären demzufolge im Vermittlungsausschuss gemäß Art. 77 Abs. 2 GG zu lösen. Ein Bundeskonsensgesetz käme also zustande, wenn der Bundesrat einem Gesetz zustimmt (es sei denn, dass nur die Länder, deren Vertreter im Bundesrat das Gesetz genehmigt haben, dem Gesetz unterworfen werden) und der Bundestag keinen Einspruch einlegt, den Einspruch zurücknimmt oder der Einspruch vom Bundesrat überstimmt wird. Nach Art. 82 Abs. 1 GG könnte das zustandegekommene Gesetz vom Bundespräsident ausgefertigt und im Bundesgesetzblatt verkündet werden. Es wäre nicht notwendig, dass die Ausfertigung eines Bundeskonsensgesetzes von einem oder mehreren Bundesministern gegengezeichnet werden müsste. Die Bundesregierung trüge in diesem Falle schließlich keine eigene Verantwortung, weil das Gesetz inhaltlich Sache der Länder wäre. Eine Gegenzeichnung durch Minister der beteiligten Länder wäre dagegen durchaus vorstellbar. Das ganze Verfahren müsste im Grundgesetz festgelegt werden. Dafür eignen sich am besten zwei neue Artikel 77a und 78a, in der die hier skizzierte Prozedur näher ausgearbeitet werden sollte. Sie wäre dann als eine Abweichung vom normalen Bundesgesetzgebungsverfahren zu konzipieren.

## VI. SCHLUSSFOLGERUNGEN

Die Bundesrepublik Deutschland und das Königreich der Niederlande haben in den letzten Jahren wichtige verfassungsrechtliche Veränderungen erfahren. Für die Bundesrepublik war die Föderalismusreform 2006 wahrscheinlich die wichtigste Erneuerung des Grundgesetzes seit 1949; für das Königreich ist die Aufhebung der niederländischen Antillen zum Oktober 2010 die wichtigste Modifikation seit der Unabhängigkeit Surinams 1975.

Die Änderungen in der Staatsstruktur beider Länder sind sich nicht ähnlich. Die Einteilung der Bundesrepublik in 16 Ländern änderte sich nicht. Umgekehrt führte

die Aufhebung der niederländischen Antillen und das Entstehen zweier neuer Länder (Curaçao und Sint Maarten) nicht zu einer grundsätzlichen Umordnung der bestehenden verfassungsmäßigen Strukturen. Und doch gibt es Parallelen. In beiden Staaten hat die Umstrukturierung zu einer Verkomplizierung der Verhältnisse geführt. In den Niederlanden insofern, als dass das Königreich, das seit 1954 immer drei oder sogar (zwischen 1975 und 1986) nur zwei Länder umfasste, jetzt zum ersten Mal vier Länder umfasst, unter denen die Niederlande selbst in Europa *und* in der Karibik liegen; in Deutschland insofern, als dass die Neuverteilung der gesetzgebenden Kompetenzen zwischen Bund und Ländern dazu führt, dass es eine größere Ungleichheit innerhalb des Bundesgebietes geben könnte und das Verhältnis von Bundes- und Landesrecht komplexer geworden ist.

In diesem Artikel wurde überprüft, ob eine, auch im niederländischen Staatsrecht exotische Rechtsfigur – das Konsens-Reichsgesetz – für das deutsche Staatsrecht eine angemessene Figur sein könnte, um die Probleme der Föderalismusreform auszuräumen. Es ist interessant festzustellen, dass gerade bei der Umstrukturierung des Königreichs in den letzten Jahren das Konsens-Reichsgesetz eine bemerkenswerte *Renaissance* erfahren hat. Da Konsens-Reichsgesetze sogar im niederländischen Verfassungsrecht nicht sehr bekannt sind, und ausserdem aufgrund ihrer außergewöhnlichen Struktur schwer zu verstehen sind, wenn einem das Verfassungsrecht des Reiches unbekannt ist, wurde zuerst eine Skizze vom Verfassungsrecht des Königreiches gegeben. Danach wurde das normale Verfahren des Zustandekommens eines Reichsgesetzes dargelegt, mit speziellem Bezug auf den Einfluss der Karibischen Länder. Es konnte dort festgestellt werden, dass dieser Einfluss nicht ohne Bedeutung, aber doch letztendlich, auch nicht wesentlich ist.

Das ist aber bei einem sogenannten Konsens-Reichsgesetz deutlich anders – wie sich im IV. Teil herausgestellt hat. Hierbei handelt es sich um eine einzigartige Möglichkeit im niederländischen Verfassungsrecht. In einem Konsens-Reichsgesetz kann der Reichsgesetzgeber – also der Gesetzgeber des Königreichs – eine Materie regeln, die nicht eine Reichsangelegenheit, sondern Landessache ist. Das ermöglicht es, eine einheitliche Regelung für zwei, drei oder sogar alle Länder zu treffen, die den hierarchischen Status eines Reichsgesetzes hat (also höher ist als die Landesgesetze und sogar höher als die Landesverfassungen), aber deren Inhalt abhängig ist von einem Konsens zwischen den Ländern. Eine derartige Regelung könnte auch in Deutschland von Vorteil sein. Sie wäre nicht nur eine möglicherweise attraktive Alternative zu Gliedstaatsverträgen (speziell in Bezug auf die Umsetzung in die Rechtsordnung der Länder), sondern sie könnte auch auf anderen Gebieten von Vorteil sein. Weil ein Bundeskonsensgesetz ein Bundesgesetz ist, wäre nicht nur die einheitliche Anwendung im Bundesgebiet gesichert (oder doch zumindest in den Ländern, die das Gesetz wollen). Es würde zugleich eine komplizierte Regelung wie die des Art. 72 Abs. 3 GG überflüssig machen. Es würde sich ja zweifelsohne um Bundesrecht handeln, so dass Art. 31 GG einfach Anwendung fände. Und doch wäre die gesetzliche Autonomie der Länder völlig gesichert, weil das Gesetz nur durch Konsens zwischen den beteiligten Ländern zustande kommen könnte. In diesem Sinne wäre die Einführung eines Bundeskonsensgesetzgebungsverfahrens im Grundgesetz wofür

ein Grundriss gegeben wurde ein schönes Beispiel der Befruchtung des deutschen Staatsrechts durch das niederländische Staatsrecht.



# L'EMPRISE DE LA CONVENTION EUROPEENNE DES DROITS DE L'HOMME SUR LA JURISPRUDENCE ET LA LEGISLATION FRANÇAISES DANS LE DOMAINE DE LA LIBERTE D'EXPRESSION

Diane de Bellescize\*

Depuis le milieu des années 90, la compatibilité des textes nationaux avec l'article 10 de la Convention – texte de base en matière de liberté d'expression– est à peu près systématiquement invoquée devant les juridictions françaises dès lors que la liberté d'expression est en cause. La Convention Européenne des droits de l'homme (CEDH) s'impose en effet en vertu des dispositions de l'article 55 de la Constitution, puisque la France l'a ratifiée, tardivement il est vrai, en 1974.

L'affirmation de la liberté d'expression et de communication figure dans l'article 10 de la Convention européenne des droits de l'homme, dont le premier paragraphe: proclame le droit à la liberté d'expression, et le second admet certaines limitations à cette liberté. Cet article dispose: Art. 10 sec. 1 'Toute personne a droit à la liberté d'expression. Ce droit comprend la liberté d'opinion et la liberté de recevoir ou de communiquer des informations ou des idées sans qu'il puisse y avoir ingérence d'autorités publiques et sans considération de frontière. Le présent article n'empêche pas les États de soumettre les entreprises de radiodiffusion, de cinéma ou de télévision à un régime d'autorisations.

Sec. 2 'L'exercice de ces libertés comportant des devoirs et des responsabilités peut être soumis à certaines formalités, conditions, restrictions ou sanctions prévues par la loi qui constituent des mesures nécessaires dans une société démocratique, à la sécurité nationale, à l'intégrité territoriale ou à la sûreté publique, à la défense de l'ordre et à la prévention du crime, à la protection de la santé ou de la morale, à la protection de la réputation ou des droits d'autrui, pour empêcher la divulgation d'informations confidentielles ou pour garantir l'autorité et l'impartialité du pouvoir judiciaire.'

La Convention fait prévaloir le principe de la liberté sur les restrictions; elle lui reconnaît néanmoins des limites et s'inscrit de ce fait dans le sillage direct de l'article 11 de la Déclaration des Droits de l'Homme et du Citoyen, auquel renvoie le préambule de la Constitution du 4 octobre 1958:

'La libre communication des pensées et des opinions est un des droits les plus précieux de l'homme; tout citoyen peut donc parler, écrire, imprimer librement, sauf à répondre de l'abus de cette liberté dans les cas déterminés par la loi'.

---

\* Professeur de droit, Université du Havre.

Le juge français, lorsqu'il exerce un contrôle de conventionnalité, doit discerner l'usage de la liberté de ses abus. Eux seuls peuvent être sanctionnés.

Il n'est pas sans intérêt de souligner que l'article 11 de la Charte des droits fondamentaux de l'Union européenne, mise en annexe du Traité de Lisbonne entré en vigueur depuis le 1<sup>er</sup> décembre 2009, reproduit mot pour mot le paragraphe 1 de l'article 10 de la Convention, amputé de sa dernière phrase (Le présent article...); mais son paragraphe 2 est en revanche extrêmement bref: 'La liberté des médias et leur pluralisme sont respectés'. Il s'agit là d'une conception absolue de la liberté d'expression, sans mention de restrictions ou de limitations, qui ne s'inscrit pas dans la tradition française. Cette différence entre les deux textes pourrait soulever des problèmes, les juges de Strasbourg et ceux de Luxembourg appréciant différemment la liberté d'expression. Quid si des interprétations divergentes des mêmes droits reconnus aux citoyens européens se font jour? Le risque n'est pas négligeable.

Lorsqu'elle est saisie d'une requête fondée sur l'article 10, la Cour européenne examine dans un premier temps si la condamnation litigieuse s'analyse en une 'ingérence d'autorités publiques' dans l'exercice par les intéressés de leur liberté d'expression ; si c'est le cas, elle examine dans un second temps la justification de l'ingérence.<sup>1</sup>

A cet effet, elle procède à une méthode d'analyse en trois temps, en exposant tour à tour les arguments des parties- les requérants et le Gouvernement français- puis sa propre appréciation:

- (1) L'ingérence est-elle prévue par la loi? La loi étant entendue dans son acception matérielle et non formelle, au sens large (le droit écrit et la jurisprudence qui l'interprète), et si oui, la loi est-elle accessible et prévisible (exigence d'une jurisprudence constante, nette, abondante et amplement commentée). C'est la question de la légalité.
- (2) L'ingérence vise-t-elle un but légitime? C'est la question de la légitimité.
- (3) L'ingérence est-elle nécessaire dans une société démocratique? C'est la question de la nécessité.

La première condition, celle de la légalité des restrictions à la liberté d'expression, ne pose en général pas problème; l'ingérence est pratiquement toujours prévue par la loi.

La seconde condition, la légitimité du but poursuivi, est rarement la cause d'une condamnation. Dans la plupart des affaires concernant la France, la Cour a conclu

---

<sup>1</sup> Concrètement, une 'ingérence' se traduit en général par la condamnation par les juridictions d'un Etat d'une ou plusieurs personnes –ou sociétés– dans le domaine de la liberté d'expression.

que l'ingérence litigieuse poursuivait bien l'un au moins des buts légitimes énoncés au second paragraphe de l'article 10. Dans de nombreux cas, il s'agissait de la protection de la réputation et des droits d'autrui, au sens large du terme.

En revanche, c'est sur la troisième condition – la nécessité de l'ingérence dans une société démocratique, l'adjectif nécessaire impliquant 'un besoin social impérieux' – que portent la plupart des condamnations de la Cour, en l'occurrence, toutes les condamnations de la France. En général, la Cour commence par rappeler les principes fondamentaux qui se dégagent de sa jurisprudence: la liberté d'expression constitue l'un des fondements essentiels d'une société démocratique, l'une des conditions primordiales de son progrès; sous réserve du § 2 de l'article 10, elle vaut non seulement pour les 'informations' ou 'idées' accueillies avec faveur ou considérées comme inoffensives ou indifférentes, mais aussi pour celles qui heurtent, choquent ou inquiètent; ainsi le veulent le pluralisme, la tolérance et l'esprit d'ouverture sans lesquels il n'est pas de 'société démocratique'<sup>2</sup>.

La Cour statue ensuite sur le point de savoir si une restriction prévue par l'article 10 de la Convention se concilie avec la liberté d'expression, en particulier si l'ingérence est proportionnelle au but poursuivi. L'analyse de la proportionnalité de l'ingérence la conduit fréquemment à faire prévaloir la liberté de la presse sur les droits d'autrui.

Concernant la France, depuis 1995, date du premier arrêt, 25 arrêts ont été rendus en application de l'article 10 de la CEDH. La France a été condamnée à 13 reprises, c'est-à-dire dans la moitié des cas.

Comment réagissent les juges français devant les arrêts de la Cour européenne, et dans quelle mesure le législateur accepte-t-il de mettre le droit français en conformité avec sa jurisprudence?

## I. L'ATTITUDE DES JURIDICTIONS FRANÇAIS FACE A L'ARTICLE 10 DE LA CONVENTION EUROPEENNE DES DROITS DE L'HOMME

Si la Convention est d'application directe, les arrêts de la Cour européenne n'ont pas d'influence directe sur la jurisprudence ou la législation françaises, en théorie du moins. Dans la réalité, un arrêt d'incompatibilité avec l'article 10 de la Convention ne manquera pas d'être invoqué ultérieurement par l'une des parties à un procès, et la résistance du juge français risque d'être sanctionnée par une nouvelle condamnation de la France. En tout état de cause, si un article de loi déclaré incompatible subsiste dans le droit positif, il finira par tomber en désuétude. Les juridictions nationales ne peuvent donc plus faire fi des décisions des juges de Strasbourg.

Avant d'illustrer ce propos par quelques exemples concrets, deux séries

---

<sup>2</sup> CEDH, *Handyside c/ Royaume-Uni*, 7 déc. 1976.

d'observations préalables sont nécessaires. Première observation: notons que ce sont avant tout les juridictions judiciaires qui sont concernées, plus rarement les juridictions administratives – Et d'autre part, que la plupart des procès ont lieu devant les juridictions parisiennes: les procès de presse (pris au sens large du terme), se plaignent pour plus de 80% à Paris. Selon l'adage bien connu, 'c'est la publication qui fait l'infraction', le choix reste en effet ouvert aux requérants. La création en 1999 à Paris de la Chambre de Presse n'a fait que renforcer cette tendance.

Deuxième observation: au sein des juridictions judiciaires, on observe une nette ligne de démarcation selon le degré de juridiction.

Le Tribunal de Grande Instance de Paris – en l'occurrence la XVII<sup>e</sup> chambre correctionnelle- Chambre de Presse depuis 1999- fait en général preuve d'une attitude d'avant-garde; elle anticipe les condamnations éventuelles de la Cour et reconnaît sans que celle-ci l'y ait invitée, l'incompatibilité de tel ou tel texte avec l'article 10, ce qui la conduit souvent à relaxer les journalistes poursuivis. Dans l'affaire Colombani évoqué ci-dessous, la Cour européenne a même été jusqu'à fonder son raisonnement sur le jugement de la XVII<sup>e</sup> correctionnelle du 25 avril 2001 (affaire Deby et Bongo) dont elle citait de très larges extraits dans son arrêt de condamnation, donc sur une décision qui n'était pas définitive, ce qui peut sembler pour le moins surprenant.

Au contraire, la Cour d'appel de Paris (11<sup>ème</sup> chambre, spécialiste en matière de presse) fait régulièrement preuve d'une allergie plus ou moins prononcée à l'égard de la Convention et infirme fréquemment les jugements de la 17<sup>ème</sup> chambre correctionnelle. De même, résiste-t-elle après les condamnations de la France.

Quant aux deux Cours suprêmes, la Cour de cassation (chambre criminelle ou deuxième chambre civile) comme le Conseil d'État, elles ont longtemps résisté, refusant de reconnaître l'incompatibilité d'un texte français avec l'article 10 de la Convention, quitte à attendre que le législateur intervienne/ Deux tournants marquent un début de revirement de jurisprudence : En 2001, la Cour de cassation s'incline (arrêt *X.Gouyou-Beauchamps et autres* du 16 janvier 2001) après la condamnation de la France le 3 octobre 2000 (arrêt *Du Roy et Malaurie*), et le Conseil d'Etat fait de même deux ans plus tard avec l'arrêt *GISTI* du 7 février 2003 (régime des publications étrangères).

Quelle que soit l'attitude des juges français- résistance ou soumission – ils ont, au fil des années, progressivement intégré et adopté les méthodes d'analyse des juges de Strasbourg lorsqu'ils sont confrontés à une demande de contrôle dit de conventionnalité.

Quatre exemples symptomatiques permettront d'apprécier l'attitude des juges français. Trois concernent l'application de la loi sur la liberté de la presse du 29 juillet 1881, notre monument historique (1), et l'un le secret des sources (2)



1. LA LOI 1881 CONFRONTÉE A UN CONTRÔLE DE CONVENTIONALITÉ
- a) L'APOLOGIE DE CRIMES DE GUERRE: LES ARRÊTS LEHIDEUX ET ISORNI, DU 22 SEPTEMBRE 1998 ; ET ORBAN ET AUTRES C/ FRANCE DU 15 AVRIL 2009

La France est condamnée à deux reprises sur des questions concernant son Histoire.

- aa) L'AFFAIRE LEHIDEUX ET ISORNI

Dans l'affaire Lehideux et Isorni, elle est condamnée pour avoir retenu le délit d'apologie de crimes de guerre ou de crimes et délits de collaboration avec l'ennemi prévu par l'article 24 alinéa 5 de la loi de 1881, contre Marie-François Lehideux, Président de l'Association pour défendre la mémoire du maréchal Pétain, et Jacques Isorni, Président de l'Association nationale Pétain-Verdun. Le premier, ancien ministre du Gouvernement Pétain, et le second, avocat commis d'office à la défense du maréchal Pétain devant la Haute Cour de Justice, entendaient réhabiliter la mémoire du Maréchal Pétain et obtenir la révision de sa condamnation. Ils avaient fait publier, en pleine page du quotidien *Le Monde* daté du 13 juillet 1984, un encart publicitaire portant en gros caractères le titre: «*Français, vous avez la mémoire courte*»; le texte rappelait, par assertions successives, les principales étapes de la vie publique de Philippe Pétain de 1916 à 1945 en valorisant ses actions comme chef de l'Etat français pendant l'occupation et se terminait par une invitation à écrire aux deux associations.

Alors que le Tribunal de grande instance de Paris (17<sup>ème</sup> chambre corr.) relaxait les prévenus par jugement du 27 juin 1986, au motif que le délit n'était pas constitué, la Cour d'appel de Paris, par un arrêt du 26 janvier 1990, considérait que les éléments constitutifs de l'infraction d'apologie de crimes ou délits de collaboration étaient réunis et les condamnait ; elle retenait l'absence de distance et de critique du texte par rapport à certains agissements de Philippe Pétain, observant que ses auteurs avaient valorisé la politique de Montoire présentée comme 'suprêmement habile', et accrédité la thèse du double jeu, qu'il s'agissait là d'une éloge sans réserve de la politique de collaboration ; la chambre criminelle de la Cour de cassation, dans son arrêt du 16 novembre 1993, confirmait la qualification d'apologie de crimes.

La Cour européenne juge disproportionnée, et dès lors non nécessaire dans une société démocratique, la condamnation pénale subie par les requérants (Lehideux et Isorni); même s'il ne fait aucun doute que la justification d'une politique nazie ne saurait bénéficier de la protection de l'article 10, elle relève qu'en l'espèce, les requérants se sont explicitement démarqués des atrocités et des persécutions nazies; ils ont moins fait l'éloge d'une politique que celle d'un homme, dans un but dont la Cour d'appel a reconnu la légitimité: la révision de la condamnation du Maréchal Pétain. Mais l'élément capital de son raisonnement réside dans la prise en compte du facteur temps:

‘Le recul du temps entraîne qu’il ne conviendrait pas, 40 ans après, d’appliquer aux propos tenus par les requérants, ‘la même sévérité que dix ou vingt auparavant’[...] cela participe des efforts que tout pays est appelé à fournir pour débattre ouvertement et sereinement de sa propre histoire’.

Cet arrêt, rendu par la Grande Chambre de l’ancienne Cour, a été l’un des plus controversés, comme l’atteste le décompte des votes (15voix c/6). Deux observations critiques peuvent être émises: d’une part, la liberté d’expression peut-elle être jugée à l’aune d’un encart publicitaire; un texte de nature publicitaire, où figure notamment une section intitulée:

‘Français, vous avez la mémoire courte - si vous avez oublié...- Que l’accusation utilisa, avec les plus hautes complicités, un faux, comme dans l’affaire Dreyfus, pour obtenir sa condamnation’.

C’est-il réellement susceptible d’alimenter un ‘débat historique d’intérêt général’? D’autre part, la prise en compte de l’ancienneté des événements comme facteur d’atténuation des responsabilités et d’ouverture sur un débat historique serein ne constitue-t-elle pas de la part de la Cour un empiètement sur la marge d’appréciation des juges français, mieux à même de juger une période aussi sensible de l’histoire de France?

#### bb) L’AFFAIRE AUSSARRESSES (AFFAIRE ORBAN ET AUTRES)

La seconde affaire, qui vaut une condamnation de la France par la Cour Européenne le 15 avril 2010, concerne un livre écrit par le général Aussarresses, publié aux éditions Perrin, intitulé *Services Spéciaux Algérie 1955-1957*, qui relate son expérience d’officier pendant la guerre d’Algérie et évoque longuement la question de l’utilisation de la torture par l’armée française en Algérie. Des extraits parurent le jour de sa publication dans le journal *Le Monde*. Un premier tirage à 25.000 exemplaires environ fut suivi de plusieurs réimpressions. Le 13 juin 2001, le procureur de la République de Paris fit citer le PDG et le Directeur général des éditions Perrin et le général Aussarresses devant le tribunal correctionnel de Paris pour y répondre du délit d’apologie de crimes de guerre (article 24 de la loi du 29 juillet 1881 sur la liberté de la presse) quant au PDG des éditions Perrin, et de complicité de ce délit s’agissant du Directeur général et de l’auteur. Par un *jugement du 25 janvier 2002*, le tribunal de Grande Instance déclara les prévenus coupables. Il condamna les deux premiers requérants à des amendes de 15000 euros (‘EUR’), le général Aussarresses à une amende de 7500EUR, La société des Editions Plon fut quant à elle déclarée civilement responsable. La cour d’appel de Paris, par un arrêt du 25 avril 2003, confirma le jugement. Le 7 décembre 2004, la Cour de cassation rejeta le pourvoi formé par les requérants et le général Aussarresses. Elle jugea tout d’abord que l’article 24, alinéa 3, de la loi du 29 juillet 1881 s’applique à l’apologie de la torture ou des exécutions sommaires pratiquées à l’occasion d’un conflit armé, telle la guerre d’Algérie.

Sur la question de l’apologie, la Cour européenne estime que la conclusion de la cour d’appel selon laquelle l’objectif de l’auteur aurait été de persuader le lecteur de la légitimité, de l’inévitabilité de la torture et des exécutions sommaires pratiquées

durant la guerre d'Algérie, n'est pas décisive pour l'appréciation des faits litigieux au regard de l'article 10 de la Convention. La Cour s'appuie sur deux arguments qui lui sont chers : premièrement, il s'agit d'un débat d'intérêt général : l'ouvrage litigieux relate le témoignage d'un ancien officier des services spéciaux missionné en Algérie, 'acteur central du conflit' directement impliqué dans de telles pratiques dans l'exercice de ses fonctions. Sanctionner un éditeur pour avoir aidé à la diffusion du témoignage d'un tiers sur des événements s'inscrivant dans l'histoire d'un pays entraverait gravement la contribution aux discussions de problèmes d'intérêt général et ne saurait se concevoir sans raisons particulièrement sérieuses'

'La publication d'un témoignage de ce type s'inscrivait indubitablement dans un débat d'intérêt général d'une singulière importance pour la mémoire collective : fort du poids que lui confère le grade de son auteur, devenu général, il conforte l'une des thèses en présence et défendue par ce dernier, à savoir que non seulement de telles pratiques avaient cours, mais qui plus est avec l'aval des autorités françaises'. Selon la Cour, le fait que l'auteur ne prenne pas de distance critique par rapport à ces pratiques atroces et que, au lieu d'exprimer des regrets, il indique avoir agi dans le cadre de la mission qui lui avait été confiée, accomplissant son devoir, est un élément à part entière de ce témoignage. Dans ces circonstances, le reproche fait par la cour d'appel de Paris aux requérants, en leur qualité d'éditeur, de ne pas avoir pris de distance par rapport au récit du général Aussaresses, ne saurait être justifié.

Deuxième argument déjà invoqué : comme dans l'affaire *Lehideux et Isomi*, les événements évoqués dans l'ouvrage litigieux se sont produits plus de quarante ans avant sa publication. Sans occulter les différences qu'il y a entre ces deux affaires, elle tire de ce constat une conclusion similaire à celle qu'elle avait précédemment retenue : s'il est certain que les propos litigieux dont il est question en l'espèce n'ont pas pour autant perdu leur capacité à raviver des souffrances, il n'est pas approprié de les juger avec le degré de sévérité qui pouvait se justifier dix ou vingt ans auparavant; il faut au contraire les aborder avec le recul du temps. 'Cela participe des efforts que tout pays est appelé à fournir pour débattre ouvertement et sereinement de sa propre histoire'. Elle conclut en conséquence à la violation de l'article 10 de la Convention.

b) L'ARTICLE 14 DE LA LOI DE 1881 SUR LE REGIME SPECIFIQUE DES PUBLICATIONS ETRANGERES. L'ARRET ASSOCIATION EKIN C/FRANCE, 17 JUILLET 2001

L'article 14 de la loi de 1881 prévoyait un régime spécifique des publications étrangères. Modifié à la veille de la seconde guerre mondiale par un décret du 6 mai 1939, à une époque où la situation pouvait justifier un contrôle renforcé des publications étrangères, l'article 14 permettait au ministre de l'Intérieur d'interdire la circulation, la distribution ou la mise en vente en France des journaux ou écrits, périodiques ou non, rédigés en langue étrangère ou de provenance étrangère, qu'ils soient rédigés en langue française, imprimés à l'étranger ou en France. Non seulement les sanctions en cas d'infraction à l'interdiction sont lourdes – de 4.500 à

9.000 euros d'amende, peine d'emprisonnement d'un an. Enfin, la saisie administrative est autorisée. Or la notion de publications étrangères progressivement définie par la jurisprudence est assez vague.

À l'origine de cette affaire, le Ministre de l'Intérieur avait, par arrêté du 28 avril 1988, interdit sur l'ensemble du territoire l'ouvrage basque *Euskadi en guerre*, dans ses quatre versions (quatre langues), ouvrage auquel avaient participé des universitaires spécialistes du pays basque. Motif: la provenance étrangère de l'ouvrage et l'idée qu'il encourageait le séparatisme. L'arrêté fit l'objet d'un recours administratif, et par jugement du 1er juin 1993, le Tribunal administratif de Pau confirma le bien-fondé de la mesure d'interdiction. Par un arrêt très commenté, l'arrêt *Association Ekin* du 9 juillet 1997, rendu neuf ans après l'interdiction – mieux vaut tard que jamais – le Conseil d'État annula le jugement du TA de Pau ainsi que l'arrêté d'interdiction. Paradoxalement, malgré ce revirement de jurisprudence, il persista à affirmer, contre les conclusions du commissaire du Gouvernement, la compatibilité de ce régime spécial avec les articles 10 et 14 de la Convention européenne des droits de l'homme, ce qui explique pourquoi les requérants, bien qu'ils aient eu gain de cause après une attente de neuf ans, ont saisi la Cour européenne qui a jugé la requête recevable.

La Cour observe que les restrictions préalables à la publication, si elles sont autorisées par l'article 10-2 'présentent pourtant de si grands dangers qu'elles appellent de sa part l'examen le plus scrupuleux, spécialement dans le cas de la presse'. Elle constate que la requérante a dû attendre plus de neuf ans avant d'obtenir une décision judiciaire définitive, ce qui a privé d'efficacité pratique le contrôle juridictionnel dans un domaine où l'enjeu du litige demandait précisément une célérité accrue; elle souligne avant tout l'imprécision du texte: l'absence de définition du terme «de provenance étrangère», et l'absence d'indication des motifs pour lesquels une publication considérée comme étrangère peut être interdite. La Cour européenne enjoint la France de supprimer son article 14: 'il apparaît difficilement soutenable qu'un tel régime discriminatoire à l'encontre de ce type de publications soit toujours en vigueur' (§62).

Quelle a été l'attitude du Conseil d'État en amont de la condamnation de la France? Il contourne l'obstacle en modifiant sa jurisprudence antérieure. Son arrêt *Association Ekin* marque en effet une évolution importante de sa jurisprudence, puisque d'un contrôle minimum de légalité qui portait sur le seul bien fondé de la qualification de publication étrangère, il exerce dans cette affaire un contrôle entier des motifs de la décision du ministre. Cependant, malgré ce revirement de jurisprudence influencé par l'article 10, il refuse, contre les conclusions du commissaire du Gouvernement, Mme Denis-Linton, de reconnaître l'inconventionnalité de ce régime spécial et affirme que le pouvoir du ministre de l'Intérieur n'est pas incompatible avec les stipulations des articles 10 et 14 de la Convention.

Il faudra attendre presque deux ans pour que la Haute Assemblée, par son arrêt *GISTI* du 7 février 2003, opère un revirement de jurisprudence, et reconnaisse que

le pouvoir d'interdiction du ministre de l'Intérieur est contraire à la liberté d'expression et constitue 'une atteinte disproportionnée' aux buts en vue desquels les restrictions aux libertés peuvent être définies. Le Conseil d'Etat enjoint au Premier ministre d'abroger le décret-loi du 6 mai 1939, sans assortir son injonction d'une astreinte et sans préciser le délai dans lequel l'abrogation doit intervenir.

c) L'ARTICLE 36 DE LA LOI DE 1881 LE DELIT D'OFFENSE A CHEF D'ETAT ETRANGER: ARRET COLOMBANI ET AUTRES C/FRANCE, 25 JUIN 2002

L'incrimination d'offense à chef d'État étranger répond au souci de protéger les hauts responsables politiques étrangers contre certaines atteintes à leur honneur ou à leur dignité. Il s'apparente au délit d'offense au Président de la République française prévu par l'article 36 de la loi de 1881, plus ou moins tombé en désuétude depuis que Valéry Giscard d'Estaing avait renoncé à en faire usage, mais remis à l'honneur par le Président Sarkozy.

L'article 36 dispose:

'L'offense commise publiquement envers les chefs d'État et les chefs de Gouvernement étrangers et les ministres des Affaires étrangères d'un Gouvernement étranger sera punie [d'un emprisonnement d'un an (texte antérieur au 22 septembre 2000) et] d'une amende de 45.000 euros (300.000 F) [ou de l'une de ces deux peines seulement]'.

La notion d'offense, relativement large et incertaine, peut recouper tout à la fois les notions d'injure, de diffamation, d'expression outrageante ou de nature à offenser la délicatesse des personnes protégées. Mais elle est soumise à un régime spécifique, notamment la preuve de la vérité n'est pas admise comme exonération du délit d'offense. L'appréciation des juridictions françaises est particulièrement intéressante, car cet article a été invoqué dans deux affaires : l'affaire Colombani, où la France a été condamnée par la Cour européenne, et l'affaire Deby et Bongo c/Verschave et Beccaria.

À l'origine de la condamnation de la France, la publication d'un article dans *Le Monde* le 3 novembre 1995, faisant état du trafic de hachisch au Maroc et mettant en cause l'entourage du Roi du Maroc Hassan II ; cet article est fondé sur un rapport confidentiel réalisé par l'observatoire géopolitique des drogues à la demande de l'Union européenne. Poursuivis pour offense proférée à l'encontre d'un chef d'État étranger, le directeur de publication de la société le Monde, J-M. Colombani, et l'auteur de l'article, Eric Incyan, sont relaxés par le Tribunal de grande instance de Paris (17<sup>ème</sup> ch. corr.-ch. de presse) par jugement du 5 juillet 1996 ; il estime que le journaliste a agi de bonne foi, s'étant 'borné à citer, sans attaque gratuite ni déformation ou interprétation abusive, les extraits d'un rapport dont le sérieux n'était pas contesté'.

Mais le Roi du Maroc et le Ministère public interjettent appel. La Cour d'appel de Paris, par arrêt du 6 mars 1997, infirme le jugement du TGI et donne raison aux

plaignants. Elle juge que la ‘volonté d’attirer l’attention du public sur la responsabilité de l’entourage royal [...] se trouvait empreinte d’intention malveillante’; les articles contenaient ‘une accusation de duplicité, d’artifice, d’hypocrisie constitutive d’une offense à chef d’État étranger’. Cette décision est confirmée par la chambre criminelle de la Cour de cassation (arrêt du 20 octobre 1998) qui rejette le pourvoi en considérant ‘le caractère offensant des propos et l’insistance malveillante à attirer l’attention du lecteur sur la personne du roi’.

Dans cette affaire, le jugement de la 17<sup>ème</sup> chambre correctionnelle anticipe la décision de la Cour européenne.

La Cour européenne critique le régime de l’article l’impossibilité pour les prévenus (ici les journalistes du Monde) de prouver la vérité de leurs allégations (l’*exceptio veritatis* n’est pas admise) afin d’être exonérés de toute responsabilité pénale, ‘ce qui constitue une mesure excessive pour protéger la réputation et les droits d’une personne, quand bien même il s’agit d’un chef d’État ou de gouvernement’ (§66). Elle estime surtout que ce délit confère aux chefs d’État un statut exorbitant du droit commun, alors que les délits d’injure et de diffamation suffiraient à fixer les bornes de la liberté d’expression et du droit de critique à leur égard (§67).

In fine, c’est l’existence même de l’article 36 que les juges de Strasbourg mettent en cause : il ‘tend à porter une atteinte à la liberté d’expression et ne répond à aucun besoin social impérieux susceptible de justifier cette restriction’ (§ 69). En un mot, l’ingérence dénoncée n’était pas nécessaire dans une société démocratique. Dans l’affaire Deby et Bongo, concernant le livre écrit par F.X. Verschave, *Noir Silence, qui arrêtera la Françafrique?* la 17<sup>ème</sup> chambre correctionnelle une fois de plus va dans le sens de la Cour Européenne, contrairement à la Cour d’Appel de Paris et à la Cour de Cassation, et ce malgré l’arrêt Colombani. La raison diplomatique l’emporte sur la raison des juges européens.

#### d) LES TEXTES SUR LA PROTECTION DU SECRET DES SOURCES

Précisons que jusqu’à 2010, il n’existait pas de loi spécifique sur la protection des sources.

##### aa) L’ARRET FRESSOZ ET ROIRE, 21 JANVRIER 1999<sup>3</sup>

L’affaire dite du *Canard enchaîné*, et la condamnation de la France qui en est résultée, a été l’une des plus médiatisées au cours de ces dernières années. Après avoir été condamnée une première fois par la Cour européenne dans l’affaire *Fressoz et Roire*, la France ne s’est pas inclinée et a été condamnée une seconde fois dans l’affaire *Dupuis et autres*. Ces deux affaires posent un double problème : celui du respect du secret des sources et celui du délit de recel. Avec *L’arrêt Fressoz et*

---

<sup>3</sup>, *Fressoz et Roire v France* (1999) CEDH 21/01/1999, Juris-Classeur Périodique [J. C. P.], 1999, no. 26, II, 10120, note E. Derieux. Les Petites Affiches [L. P. A.], 4/08/1999, p.11, note R. Marie. Gaz.Pal, J. no. 208, 27/07/1999, p.18, note P.Lambert.

*Roire*, dite affaire dite du *Canard enchaîné*, c'est bien le délit de recel qui est censuré. Le journal satirique avait publié en septembre 1989, dans le cadre d'un conflit social au sein de l'entreprise automobile Peugeot, un article comportant trois extraits d'avis d'imposition du PDG de Peugeot, M.J. Calvet, soulignant d'importantes augmentations de salaires au moment même où il refusait celles réclamées par le personnel. Le Directeur de publication, M. Roger Fressoz, et le journaliste, M. Claude Roire, étaient poursuivis, non pas sur la base de la loi sur la presse, mais pour recel de photocopies de déclarations d'impôts provenant de la violation du secret professionnel, en l'occurrence fiscal<sup>4</sup>. Par un jugement du 17 juin 1992, la 17<sup>ème</sup> chambre correctionnelle du TGI de Paris relaxa les requérants, les infractions principales de vol et de violation du secret professionnel ne pouvant être établies puisque les auteurs de la divulgation des documents litigieux n'étaient pas identifiés et que les circonstances de la commission des infractions étaient inconnues. La cour d'appel de Paris infirma le jugement le 10 mars 1993 et déclara les requérants coupables de 'recel de photocopies de déclarations d'impôt de M. Calvet provenant de la violation du secret professionnel par un fonctionnaire des impôts non identifié'. Rejetant le pourvoi des journalistes, la Cour de cassation, au terme d'un raisonnement subtil, distinguait dans son arrêt le régime applicable à l'information elle-même de celui applicable à son support ; la condamnation des requérants reposait uniquement sur la reproduction de documents détenus par les services fiscaux, alors même que la preuve de la violation du secret professionnel n'avait pas été rapportée et donc que le recel imputé aux prévenus n'était pas établi. Saisie par les journalistes, la Cour européenne commence par rechercher si, 'dans les circonstances particulières de l'espèce, l'intérêt d'informer le public l'emportait sur les devoirs et responsabilités pesant sur les requérants en raison de l'origine douteuse des documents qui leur avaient été adressés' (§ 52). 'L'écrit litigieux apportait une contribution à un débat public relatif à une question d'intérêt général ; son but n'était pas de porter préjudice à la réputation de M. Calvet, mais plus largement de débattre d'une question d'actualité intéressant le public'. Elle s'interroge en particulier sur le point de savoir si 'l'objectif de préservation du secret fiscal, légitime en lui-même, offrait une justification pertinente et suffisante à l'ingérence', concluant que tel n'est pas le cas. Mais surtout, – c'est là l'un des points essentiels de l'arrêt – la Cour européenne réfute la distinction faite par la Cour de cassation entre l'information et son support, dont la publication a entraîné la condamnation des deux journalistes. Si la divulgation des informations sur le montant des revenus annuels de M. Calvet était autorisée, ce qu'admet le Gouvernement français, la condamnation des requérants pour en avoir publié le support – les avis d'imposition – ne peut-être justifiée. L'article 10 de la Convention:

'laisse aux journalistes le soin de décider s'il est nécessaire ou non de reproduire le support de communiquer des informations sur des questions d'intérêt général, 'dès lors qu'ils s'expriment de bonne foi, sur la base de faits exacts et fournissent des informations fiables et précises dans le respect de l'éthique journalistique' leur information pour en asseoir la crédibilité'; il protège le droit des journalistes de (§ 54).

---

<sup>4</sup> Le délit de recel était poursuivi sur le fondement des articles 460 du CP et L103 du code des procédures fiscales.

En l'occurrence, la Cour estime que 'l'écrit litigieux apportait une contribution à un débat public relatif à une question d'actualité intéressant le public'. La Cour conclut, pour retenir la violation de l'article 10, que 'la condamnation des journalistes ne représentait pas un moyen raisonnablement proportionné à la poursuite des buts légitimes visés compte tenu de l'intérêt de la société démocratique à assurer et à maintenir la liberté de la presse' (§ 55 et 56). Cette condamnation, et la Recommandation du 8 mars 2000 du Comité des ministres du Conseil de l'Europe n'ont pas empêché les juges français de refuser d'une seule voix de s'incliner devant la jurisprudence européenne, à l'occasion de l'affaire dite des 'Écoutes de l'Élysée'.

bb) L'ARRET DUPUIS ET AUTRES C/FRANCE, 14 JUIN 2007

Quelques jours après le décès du Président Mitterrand, MM. Pontaut et Dupuis publiaient un ouvrage intitulé 'Les oreilles du Président', décrivant le fonctionnement des écoutes au sein de l'Élysée, et dans lequel figuraient des fac-similés d'écoutes téléphoniques reproduisant des fiches consignées dans la procédure d'instruction. Les deux auteurs sont poursuivis par M. Gilles Ménage, directeur adjoint du cabinet du président de la République à l'époque des écoutes, qui sera lui-même prévenu en 2005 dans ce procès des 'Écoutes de l'Élysée', ce qui ne manque pas de sel. Le 10 septembre 1998, le TGI de Paris/ chambre de presse juge que les documents incriminés trouvent leur origine dans le dossier d'instruction auquel ne pouvait avoir accès que des personnes tenues au secret de l'instruction ou au secret professionnel, et qu'elles ne pouvaient être parvenues dans les mains des requérants qu'à l'aide d'une infraction. Il déclare MM. Pontaut et Dupuis coupables du délit de 'recel de violation du secret de l'instruction ou du secret professionnel'. L'ouvrage des requérants continue néanmoins à être publié.

Le 16 juin 1999, la cour d'appel de Paris confirme la condamnation, notamment par les motifs suivants : 'Par leur nombre, leur diversité et leur précision les sources utilisées par les prévenus démontrent qu'ils ont été en possession matérielle' [...] de documents qu'ils n'ont pu obtenir 'que par la voie de personnes associées à la procédure' [...] Ainsi la provenance des documents utilisés par les prévenus était nécessairement délictuelle'

La chambre criminelle de la Cour de cassation rejette le pourvoi des requérants par un arrêt du 19 juin 2001<sup>5</sup>.

Six ans plus tard (!)<sup>6</sup>, la Cour européenne condamne la France à l'unanimité pour violation de l'article 10 (arrêt *Dupuis et autres*, du 7 juin 2007). Après avoir souligné, que les journalistes ne sont en principe pas déliés 'par la protection que leur offre

<sup>5</sup> Cass. Crim. 19 juin 2001, pp. 99-85.188; D. 2001, no. 31, note B. Beignier et B. de Lamy. TGI Paris, 12 mars 1997, Légipresse no. 145, oct. 1997.

<sup>6</sup> La Cour européenne condamne les Etats sur le fondement de l'article 6 de la Convention européenne, 'Toute personne a droit à ce que sa cause soit entendue [...] dans un délai raisonnable', mais ne parvient plus elle-même à respecter ce 'délai raisonnable', du fait de l'augmentation exponentielle des requêtes ces dernières années.



l'article 10 de leur devoir de respecter les lois pénales de droit commun', la Cour s'attache à déterminer si 'dans les circonstances particulières de l'affaire, l'intérêt d'informer le public l'emportait sur les 'devoirs et responsabilités' pesant sur les requérants en raison de l'origine douteuse des documents qui leur avaient été adressés' (§43), et si 'l'objectif de préservation du secret de l'instruction offrait une justification pertinente et suffisante à l'ingérence'.

Elle se pose en particulier la question de savoir s'il subsistait encore un intérêt à garder secrètes 'des informations dont le contenu avait déjà, au moins en partie, été rendu public, eu égard à la couverture médiatique de l'affaire, tant en raison des faits que de la personnalité de nombreuses victimes desdites écoutes'; il était en effet déjà 'de notoriété publique que Gilles Ménage était mis en examen dans cette affaire'<sup>7</sup>, sur laquelle il s'était régulièrement exprimé au travers de nombreux articles de presse. 'Dès lors, la protection des informations en tant qu'elles étaient confidentielles ne constituait pas un impératif prépondérant' (§45). Surtout, la Cour estime 'qu'il convient d'apprécier avec la plus grande prudence, dans une société démocratique, la nécessité de punir pour recel de violation de secret de l'instruction ou de secret professionnel des journalistes qui participent à un débat public d'une telle importance, exerçant ainsi leur mission de 'chiens de garde' de la démocratie', un conseil direct aux juges français. En l'espèce, elle conclut, comme dans l'affaire *Fressoz et Roire* (§ 55), que les requérants ont agi dans le respect des règles de la profession journalistique, 'dans la mesure où les publications litigieuses servaient ainsi non seulement l'objet mais aussi la crédibilité des informations communiquées, attestant de leur exactitude et de leur authenticité' (§46) et que leur condamnation s'analyse en une ingérence disproportionnée dans leur droit à la liberté d'expression. Une fois de plus, le juge européen défend les droits des journalistes.

Dans un arrêt récent rendu contre la Belgique (arrêt *Tillack c/ Belgique*, 27 nov. 2007), la Cour affirme encore plus clairement le droit des journalistes au secret des sources : elle 'souligne que le droit des journalistes de taire leurs sources ne saurait être considéré comme un simple privilège qui leur serait accordé ou retiré en fonction de la licéité ou de l'illicéité des sources, mais un véritable attribut du droit à l'information, à traiter avec la plus grande circonspection' (§65).

Dans l'ensemble, et à l'exception d'une avancée en 2003 concernant la production en justice de pièces couvertes par le secret de l'instruction pour les nécessités de la défense d'une personne poursuivie en diffamation, la protection des journalistes dans le cadre du secret des sources était mal assurée en France, et la résistance des juridictions françaises à la jurisprudence libérale de la Cour européenne patente..

## II. L'ATTITUDE DU LEGISLATEUR

Si les Cours suprêmes ont attendu un temps certain pour s'incliner devant les arrêts de la Cour européenne, le législateur a encore plus tardé avant de montrer quelques signes de bonne volonté, et encore n'a-t-il parfois été qu'à mi-chemin ; mais en la

---

<sup>7</sup> Il sera condamné le 9 novembre 2005 à une peine d'emprisonnement avec sursis.

matière, la prudence vaut parfois mieux que la précipitation.

On peut distinguer trois étapes successives dans l'attitude du législateur : la première au tournant du siècle, où il se contente prudemment de modifier les textes déclarés incompatibles avec la Convention, tandis qu'avec la seconde étape, il va plus loin et les abroge. Avec la 3<sup>ème</sup> étape qui date de janvier 2010, le législateur introduit un texte nouveau dans la loi de 1881.

1. PREMIERE ETAPE, LA LOI DU 15 JUIN 2000 RENFORÇANT LA PROTECTION DE LA PRESOMPTION D'INNOCENCE ET LES DROITS DES VICTIMES, DITE LOI GUIGOU, ET LA LOI DU 19 FEVRIER 2002 SUR LES SONDAGES ELECTORAUX

Bien que la loi du 15 juin 2000, au départ, un texte de circonstance – son origine remonte en effet à l'affaire de la publication des photos de victimes de l'attentat en 1995 du RER Saint-Michel., soit extrêmement importante et comporte de nombreux aspects concernant le droit à l'image et la dignité des victimes, ainsi que l'interdiction de publier une photo de personnes menottée et de réaliser des sondages d'opinion sur la culpabilité éventuelle d'une personne, elle sera ici passée sous silence, car elle ne concerne pas les affaires évoquées ci-dessus. Il en va de même pour la *loi du 19 février 2002 modifiant la loi du 19 juillet 1977 relative à la publication et à la diffusion de certains sondages d'opinion*, qui circonscrit désormais l'interdiction de publication des sondages d'opinion au jour qui précède chaque tour de scrutin ainsi qu'à la période de son déroulement.

2. DEUXIEME ETAPE, LA LOI DU 9 MARS 2004 PORTANT ADAPTATION DE LA JUSTICE AUX EVOLUTIONS DE LA CRIMINALITE, DITE 'LOI PERBEN 2'

La seconde étape est franchie quatre ans plus tard. La loi du 9 mars 2004 contient dans ses 224 articles de nombreuses modifications intéressant le droit de la communication, notamment l'abrogation de les articles 36 et 14 de la loi du 29 juillet 1881 (et l'abrogation de la loi du 2 juillet 1931 modifiant l'article 70 du Code d'instruction criminelle).

a) L'ARTICLE 36 DE LA LOI DE 1881

L'article 36 de la loi de 1881 relatif à l'offense à chef d'Etats étrangers mettait la France de plus en plus souvent dans une situation embarrassante ; non seulement il soulevait des difficultés indéniables en matière de liberté d'expression, s'apparentant au crime de lèse majesté, mais il était souvent invoqué par des chefs d'Etats étrangers dont le régime était discuté sur le plan démocratique, notamment certains régimes africains qui poursuivaient des écrivains ou journalistes français, en évoquant des atteintes aux droits de l'homme qu'ils commettaient dans leur pays. Enfin, il conduisait parfois les juges à des décisions où la raison diplomatique l'emportait sur la raison juridique.

Cette abrogation s'inscrit dans le sillage d'un mouvement de désacralisation des personnalités politiques, symbolisé en France par la révision en cours de l'article 68 de la Constitution relatif à la responsabilité pénale du chef de l'Etat. On peut s'étonner que la loi Perben 2 n'ait pas abrogé dans la foulée l'article 26 de la loi de 1881 sur l'offense au Président de la République, ceci d'autant plus que les chefs d'Etat français avaient renoncé à s'en prévaloir depuis Valéry Giscard d'Estaing, ce qui n'est plus la philosophie du chef d'Etat actuel. La jurisprudence de la Cour européenne exerce ici une influence directe.

b) L'ARTICLE 14 DE LA LOI DE 1881 SUR LES PUBLICATIONS ÉTRANGÈRES

Le gouvernement tirant après trois ans, les conséquences de la condamnation de la France par la CEDH et de l'injonction du Conseil d'État abrogé par le décret du 4 octobre 2004 le décret loi du 6 mai 1939. Néanmoins, sur le plan juridique, seule la modification découlant du décret-loi du 6 mai 1939 est abrogée, la version antérieure de l'article 14 étant théoriquement rétablie. Ceci dit, dans le contexte actuel, on voit mal comment la France pourrait continuer à appliquer l'art. 14 de la loi de 1881, incompatible avec l'article 10 de la Convention et '*avec son § 1 selon lequel les droits qui y sont reconnus valent sans considération de frontière*' (§ 62). L'arrêt *Ekin* constitue une fois de plus, une illustration remarquable de l'influence de la CEDH.

3. TROISIEME ETAPE: LA LOI DU 4 JANVIER 2010 SUR LE SECRET DES SOURCES

Sous la double pression de la Cour européenne et des journalistes français, le gouvernement a fini par réagir – mieux vaut tard que jamais.

La loi n'est pas sans défaut, notamment sur un point important inscrit à l'article 1er: la possibilité d'une atteinte au secret des sources '*si un impératif prépondérant d'intérêt public le justifie*', le caractère exceptionnel de l'atteinte n'étant envisagé que '*si la nature et la particulière gravité du crime ou du délit*' le justifient. Le caractère flou de ces formulations vagues autorise une marge d'interprétation très large pour le juge national.

Toutefois, le texte représente des avancées notables:

- Il consacre avec force le principe même du secret des sources en le faisant figurer en tête de la loi sur la presse du 29 juillet 1881.
- Il donne du journaliste protégé une définition plus large que celle du code du travail.
- Il élargit cette protection à l'ensemble des juridictions de jugement devant lesquelles un journaliste peut comparaître (tribunaux correctionnels, cours d'appel et cours d'assises).
- Il établit des procédures en matière de perquisition qui assurent une protection étendue aux agences de presse, entreprises de communication audiovisuelle, entreprises de communication au public en ligne, véhicules professionnels de ces entreprises ou agences, domicile du journaliste.

- Il permet aussi au journaliste poursuivi en diffamation de produire pour sa défense, sans que cette production puisse donner lieu à des poursuites pour recel, des éléments provenant d'une violation du secret de l'enquête ou de l'instruction, ou de tout autre secret professionnel, s'ils sont de nature à établir sa bonne foi ou la vérité des faits diffamatoires. Le projet entérine sur ce point la jurisprudence de la Cour de cassation<sup>8</sup>.

In fine ce projet de loi, malgré des progrès certains, reste en retrait par rapport à la jurisprudence européenne et en particulier à l'arrêt récent *Tillack c/ Belgique* du 27 novembre 2007 (sur les perquisitions). Il n'a pas même été évoqué dans le cadre des Etats généraux de la Presse, ce qui n'incite pas à l'optimisme.

### III. CONCLUONS CE TOUR D'HORIZON SUR DEUX REMARQUES

D'une part, il a fallu attendre le tournant du siècle pour que les Cours suprêmes, puis le législateur, commencent à s'incliner devant la jurisprudence de la Cour européenne relative à l'article 10 de la Convention, voire à l'anticiper. Comme celui du siècle, il s'agit sans doute d'un tournant déterminant et irréversible. Cette critique peut néanmoins être atténuée par un triple constat : tout d'abord les juges français n'ont pas attendu l'an 2000 pour adopter les méthodes d'analyse des juges de Strasbourg ; leur influence a certes été lente mais progressive. Ensuite, la Cour européenne, bien qu'elle affirme régulièrement ne pas se substituer aux juridictions nationales, a parfois empiété sur la marge d'appréciation des juges français en imposant une interprétation des textes susceptible de provoquer des réactions, voire des critiques; ceci peut expliquer dans certains cas leur peu d'empressement. Ceci dit, la Cour européenne, même si elle a censuré certaines dispositions de la loi de 1881, a implicitement ou explicitement reconnu la compatibilité de la plupart d'entre elles, parfois même à l'occasion de ses arrêts de condamnation.

D'autre part, on remarque que certaines dispositions de la loi de 1881 ont été mises à mal, soit par la Cour européenne, soit même par la Cour de cassation. Pour autant, notre grande loi sur la presse ne semble pas en péril du fait de l'influence croissante de l'article 10 de la Convention européenne des droits de l'homme. En dépit des critiques de la Cour européenne, elle reste en France la charte fondamentale du droit de la presse.

L'évolution du droit de la presse au cours des années 2000-2010 s'avère particulièrement abondante, riche et novatrice, conférant une influence croissante aux juges nationaux. Les jurisprudences françaises et européennes convergent plus qu'elles ne divergent. In fine, si le juge européen oblige la loi à s'adapter et à corriger ses imperfections, la liberté d'expression en sortira confortée. N'est-ce pas là l'essentiel.

---

<sup>8</sup> Cass.crim., 11 février 2003, *Légipresse* no. 201, mai 2003, III p. 71.

# GOVERNANCE AND PUBLIC HEALTH

Friedhelm Hase\*

I would like to present some reflections on the development of the public health care system in Germany, reflections which are based on my work in recent years and which are also related to projects we intend to pursue. In Germany, “public health care” means – not only, but predominantly – social insurance, that is statutory health insurance.

## I. SOCIAL INSURANCE AS A UNIVERSALISED INSURANCE FOR THE GAINFULLY EMPLOYED

Statutory health insurance was established as the first branch of workers’ insurance under Bismarck<sup>1</sup> in 1883: as a public institution for the protection of a relatively small portion of the population, for which, as experience had shown, the insurance level of the private law society was unattainable.<sup>2</sup> Today it is an insurance system with contradictory aspects. While its structure and basic legal principles have remained those of an insurance for the gainfully employed,<sup>3</sup> it determines the medical and healthcare of the whole population. About 90 % of the population are insured by the system of statutory health insurance, which is also the model that establishes the standards for health protection for the entire society.<sup>4</sup> A separate system for a disadvantaged minority has turned into the dominant institution in its sphere, in short, a public institution for the whole population.

The main problem is that the fundamental restructuring required by the changed role of statutory health insurance has not taken place. Although almost everyone is covered by it, statutory health insurance, i.e. its entire regulatory framework, has not actually been developed into a health care system for the whole population.

---

\* Professor of Law, University of Bremen.

<sup>1</sup> Act on the health insurance of workers of 15 June 1883 (RGBl. p. 73).

<sup>2</sup> Cf. only G. *Wannagat*, Lehrbuch des Sozialversicherungsrechts Vol. 1, Baden-Baden: Mohr-Siebeck, 1965, pp. 61 et seq.; H. *Achinger*, Sozialpolitik als Gesellschaftspolitik, Reinbek: Rowohlt Taschenbuch Verlag, 3rd edition, 1979, pp. 14 et seq., 30 et seq., 26 et seq.; H. F. *Zacher*, Festschrift für Kurt Jantz, 1968, p. 29 et seq.; F. *Bydlinski*, Das Privatrecht im Rechtssystem der „Privatrechtsgesellschaft“, Wien/NewYork: Springer, 1994, pp. 34 et seq.; G. A. *Ritter*, Sozialversicherung in Deutschland und England, München: Beck, 1983, pp. 35 et seq.; *idem*, Der Sozialstaat, 1991, pp. 62 et seq.

<sup>3</sup> H. *Bley*, Lehrbuch des Sozialrechts, 6th edition, Frankfurt: Metzner, 1988, p. 128; H. F. *Zacher*, Alterssicherung – Spiegel der gesellschaftlichen Entwicklung, DRV 1987, 714, 719 f.; G. *Wannagat*, supra fn. 2, p. 25.

<sup>4</sup> The latter is particularly evident in the definition of medical benefits in §§ 46 et seq. SGB XII („health benefits“) which correspond, in the absence of special social welfare provisions, to “statutory health insurance services” (§ 52 (1) 1 SGB XII). The recipients of the benefits are better off than members of the social security system, however, as they do not have to bear part of the healthcare expenses with their own contributions set by health insurance law and their requirements are fully covered by the healthcare institutions.

Rather, the old insurance system, the basic foundations of which had already been established during the German empire, was more or less transferred to society as a whole: the concept of a public health care institution which is to cover all medical and health care needs of the individual through a comprehensive social transfer system legitimised by the weakness of the individual.

Today's statutory health insurance is a largely universalised insurance for the gainfully employed<sup>5</sup> which has been expanded to cover the entire society while its rules and regulations reflect the conditions of the "poverty society". A linear extension of such an insurance system will hardly provide a concept for the future!

## II. HEALTH CARE PROVISION UNDER THE REGIME OF ADMINISTRATIVE LAW

In liberal constitution systems, provision for the vagaries of life is primarily left to the individual.<sup>6</sup> The individual has (the freedom) to decide how and to what extent he will make provisions for himself and his family to cover the necessities of life in the future.

Through the establishment of social insurance, this responsibility of the individual for him-/herself is subjected to the regime of administrative law. Freedom is replaced by legal coercion. This is the price to be paid for access to an insurance which is of existential importance for the individual, but cannot be provided under market conditions and by the means of private law.

## III. THE REGULATORY FRAMEWORK OF HEALTH INSURANCE LAW

The establishment of statutory health insurance overrules the controlling function of the market price for the provision of medical and health care goods and services. The reciprocity of service and return services, which is a constitutive characteristic of modern profit-oriented economy, is replaced by a public system of allocation of services where the individual expense is independent of the services provided, or, the extent of services provided is independent of the money raised. This is, of course, essentially a socialist principle. Every insured person will receive all medical and health care services required if the insurance contingency occurs and pay for

---

<sup>5</sup> *H. F. Zacher* has described the structural differences between social insurance systems on the one hand and public assistance and support systems on the other hand with the contrasting terms of „selectivity“ and „universalism“: Social insurances are by definition selective since they differentiate according to the ability to make provisions for care while assistance and support systems are universal because they can protect and support everyone, *Gedächtnisschrift für Wilhelm Karl Geck*, 1989, p. 955, pp. 965 et seq., p. 969.

<sup>6</sup> Cf. *P. Laband*, *Das Staatsrecht des Deutschen Reiches*, Vol. 3, Leipzig: Mohr-Siebeck, 5th edition, 1913, p. 289: "According to the basic principle of the private economy employment and social order, the individual is responsible for making provisions for temporal or permanent incapacity for work or exceptional requirements. The formal means are provided by private law".

this what he can afford, according to his income from employment (“everyone according to his abilities, everyone according to his needs!”), Karl Marx).

The provisions accorded to the individual are no longer related to his/her economic performance. This allows for the insurance against risks which could not be covered under market conditions; because the risks are high or the available means are limited, or because of both high risks and limited means. This amazing capacity of statutory health insurance appears to be based on the system of compulsory health insurance and contributions, which integrates insured persons with “good risks” and higher income as well as employers into the apportionment system of statutory health insurance.<sup>7</sup>

However, in the constitutional state, the legal coercion on which the social insurance system is based requires a justification that can only be provided by the need of protection of those who are part of the system as insured persons, as they are unable to cope with existential dangers with their own means (which are those of private law).

Those in need of protection were at first, in the 19<sup>th</sup> century, free employees, released from the bonds of pre-modern times and employed on the basis of contracts. They were not in need of protection because they were paupers, but because, as protagonists of a new economy and in accordance with the law of obligations, they could only claim a return service (payment) if a service had been rendered before (“No payment without work”).<sup>8</sup> If their capacity for work was reduced, not of any use or no longer existed, they were left to fend for themselves. Experience showed that they were unable to deal with this problem themselves.

#### IV. NEED FOR REFORM

The regulatory framework of statutory health insurance, which has just been outlined, cannot fulfil the requirements of present times, as is apparent from the enormous problems facing it today: cost explosion, problems of control, demographic crisis etc. A structural reform of statutory health care provision is therefore unavoidable. The need for reform is particularly evident in two areas.

---

<sup>7</sup> Cf. on social insurance as a result of „market failure“ e.g. *J. E. Stiglitz/B. Schönfelder*, Finanzwissenschaft, München: Oldenbourg, 2nd edition, 1989, pp. 336 et seq.; *N. Berthold*, Marktversagen, staatliche Intervention und Organisationsformen sozialer Sicherung, in: G. Rolf/P. B. Spahn/G. Wagner (eds), Sozialvertrag und Sicherung, Frankfurt am Main: Campus Verlag, 1988, pp. 339 et seq.; for the legal perspective see *F. Bydlinski*, supra fn. 2, pp. 34 et seq.

<sup>8</sup> In particular the urban „wage labourers“ employed in factories and trades already belonged to the economically and socially well-off sections of the population in the second half of the 19<sup>th</sup> century, cf. only *H. Achinger*, supra fn. 2, pp. 10 et seq.; *K. Guderjahn*, Die Frage des sozialen Versicherungsschutzes für selbständig Erwerbstätige vom Entstehen der deutschen Sozialversicherung bis zur Gegenwart, Sankt Augustin: Asgard Verlag, 1971, pp. 38 et seq.; *F. Tenstedt*, Sozialgeschichte und Sozialpolitik in Deutschland, Göttingen: Vandenhoeck und Ruprecht, 1981, pp. 87 et seq.

Statutory health insurance is still a system providing full insurance for the gainfully employed and their families.<sup>9</sup> It is a system that has to ensure the entire provision of medical and health care services to those who are reliant on the income from their own employment for the necessities of life. Negative and positive lists, co-payments by the insured, reference price regulations – all these are half-hearted attempts to regain control of this exaggerated concept. These basic orientations of statutory health insurance law are no longer acceptable today. The scope of services is far too extensive and restriction of membership to the gainfully employed (including those of equal status) has lost its justification.

With regard to the scope of services, it has to be said that most of the insured are able to take charge of and responsibility for the greatest part of their medical and health care requirements themselves. It is no longer necessary to suppress market structures and the principle of personal responsibility of the individual to the given extent and to force nearly all medical provision into the pattern of social compensation. On the other hand, even in affluent societies like ours, today almost anyone might be faced with a very unfavourable course of events where the need for medical provision can no longer be met with individual resources. The risk of this is particularly high at the end of life when the need for medical provision frequently rises exorbitantly while the income is typically reduced.

## V. TOWARDS A BASIC INSURANCE FOR ALL CITIZENS?

In order to correct the outlined erroneous orientations of health insurance law, statutory health insurance has to be reorganised by establishing a “basic insurance” including all citizens.

I define “basic insurance” as a system of health care insurance where the specifically social concept of regulation, which is diametrically opposed to the mechanisms of the market, is restricted to those problems with which the individual cannot cope in his/her own responsibility under market conditions.

If all citizens are included in such a basic insurance, the focus on gainful employment, which has characterised health insurance law up to now, based on the concept of “workers’ insurance”, has to be abandoned. In a truly universal health insurance system, insurance cannot be based on employment and contributions cannot be calculated on individual income from employment.

## VI. ALTERNATIVES OF HEALTH INSURANCE REFORM LEGISLATION

The legislation has considerable scope for such structural changes. From the political point of view, the central question is

– whether statutory health insurance should be continued as an independent insurance system under public law, though drastically reduced to the level of “basic insurance” or

---

<sup>9</sup> On the general characterisation of social insurance as a security system for the gainfully employed cf. *G. Wannagat*, supra fn. 2, p. 25; *H. Bley*, supra fn 3, p. 128; *H. F. Zacher*, supra fn. 3; *F. Hase*, *Versicherungsprinzip und sozialer Ausgleich*, Tübingen: Mohr Siebeck, 2000, pp. 2 et seq., p. 45, pp. 370 et seq., pp. 382 et seq.



- whether medical and healthcare provision should be completely privatised.

The first solution would require the establishment of compulsory insurance for everyone (in the form of a basic insurance as described earlier on). At the same time, the “social” minimum protection level must be guaranteed by binding statutory requirements for insurance contracts. In addition to an obligation to contract, this requires the prohibition of individual risk calculations. The second solution would refer to the “social element” of healthcare provision, which has been established under public law for more than a century, back to private law, and the constructive mandate of the welfare state would be fulfilled through a restructuring of private legal relationships, a change of market conditions.

It may be pointed out that such a reform concept for the health care sector would correspond to wider structural changes which have already transformed the relationship of public administration and private societal forces and processes with lasting effect. The state has already abandoned the role of a more or less monopolistic and comprehensively responsible organiser by privatising its institutions in other areas where services for the public are provided, in order to assume the new, challenging role of a mediator and “guarantor”, determining rationality standards for processes that are mainly controlled by private actors.<sup>10</sup> Another argument in favour of an – at least partial – privatisation of health care provision is the fact that an excessive financial burden arising from health problems will mostly occur in the last years of an individual’s life. The build-up of capital stock over decades is therefore a process that appears to be very appropriate for the insurance of health risks.

## VII. PUBLIC AID FOR THOSE UNABLE TO MAKE PROVISION FOR THEMSELVES

Nonetheless, special social provisions will still be required to provide health care for those who cannot afford health insurance premiums for economic or social reasons or are unable to pay their own contribution in a social health insurance system providing only “basic insurance”. Any insurance has its limits and when these are reached, the individual requires support. It is the responsibility of the state to provide such support.

---

<sup>10</sup> Such changes have been most noticeable in the fields of railways, post and telecommunication, cf. the general observations of *C. Franzius*, *Gewährleistung im Recht*, Tübingen: Mohr Siebeck, 2008.



# THE QUEST FOR SOFT LAW AS BINDING LAW CONTRIBUTING TO EUROPEAN INTEGRATION

Herman E. Bröring\*

## I. INTRODUCTION

This article concerns the role of European soft law for European integration. The topic was initiated by the fact that the number of European soft law has increased enormously, whereas the European integration seems to stagnate. The quest for soft law as binding law, which can contribute to European integration, says nothing about the desirability of European integration. Although in some circles this integration is almost talismanic, this article is neutral about it. It only tries to give an impression of the relation between European soft law and European integration.

First, we need an indication of the notion of European soft law. Several definitions of soft law are used. Yet, none of them is the ultimate one, because the adequacy of the definition of soft law depends on its function and context. A fixed characteristic is that soft law implies a norm for behaviour, which is *not legally binding as such* (because of the absence of a power to bind). Therefore, primary legislation (the Treaties and the general principles of law) and secondary legislation (regulations, directives and decisions) of the European Union are hard law, not soft law. Examples of soft law, which can be found on the European level, are administrative rules, guidelines, policy rules, recommendations, advices, programmes, measures, notices, technical norms on the basis of self-regulation, protocols, codes of conduct, preparatory instruments, political statements, peer reviews, benchmarks, etc. These examples illustrate that soft law can be addressed to public bodies, e.g. the European Commission or administrative authorities of the member states, as well as to private actors, e.g. financial institutions, companies or hospitals and their boards. It is for sure that soft law is a very heterogeneous phenomenon.<sup>1</sup>

Next to an indication of the notion of soft law, we need an indication of the notion of European integration. European integration can be considered as a process directed to more unity and uniformity in the framework of the European Union and its member states.<sup>2</sup> This process is not only a *top-down* process, but also a *bottom-up* experience. Therefore, the European public as well as national public authorities, and even private institutions can take initiatives to more integration.

---

\* Professor of integrative law studies, department administrative law and public administration, University of Groningen. He thanks Lorenzo Squintani (same department) for his helpful suggestions. The article was completed in October 2010.

<sup>1</sup> L. Senden, *Soft Law in European Community Law*, Oxford: Hart Publishing, 2004, pp. 113-115 and chapter 5 (surveying many categories of soft law).

<sup>2</sup> So integration concerns two levels: the level of the European institutions and the level playing field of the member states. This article focusses on the latter one.

Soft law and European integration are both highly complicated issues, not to mention the mutual relationship between both phenomena. Subsequently, the objective of this article is modest. The first aim is to give a rather simple overview of some *legal* factors that influence the role of soft law for European integration, in particular the diverging national concepts of interpretation and discretion rules. The legal perspective (in contrast to an empirical one) makes clear that this article implies a quest for binding aspects of such rules. The second aim is to inform about some remarkable Dutch developments and examples concerning soft law, which are relevant for European integration. An important restraint is that only soft law with a regulatory function for exercising a legal power is involved. So this article only deals with a category of *rules*, i.e. with *definitive* (general) ‘norms’ which can be applied *timely unlimited*. As a consequence, soft law like preparatory instruments, political statements, green papers, white papers, peer reviews or benchmarks will be passed over. The limitation to (non-legislative) rules for exercising a legal power implies that soft law exclusively addressed to private actors will be ignored, too. Soft law in the twilight zone of private and public law is not excluded.

In short, the denomination of soft law in this article concerns norms with the following negative and positive characteristics:

- 1) they have no explicit basis in any (primary or secondary Community) legislation;
- 2) they are not inherent legally binding;
- 3) they do not concern a derogation from (primary or secondary Community) legislation;
- 4) they have the aim of norm-making with external effects;
- 5) they are generally applicable;
- 6) they are intentionally binding for exercising a legal power.<sup>3</sup>

The first three (negative) aspects are generally accepted characteristics of soft law, the last three (positive) aspects relate to the regulatory function of soft law, which is the object of this article. In addition to primary and secondary legislation, the soft law we deal with could be denominated as tertiary regulation. However, in contrast to the term soft law the term tertiary regulation is not current. The next paragraph pays attention to European soft law on the level of the European Union itself. The increase of the number of European soft law, the self-binding element of a part of soft law and the meaning of the Lisbon Treaty for both issues will be covered.

## II. SOFT LAW ON THE EUROPEAN LEVEL

The number of European soft law has increased enormously. Why did this type of rules become more and more popular? Different factors are relevant. Firstly, there is a lack of attributed powers. Extensive interpretation of powers by European institutions is a remedy, indeed. Nevertheless, it can only be a partial solution. Other factors are shortcomings of primary and secondary regulation in the

---

<sup>3</sup> The author of the soft law aims to bind (actually), albeit not having a power to bind (legally).

perspective of effectiveness, legitimacy and transparency.<sup>4</sup> Therefore, the popularity of soft law is particularly caused by weaknesses in the context of primary and secondary legislation.<sup>5</sup>

Most striking, however, is the mentioned lack of attributed powers, especially as a result of the principles of subsidiarity and proportionality. Where both principles prevent or delay the introduction of hard law such as regulations and directives, soft law can be an attractive alternative, at least in the eyes of European politicians and bureaucrats. Within this framework, the Better Regulation Programme of 2003 (and later reviews) seems to be important, too.<sup>6</sup> This programme aims to simplify legislation and to fight administrative burdens and is a stimulus for soft law as an alternative for regulations and directives. Forthcoming restraints for making regulations and directives could be compensated by an increase in the number of soft law.

Moreover, it is striking that some initiatives come from private or mixed institutions, like the European Committee on Standardisation (CEN) and the European Committee for Electrotechnical Standardisation (CENELEC).<sup>7</sup> According to the Council Conclusions on standardisation and innovation from 2008 standardisation has an essential contribution to make "towards developing innovation and competitiveness, by facilitating access to markets, enabling interoperability between new and existing products, services and processes, enhancing protection of users, giving consumers confidence in innovations and disseminating research results".<sup>8</sup> With regard to European integration, standardisation by private actors - to be qualified as self-regulation - is of special interest.<sup>9</sup>

For a better understanding of European soft law and its role in favour of European integration, it is of essential importance to distinguish between two categories of soft law with a regulatory function. Firstly, there is soft law established or adopted by an authority and concerning its own power (own soft law: soft law established by authority A addressed to authority A itself). In this article, this category is called *administrative rules*. Secondly, there is soft law established by another authority (soft law from a third actor: soft law established by authority A addressed to authorities B, C, D, etc.). In this article, this category is called *external guidelines*. Generally, this last category is seen as legally irrelevant. For the category of administrative rules, it

---

<sup>4</sup> L. Senden, *supra* fn. 1, pp. 13-15.

<sup>5</sup> One can wonder whether these aspects do not stick to soft law; see for this question paragraph VI.

<sup>6</sup> See [http://ec.europa.eu/governance/better-regulation/index\\_en.htm](http://ec.europa.eu/governance/better-regulation/index_en.htm) (accessed on 09 Nov. 2012); see for other relevant documents, which stimulated the use of soft law: L. Senden, *supra* fn. 1, pp. 13-25.

<sup>7</sup> See [www.cenelec.eu](http://www.cenelec.eu) (accessed on 09. Nov. 2012).

<sup>8</sup> See [http://ec.europa.eu/enterprise/policies/european-standards/files/standards\\_policy/standardisation\\_innovation/doc/councilconclusions\\_20080925\\_en.pdf](http://ec.europa.eu/enterprise/policies/european-standards/files/standards_policy/standardisation_innovation/doc/councilconclusions_20080925_en.pdf) (accessed on 05 Nov. 2012).

<sup>9</sup> Besides, this type of soft law demands special attention in terms of legitimacy, accountability and effectiveness; see further paragraph V.

is not that simple. Until the late fifties of the last century, in Western European legal systems soft law with a regulatory function was qualified as purely *internal* instructions with legally binding elements within the authority's own organisation. In case of these internal instructions, the enforcement depended on internal measures. Later on, it was more and more recognised that these internal rules have *external* effects. After all, the legal position of citizens and their private institutions is influenced by the use of these rules. In the next stage of legal development regarding the category of internal instructions, the discussion focussed on two questions. First of all, is there any power for establishing non-legislative rules? Second, how can such rules have any binding significance?

Meanwhile, we all know the answers. An administrative authority (A) which is conferred a power to decide in individual cases, e.g. about granting permits or providing subsidies, has the implied power to settle in advance rules, criteria or standards for exercising its (A's) power for individual decision-making. The binding significance of settling in advance non-legislative rules is that the power-holder (A) is bound by his (A's) own rules. The basis for this *self-binding* is the principle of legal equality, the principle of legitimate expectations and other standards of rationality, like legal certainty, consistency, transparency and accessibility (publication). Contrary to these self-binding soft law, soft law established by authority A addressed to authorities B, C, D, etc., at the most have the *ambition* of binding B, C, D, etc., but this other-binding lacks a legal basis in legislation or a legal principle.<sup>10</sup>

Therefore, the legal meaning of European soft law for the European institutions itself seems to be rather simple. Policy rules e.g. imposed by the European Commission can bind itself by means of its own administrative rules. Especially own soft law in the framework of discretion is binding the European Commission itself, but the same applies for own interpretative regulation, although this type of regulation can be overruled by a court (after all, the division of powers must be respected). The concept of self-binding excludes other-binding (because of the lack of a power to do so). Therefore, another body cannot bind a European institution by soft law. This is at least valid in case of discretion and policy rules. When interpretative or expertise rules are at stake, the legal binding is more delicate. In short, the theory of soft law from and for Community institutions for the exercise of Community powers in essence is similar to the theory of the legal status of national soft law in a national context. This is rather evident, considering the fact that the theory of self-binding (and no other-binding without a legislative basis) is generally accepted in the member states.<sup>11</sup>

---

<sup>10</sup> An exception is to be made in case of an explicit basis in legislation for making administrative rules which imply other-binding instead of self-binding; see e.g. art. 4:81 (2) of the Dutch General Administrative Law Act about, in German, intersubjektive Verwaltungsvorschriften (cited in paragraph V.).

<sup>11</sup> Another item is that the use in practice of European self-binding soft law is liable to more consistency and other improvements; see also *L. Senden*, *supra* fn. 1, pp. 498-502.

Has the position and meaning of European soft law changed because of the coming into force of the Lisbon Treaty? Article 288 TFEU reads as follows:

‘To exercise the Union’s competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.

A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.

Recommendations and opinions shall have no binding force.’

Article 288 TFEU is about legally binding as well as non-binding instruments, namely two types of soft law-like policy instruments: recommendations and opinions. The predecessor, article 249 TEC, was familiar with binding and non-binding instruments, too. The criticism in legal writings was that the distinctions between the many different legal instruments were far from clear.<sup>12</sup> Another point of criticism was that the legal instruments and procedures were to be found in many different articles. Section 1 (of Part 6, Title 1, Chapter 2 TFEU): The legal acts of the Union, of which article 288 TFEU is the first article, and Section 2: Procedures for the adoption of acts and other provisions, are to be seen as a result of attempts to improve the situation. As far as regulations and directives are concerned, there is no difference compared with the previous treaty. The category ‘decisions’ is more complicated. Formerly, a decision was by definition an individual administrative act. In the Lisbon version a decision can also be a general administrative act, i.e. a kind of regulation.<sup>13</sup>

With regard to soft law it can be observed that article 288 TFEU only mentions recommendations and opinions and determines that these categories have no binding force. It is remarkable that in some legal writings, with regard to article 288 TFEU, recommendations and opinions are qualified as a legal act<sup>14</sup> (although the Dutch legal system is not totally unfamiliar with soft law as a legal act, too<sup>15</sup>). A legal act by definition is legally binding, so a legal act with no binding force, as suggested in literature, is a contradiction.

As is stipulated in article 289 (3) TFEU those legal acts (regulations, directives, decisions) are legislative acts, resulting from the procedure of article 294 TFEU. Furthermore, it is relevant that legislative acts are superior to non-legislative acts. In connection with this, the most important changes concerning the Union regulation item is the introduction of a matrix of legal acts (regulations, directives, decisions)

<sup>12</sup> *B. de Witte*, Legal Instruments and law-making in the Lisbon Treaty, in: S. Griller/J. Ziller (eds), *The Lisbon Treaty: EU Constitutionalism without a Constitution*, Wien/New York: Springer, 2008, p. 83.

<sup>13</sup> This leads *B. De Witte*, supra fn. 12, p. 95, to his remark that ‘A decision is not a decision’.

<sup>14</sup> *W.J.M. Voermans*, Delegeren is een kwestie van vertrouwen: De nieuwe EU-delegatiesystematiek onder het Verdrag van Lissabon, *RegelMaat*, 2010, p. 169.

<sup>15</sup> See paragraph V.

on the one hand and legislative, delegated and executive acts on the other hand. Delegated acts (art. 290 TFEU) and implementing acts (art. 291 TFEU) are about non-essential elements of a legislative act and, as non-legislative acts, are inferior to legislative acts.<sup>16</sup> Article 292 TFEU especially deals with recommendations. It says that the Council and the Commission, and in special cases provided for in the Treaties, “shall adopt recommendations.”

Although this Union system of legal and legislative, delegated and implementing acts is not the most simple one, the Lisbon Treaty brings more simplicity and transparency in the European legal instruments compared with former treaties.<sup>17</sup> All in all, the Lisbon Treaty seems to bring no serious changes in the position and meaning of European soft law. Nevertheless, the Lisbon Treaty seems to emphasize the *supremacy* of the *legislative* function on the European level.<sup>18</sup> This is illustrated by disputes between the European institutions about the practice of the comitology procedure within the framework of article 290 TFEU.<sup>19</sup> As a consequence of the supremacy of the legislative function, it is not plausible that in a legal respect European soft law carries much weight and at least not more weight than before the Lisbon Treaty. Besides, this treaty is restricting the issuing of delegated acts and implementing acts.<sup>20</sup> This does not suggest that there is much room left for issuing guidelines, considering that article 290 and 291 TFEU are not only relevant to the relation between the institutions of the Union, but also to the relation between the Union and the member states.

### III. EUROPEAN SOFT LAW AND THE NATIONAL INSTITUTIONS

European integration is a matter of interaction between Community law and national law. European regulation itself tells us little about the meaning of European soft law for the authorities of the member states. According to article 291 (1) TFEU member states shall adopt all measures of national law necessary to implement legally binding Union acts. Of course, European soft law can be helpful for implementing Union acts, but measures of *national* law do not contain *European* soft law as such. Consequently, we also need to look at the meaning of European

---

<sup>16</sup> To clear up a possible misunderstanding, implementing acts in the respect of art. 291 TFEU are acts of an European institution. They have nothing to do with acts of member states for implementing directives.

<sup>17</sup> *B. de Witte*, supra fn. 12, p. 104.

<sup>18</sup> *A. van den Brink*, Van rechtsinstrumenten naar rechtshandelingen: “Lissabon” en de introductie van een Europees primaat van de wetgever, 170 SEW 2008. The right of the European Parliament and the Council to revoke the delegation and the no objection expression as meant by art. 290 (2) TFEU also highlights the supremacy of the legislative function.

<sup>19</sup> *W.J.M. Voemans*, supra fn. 14, pp. 173–177.

<sup>20</sup> See also the old Meroni principle, namely that delegation must be restricted to precisely described implementing powers; about this Case C-9/56 *Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community* [1958] ECR 1954–1956; *B.J. Drijber*, Meroni/Hoge Autoriteit, in: T.W.B. Beukers/H.J. van Harten/S. Prechal (eds), *Het recht van de Europese Unie in 50 klassieke arresten*, Den Haag: Boom Juridische Uitgevers, 2010.



soft law in the framework of the member states' law. This is the subject of this and the next paragraph, where attention is paid to the implications of European soft law for the national institutions and to the national concepts of interpretation and discretion rules. In advance it must be clear that for the national institutions European soft law concerns (no self-binding administrative rules but) external guidelines.

An important finding, among many others, is that European soft law can have a different meaning for successively the national legislator, the national judiciary and the national administration.<sup>21</sup> It does not surprise us in the least that the national *legislator* is not obliged to accept, transpose, implement or apply European soft law.<sup>22</sup> But adoption is not forbidden either. There is no binding of the national legislator just because of a lack on the European side of a power to bind. Even the principle of Community loyalty and cooperation does not oblige to comply with soft law regulation. It would be peculiar and unacceptable, if a lack of law-making power, caused by the principles of subsidiarity and proportionality, was ignored completely by introducing a duty to adopt such soft law. There is only one exception, namely that the soft law is to be seen as a specific expression of the principle of Community loyalty and cooperation, so in case of a special duty to cooperate. This is a rare situation (maybe particular soft law in the context of state aid and competition law is a good example).<sup>23</sup> Although in general *de iure* there is no binding of the national legislator, soft law regulation can *de facto* have some binding effects. One can guess that sometimes, in doubtful cases, a national legislator applies with such regulation especially with the intention to avoid the risk of an infringement procedure.<sup>24</sup>

At first sight, the national *court* is not obliged to accept, transpose, implement or apply European soft law. This is evident for rules regarding discretion. It must be noticed that, contrary to the national legislator, a court is not permitted to adopt discretion rules. For interpretative rules it is more complicated. The national court is bound by the principle of Community loyalty and cooperation. It has to strive for a consistent interpretation. Interpretative rules can benefit to that. According to Senden, as a middle course between the voluntary or permissive interpretation aid and a duty of consistent interpretation, the 'Grimaldi obligation' is valid.<sup>25</sup> 'That is to say, recommendations should be considered a mandatory interpretation aid for national courts, which means that they are under an obligation to take them into account whenever they can help to clarify the meaning of Community or national

---

<sup>21</sup> L. Senden, *supra* fn.1, pp. 345-358, pp. 384-392, pp. 436-446.

<sup>22</sup> See e.g. Case C-229/86 *Brother Industries v Commission* [1987] ECR 3757; L. Senden, *supra* fn. 1, p. 351.

<sup>23</sup> L. Senden, *supra* fn. 1, p. 356.

<sup>24</sup> L. Senden, *supra* fn. 1, p. 345, with a reference to the 'Securitel scandal', Case C-194/94 *CIA Security International v Signalson and Securitel* [1996] ECR-I-2201. It would have been helpful for preventing from infringement when the national legislator had paid serious attention to an interpretative communication concerning Directive 83/189/EEC of 28 Mar. 1983 laying down a procedure for the provision on information in the field of technical standards and regulations, OJ L 109, pp. 8-12.

<sup>25</sup> Case C-322/88 *Grimaldi (Salvatore) v Fonds des Maladies Professionnelles* [1989] ECR 4407.

(implementing) law. As such, national courts are obliged to include Community soft law as a relevant element in the effort to interpret and apply Community law correctly in a case before them or to establish the meaning of the Community or national (implementing) provision at issue.<sup>26</sup>

In general, the national *administration* is not obliged to accept, transpose, implement or apply European soft law, either. Maybe this soft law is transposed to national legislation, which is binding the national administration. If not, the national administration can transpose European soft law in its own (delegated) legislation or its own administrative rules. There is no duty to do so. Only under special circumstances can the national administration be obliged to take European soft law into account as relevant considerations, as in the framework of a special duty of cooperation.<sup>27</sup> Apart from such a special duty, it could be argued that the national administration in its decision-making is responsible for a consistent interpretation, and is therefore compelled to pay attention to interpretative soft law. However, this is controversial. Furthermore, the national administration can be obliged to consider European soft law when special expertise is at stake. This is a more common aspect, i.e. with relevance for the national legislator and court as well.

#### IV. COMMON AND DIVERGING NATIONAL CONCEPTS OF INTERPRETATION AND DISCRETION RULES

Regarding the meaning of European soft law for the European institutes the enormous variety in this soft law is to be emphasised, as well as the fact that the European case law about this soft law is far from clear and consistent. Nevertheless, in paragraph II it was concluded that the theory of the legal status of national soft law in a national context is analogously applicable. The conclusion of paragraph III must be that on the national level the legal position of European soft law is very weak. On the European level, the doctrine of self-imposed and self-binding rules, i.e. of European administrative rules, is adequate. However, this doctrine does not make much sense to European soft law on a national level, where European soft law only has the position of external guidelines. A national court can follow European interpretative rules. The national legislator is free to adopt and transpose European guidelines, just like the national administration. However, a duty to do so is hardly to be found. Therefore, from a legal point of view, we have to cast doubt on the contribution of European soft law to European integration. Maybe *de facto* this soft law is applied more often than one can assume on legal grounds.

It is understood that, under the Rule of Law, the distinction between interpretation rules and discretion rules is very important. In case of vague legal norms, via national courts operating as Community court, interpretative soft law can benefit to European integration. However, sometimes the difference between vague legal norms and discretion is very difficult to catch. Moreover, in this context legal cultures diverge. This has consequences for the contribution of

---

<sup>26</sup> L. Senden, *supra* fn.1, p. 391 (her view is not taken for granted).

<sup>27</sup> L. Senden, *supra* fn. 1, p. 444.

European soft law to European integration. The *diverging national concepts* of interpretation and discretion rules and their consequences for European integration are the next theme. Where in statutes the word ‘may’ is used, instead of ‘shall’ or ‘must’, it is clear that discretion is conferred. Statutes also contain vague norms, and then it can be unclear whether the exercise of discretion or the application of legislation (for a court: the exercise of judgment) is at stake. These vague norms are the (ut)most interesting category.<sup>28</sup>

In the framework of traditional *discretion*, a national administrative authority is free to adopt European soft law or not. Of course, this authority has to obey legal norms. In the end, it is the Rule of Law and not discretion, which rules all public authorities. The idea of the division of powers and of checks and balances gives administrative authorities the power to make their own policy choices. The function of the legal norms concerning the exercise of discretion is to justify and rationalise those choices. Good faith, no bias or personnel interest, the right to be heard (*audi alteram partem*), no exercise beyond the powers (*ultra vires*) and no unreasonableness (irrationality) are norms all European countries are familiar with.<sup>29</sup>

In case of discretion these and similar norms do not force authorities to adopt soft law discretion rules established by another authority (after all, they are only self-binding). This is the same for European soft law concerning discretion. Although there is *de iure* no duty to adopt soft law, because of financial dependence and scrutiny relations *de facto* such a duty can exist, indeed.<sup>30</sup> In a highly centralised government like the French administration, we see that the big number of non-binding circulars in fact has very much influence, even though there is no strict legal basis for this. However, the European Union is not France, with its strongly centralized power. Therefore, we can conclude that European soft law in the framework of national discretion is legally and actually without meaning.<sup>31</sup>

Concerning the most interesting category of *vague norms*, it must be observed that the different national law systems show diverging attitudes. E.g. in Germany and France vague norms are sooner qualified as legal norms than in the Netherlands (in Germany: unbestimmte *Rechtsbegriffe*; in France: as a matter of qualification *juridique des faits*). Based on the idea of the division of powers, but not in the least also because of traditional factors, in the Netherlands preference is usually given to

---

<sup>28</sup> Of special interest, too, is that vagueness or imprecision in a provision of EU law is not necessarily an obstacle to the direct effect of the provision; see J. H. Jans/H. H. B. Vedder, *European Environmental Law*, Groningen: Europa Law Publishing, 2008, pp. 168-170; e.g. Case C-72/95 *Kraaijeveld* [1996] ECR I-5403; Case C-127/02 *Landelijke Vereniging tot Behoud van de Waddenzee* [2004] ECR I-7405. As a consequence, some soft law concerning the condition(s) for exercising discretionary powers can be treated as interpretative rules. The binding force of open norms and the concept of autonomous European law seem to strengthen the value of interpretative guidelines.

<sup>29</sup> T. Bingham, *The Rule of Law*, London: Penguin, 2010, pp. 60-65.

<sup>30</sup> See D.J. Galligan, *Discretionary powers*, Oxford: Oxford University Press, 1986, pp. 12-13 (about the external, legal point of view and the internal point of view of officials within the system).

<sup>31</sup> Especially the actual aspect is hypothetical and not based on any empirical research.

the qualification as a discretionary power instead of non-discretionary power.<sup>32</sup> This is counterbalanced by the Dutch general principles of proper administration, like the care principle and the justification principle (two more formal instead of substantial principles).<sup>33</sup> It goes beyond the aim of this article to go into all details of the differences in attitude of the qualification of the character of powers and vague norms (discretionary or non-discretionary).<sup>34</sup> It is sufficient to conclude that there are diverging national concepts of qualifying these powers and norms and, consequently, soft law rules as interpretation or discretion rules. Therefore, in the member states European soft law concerning vague norms will be treated in different ways. It is understood that this is not conducive to European integration, either. This has extra relevance because of an increased popularity regarding the use of open norms (more and more accompanied by co- and self-regulation and outsourced and private norm-making).<sup>35</sup>

A common attitude in the law system of the member states can be discovered where expertise or standardisation norms are at stake. Even within the framework of national discretion, a national administrative body has to consider expertise or standardisation soft law as a matter of rationality. Therefore, European soft law containing expertise of standardisation norms could be helpful for European integration, indeed. The contribution to more integration is not a guarantee. Soft law containing expertise of standardisation norms generally is a mix of interpretation and discretion rules. Even a mix of interpretation and special technical expertise elements are a mix of legal, factual and political elements (in German: wertungs- und interessenengeprägt).<sup>36</sup> This puts the legal meaning of European soft law containing expertise of standardisation norms in perspective. Even the legal meaning of such norms must be judged critically.

## V. A REPORT FROM DUTCH ADMINISTRATIVE LAW

Meanwhile, we can conclude that European soft law can only bind the (European) authority which imposed these rules or the (European or national) authority after adopting these rules as own rules. When there is no self-binding as a result of imposing or adopting the soft law, these rules are not to be considered self-binding administrative rules but guidelines, i.e. non-legislative rules or quasi-legislation without self-binding. In its relation to member states' authorities, European soft law does contain such guidelines. Roughly speaking, passing over diverging national

---

<sup>32</sup> As illustrated by the *Bentham* case from 25 years ago: *Bentham v the Netherlands* (1985) ECHR A-97.

<sup>33</sup> See art. 3:2 and 3:46 of the Dutch General Administrative Law Act.

<sup>34</sup> One of the more complicated issues is (the hypothesis) that the distinction between discretionary and non-discretionary elements is relative (sliding scale, a matter of degree) and dynamic in time (what originally was qualified as discretionary, can on the basis of the growth of knowledge and experience turn into a predominantly non-discretionary aspect).

<sup>35</sup> *H.E. Bröring/A. Tollenaar*, Legal factors of legal quality, in: K.J. de Graaf/J.H.Jans/A.T. Marseille/J. de Ridder (eds), *Quality of Decision-Making in Public Law*, Groningen: Europa Law Publishing, 2007, pp. 58-59.

<sup>36</sup> This got special attention in the late 1980's; see a.o. *Ullrich Battis/Christoph Gusy*, *Technische Normen im Baurecht*, Düsseldorf: Werner Verlag, 1988, p. 33.

concepts of interpretation and discretion rules and concentrating on the guidelines themselves instead of the (character of) the power for which exercise these guidelines are meant for, the national law systems have in common that the legal implications of guidelines depend on the content and the source of these rules.

Source \ Content	Policy	Expertise Standardisation
Public	±	++
Private	--	±
Public-Private Partnership	-	+

+ = legally seriously relevant: binding effects

-- = not to be taken into account at all

In general, expertise or standardisation soft law rules have more relevance legally than soft law rules, which only reflect political ideas. Because of the possibility of democratic justification, soft law rules from a public body have more legal relevance than soft law rules made by a private entity. In the next lines, the scheme will partly be elaborated for the Dutch administrative law. For most other member states of the European Union, the elaboration will be more or less the same. Dissimilarities are connected to differences in qualification of vague norms (as discretionary or non-discretionary) and with state related aspects such as the grade of centralisation. For France, e.g., policy guidelines from Paris addressed to regional authorities have, at least *de facto*, a strong binding effect. Therefore, in the French context public policy guidelines marked ‘++’ fit better than the ‘±’ for the Dutch situation with its concept of decentralisation.

Three Dutch issues concerning soft law are of special interest:

- 1) The category of administrative rules with the status of a legal act;
- 2) The official Instructions for Regulation, including legislation as well as non-legislative rules like administrative ones and guidelines;
- 3) Guidelines (including outsourced regulation) with an expertise and/or standardisation character.

## 1. ADMINISTRATIVE RULES AS A LEGAL ACT - INHERENT AND DIRECT BINDING

The first issue has to do with the Dutch General Administrative Law Act. Since the version of 1998 of this general act, the Dutch administrative law system has been acquainted with two types of self-binding. Traditionally, there is the category of a durable administrative practice based on an implied power to regulate, namely implied in a discretion power of individual decision-making, and binding indirectly, namely on the basis of the principles of legal equality and legal certainty.

Since 1998, there has been a second category, consisting of the group of administrative rules as a *legal* act, and therefore inherent and directly binding. It is inherent and directly binding because the General Administrative Law Act puts it this way.

Article 1:3 of the General Administrative Law Act says:

1. 'Decision' means a written decision of an administrative authority constituting a public-law juridical act.

[...]

4. 'Policy rule' means a general rule, not being a generally binding regulation, established by decision, concerning the balancing of interests, establishment of facts or interpretation of legislation in the exercise of a power of an administrative authority.

Chapter 4.3 is about 'Policy rules' and says:

Article 4:81

1. An administrative authority may establish policy rules in regard to a power vested in it, exercised under its responsibility or delegated by it.

2. In other cases an administrative authority may only establish policy rules if it is so provided by law.

Article 4:82

A reference to a consistent course of action will constitute a reason for a decision only if the consistent course of action is laid down in a policy rule.

Article 4:83

The notification of a decision laying down a policy rule shall where possible state the provision of law from which the power to which the decision relates ensues.

Article 4:84

The administrative authority shall act in accordance with the policy rule unless, due to special circumstances, this would affect one or more interested parties disproportionately in relation to the objectives of the policy rule.

The Dutch doctrine admits that there are differences between statutes and legislation on the one hand, and inherent and directly binding administrative or 'policy rules' (in Dutch: 'beleidsregels') on the other hand. It also admits differences between inherent and direct binding 'beleidsregels' and administrative soft law in a traditional sense.<sup>37</sup> The other side of the introduction of administrative rules as a legal act, inherent and directly binding, is that there is some reluctance against the

---

<sup>37</sup> An interesting question is whether the use of 'beleidsregels' implies an effective implementation. If so, for the benefit of implementation the 'beleidsregels' are an alternative for legislation; see for a negative answer Case C-361/88 *Commission v Federal Republic of Germany* [1991] ECR I-2567 (TA Luft / technical circular 'air': a practice in conformity with the requirements of a directive c.q. an actual binding does not guarantee an effective implementation). Regarding the Dutch 'beleidsregels', I am in favour for a positive answer. 'Beleidsregels' have an unquestionable force. Their position in the Dutch legal framework is clear. According to this framework, for having legal effects as 'beleidsregels', they must be published; see *K. Lenaerts/P. Nuffel*, *Constitutional Law of the European Union*, London: Thomson, Sweet & Maxwell, 2006, pp. 766-767; Case C-478/99 *Commission v Sweden* [2002] ECR I-4147.

use of external guidelines. Next to article 4:81 (2) of the General Administrative Law Act, this comes up from the Dutch official Instructions for Regulation.

## 2. NO EXTERNAL GUIDELINES; EXCEPT EXPERTISE ONES

Concerning our quest for soft law as binding law contributing to European integration, the official Instructions for Regulation, including legislation as well as non-legislative rules like administrative rules and guidelines, are relevant, indeed. These recommendations apply to regulations, which fall under the responsibility of the central government and its ministers.<sup>38</sup> They partly also apply to European law. Very curious is Instruction 5a: For the norm-making (regulation) about behaviour, acts or powers only legislation, internal instructions or administrative rules in the sense of ‘beleidsregels’ are to be used. In the official clarification it is said that guidelines must be avoided as much as possible, with one exception, namely expertise guidelines, e.g. in the field of environmental law. Related to the general prohibition of guidelines as an instrument for regulation, the official clarification also points out that circulars are only to be used for giving information. Instruction 5a is very interesting, indeed, because the Instructions for Regulation are guidelines themselves and therefore in their own respect forbidden or at least undesirable. Maybe an escape from this Catch 22 is that the Instructions for Regulation give standardisation rules for regulation and for that reason can be accepted just as expertise rules. Anyway, it is evident that policy guidelines are disliked. There is no reason why this should not be valid for soft law in favour of European integration, too. Unless via legislation, internal instructions or ‘beleidsregels’, European soft law regulation is not an acceptable way of legally relevant norm-making. More than that, such soft law is rejected by the official Dutch Instructions for Regulation. Therefore, the conclusion that according to the Dutch view European soft law cannot deliver a real contribution to European integration is an easy one.

## 3. EXPERTISE AND STANDARDISATION GUIDELINES (INCLUDING OUSOURCED REGULATION)

According to the scheme and as underlined by the official Instructions for Regulation, soft law with an expertise (and standardisation) character is to be taken into account as relevant considerations, even when self-binding is lacking. Article 3 (1) Integrated Pollution Prevention and Control (IPPC) Directive says that:<sup>39</sup>

‘Member States shall take the necessary measures to provide that the competent authorities ensure that installations are operated in such a way that:  
(a) all the appropriate preventive measures are taken against pollution, in particular through application of the best available techniques [...]’

---

<sup>38</sup> For the decentralized administration similar recommendations are available.

<sup>39</sup> Directive 2008/1/EC of 15 Jan. 2008 concerning integrated pollution prevention and control, OJ L 24, pp. 8-29, which replaced Directive 96/91/EC of 16 Jan. 1997 on health and veterinary inspection problems on importation of animals of the bovine, ovine, caprine and porcine species, fresh meat and meat-based products from third countries, OJ L 13, pp. 26-27.

In addition, article 9 (4) IPPC says:

‘Without prejudice to Article 10, the emission limit values and the equivalent parameters and technical measures referred to in paragraph 3 shall be based on the best available techniques, without prescribing the use of any technique or specific technology, but taking into account the technical characteristics of the installation concerned, its geographical location and the local environmental conditions. In all circumstances, the conditions of the permit shall contain provisions on the minimisation of long-distance or transboundary pollution and ensure a high level of protection for the environment as a whole.’

The best available techniques (BAT) are set down in BAT Reference Documents (BATRefs). According to the Dutch Environmental Protection Act, a licence must be refused when BAT cannot be applied. Furthermore, the licence contains concrete norms which apply BAT. According to the Environmental Management Installations Decree, the authority competent for licensing has to take into account BATRefs from the European Integrated Pollution Prevention and Control IPPC-framework, mentioned by ministerial legislation, for its orientation on BAT. Therefore, there is a basis in the legislation for keeping into account expertise guidelines from the European level.

The Dutch case law makes clear that also *without* such a basis these and similar expertise guidelines must be taken into consideration. The standard case is that an administrative authority has used an expertise guideline (without a basis in any legislation) as a starting point or assessment framework for its decision-making.<sup>40</sup> According to the case law, the adoption of expertise guidelines as own administrative rules is not necessary. The simple application of such guidelines does not result in what is called “Ermessensunterschreitung” in Germany. This implies that expertise guidelines (without a basis in any legislation) have any legal relevance, indeed. The expression of this is the ‘±’ in the scheme for purely private and a ‘+’ for mixed public/private expertise or standardisation norms. With regard to the political implication, e.g. about risk acceptance, preference is to be given to expertise guidelines established by or under responsibility of a public authority. This is expressed with the ‘++’.

Will European BATRefs and similar European soft law like the CEN- or CENELEC-norms consequently be attractive with regard to the European integration (at least in a few areas)? It is not just like that. Maybe the criterion of the best available techniques is better covered by a recent expertise guideline without any political approval than by a BATref. This is however not the most serious problem. The most serious problem in respect to BATRefs and other expertise and standardisation guidelines is *a huge lack of legitimacy, accountability and transparency*.<sup>41</sup> The next paragraph will give more details about this problem. First, another Dutch experience with these guidelines demands attention.

---

<sup>40</sup> See e.g., among many other cases, ABRvS 11 Aug. 2010, *ljn* BN3702.

<sup>41</sup> *H.E. Bröring*, Richtlijnen, Beleidsregels, BREF's: mooi, mooier, mooist?, in: N. Teesing (ed.), Den Haag: Nederlandse milieurichtlijnen en beste beschikbare technieken, Boom Juridische uitgevers, 2007, pp. 24-26.



This experience deals with the so-called NEN-norms, i.e. standardisation norms of the Dutch Standardisation Institute (Nederlands Normalisatie-Instituut (NNI)). The Dutch building legislation as well as building licenses refer to these NEN-norms. The question arose, whether the NEN-norms consequently receive the status of legislation or a license itself. Bottleneck is that the applicants of a building licence have to buy the NEN-norms from the NNI. They must pay for them, because these norms are not published by the (public) government but under (private) copyrights of NNI. At present, the case law judges diverge. According to the High Court of Den Haag, the NEN-norms are not binding because of a fundamental publication failure, where the High Court of Den Bosch, probably for practical reasons, esteems that a reference to these norms is sufficient for accepting their legally binding character.<sup>42</sup> In other words, the *accessibility and publication* of guidelines demand special attention, too.

## VI. FINAL REMARKS

The quest for soft law as binding law contributing to European integration has as a main result that answer that there are no *legal* reasons for the conclusion that European soft law with the status of (external) guidelines for authorities of the member states can be helpful to this integration. This is underlined by the Lisbon Treaty, which seems to emphasize the supremacy of the legislative function on the European level and is reluctant about issuing delegated acts and implementing acts; these acts only are permitted for non-essential elements of a legislative act and are inferior to legislative acts. Another factor, which seems to frustrate the capability of soft law contributing to European integration, is the divergence in attitude of the member states where vague norms are at stake. Especially for the Netherlands, there is an extra argument, namely that article 5a of the official Instructions for Regulation, although a guideline itself, forbids the use of (external) guidelines. The popularity of soft law is in particular caused by shortcomings in the context of primary and secondary legislation. Where the principles of subsidiarity and proportionality are prohibitive for any legislative activities, one can wonder whether soft law can be an acceptable alternative. An indication for a positive answer is that non-binding guidelines respect, at least in a legal sense, the position of the member states and their own political choices. On the other hand, it is the same supremacy of the national powers, which makes the contribution to European integration doubtful. Overall, there seems to be a negative relation between European soft law and European integration. Furthermore, we can conclude that for a more distinct answer more information about differences between member states concerning vague norms is needed, as well as more empirical information about the possible adoption of guidelines as an advice or recommendation and the reasons for such an adoption (financial influences, political incentives, etc.).

---

<sup>42</sup> Rb 's-Gravenhage, decision of 31 dec. 2008, *ljn* BG8465; Rb 's-Hertogenbosch, decision of 5 feb. 2010, *ljn* BL3758.

A serious exception must be made for expertise and standardisation guidelines. Such guidelines have many effects, even in a legal respect, namely in terms of the care principle and the justification principle and of the prevention from “Ermessensunterschreitung”. This is very remarkable, indeed. On the one hand, the need of democratic and transparent legislation is emphasised, as illustrated by the Lisbon Treaty and e.g. the reluctance concerning delegation and the conflicts about the comitology procedure. On the other hand, there is an increase in the use of open norms, in connection with co- and self-regulation as well as outsourced and private norm-making.<sup>43</sup> At the very least, this is a paradox, and one of a fundamental kind. Co- and self-regulation and outsourced and private norm-making fit in the modern concept of network-based government. An advantage of this concept is its flexibility. The other side seems to be fragmentation (which is not in favour of integration). The concept of a network-based government is full of unknown factors. That makes it attractive for believers. For the time being, I am not one of them. Expertise and standardisation guidelines are very effective insofar as these rules are applied just like legislation. As the BATRefs show, their transparency in procedure and content (and in publication and language), however, is problematic, subsequently also in respect to judicial review. The same applies to the democratic content of these norms. Political checks and supervision are poor, and not all stakeholders are involved. From the Dutch NEN cases we learn that accessibility is a serious problem, too. If accessibility, transparency, democratic legitimacy and possibility of judicial review are not substantially improved, European expertise and standardisation soft law must be treated very reluctantly, even when it contributes to European integration.

---

<sup>43</sup> *H.E. Bröring/A. Tollenaar*, supra fn. 35, pp. 56–61.

# THE EVOLVING CONSERVATION STANDARDS OF EU MARINE ENVIRONMENTAL LAW AND THEIR EFFECTS ON THE COMMON FISHERIES POLICY

Till Markus<sup>\*</sup>

## I. INTRODUCTION

Various EU directives and regulations relate to the protection of the marine environment. However, these have usually been adopted in the context of agricultural, fisheries, traffic, or common market policies, etc. Given that sectoral policies tend to prioritise sectoral interests over environmental concerns, these measures do not tend to specifically serve the marine environmental protection in a coherent and effective way. There are hopes that this situation will be reversed with the recent adoption of the EU's Marine Strategy Framework Directive (MSFD), by increasing integration and coherence of the different policy fields. However, it remains somewhat unclear how the MSFD and sectoral policies interact and the influence that the MSFD will have over such policies. By using the Common Fisheries Policy (CFP) as an example, this submission aims at elucidating the legal and institutional relationship between the MSFD and those sectoral policies relevant for marine environmental protection. First, a general distinction is drawn between fisheries and environmental policies. Second, the article describes the content and scope of EU marine environmental law and the CFP, and explains the state of integration and the reasons for disintegration of these two policies. Third, it outlines the development of the scientific criteria and methodological standards under the MSFD to determine a good environmental status. Finally, it analyses the extent to which the process of putting the MSFD into effect may eventually contribute to increasing integration and coherence of marine environmental law and sectoral policies.

## II. GENERAL DISTINCTION BETWEEN MARINE ENVIRONMENTAL AND FISHERIES LAW

An article on the effects of marine environmental law on fisheries law should begin with a clear distinction between marine environmental law and fisheries law. Both policies traditionally pursue their own individual objectives and are built on their own institutional and legal structures. Accordingly, any assessment of the relationship between these two policies must take into account the genuine identity, degree of autonomy and operative closure of each of these policy areas. In general, marine environmental policies and laws aim at the protection of the marine environment as a whole, while fisheries policies and laws are concerned with fishing activities and the consequences such activities have on the future

---

<sup>\*</sup> Doctor of law and LL.M., Bremen Graduate School for Marine Sciences (GLOMAR), Research Centre for European Environmental Law, University of Bremen.

availability of resources.<sup>1</sup> Due to over-exploitative tendencies of fisheries, limiting fishing activities should be seen as a precondition, i.e., an intrinsic part of fisheries law itself. However, to some extent, the objective and scope of marine environmental law and fisheries law overlap. By limiting fishing activities, the environmentally harmful effects of activities such as over-fishing of commercially exploited stocks, by-catching of non-target species, threats to marine mammals and sea birds, and the destruction of marine and coastal ecosystems are automatically reduced.<sup>2</sup> There is a clear overlap where fisheries measures aim at protecting commercially unexploited (*i.e.*, non-target species) birds, mammals, reptiles, habitats, coastal areas, etc., or where they take into consideration other environmental factors.<sup>3</sup> Conversely, EU environmental law may establish protection requirements that either directly or indirectly affect fisheries legislation.<sup>4</sup> In order to protect marine ecosystems, marine environmental laws may also protect certain species that require the adoption of fisheries conservation measures.

### III. DISINTEGRATION OF THE OBJECTIVES OF MARINE ENVIRONMENTAL LAW

The following section briefly outlines the content of existing EU marine environmental protection law and the CFP. It concludes that both of these policies are disintegrated and to some extent inconsistent. It then examines the underlying institutional and legal reasons for this disintegration.

#### 1. EU MARINE ENVIRONMENTAL LAW

To date, the EU has failed to develop a comprehensive marine environmental policy. Marine environmental laws have been adopted under different policies and institutional settings (different competence orders, different actors). These include the Common Fisheries Policy, the Common Agricultural Policy, EU Transport Policy, the EU Fresh Water Policy and even the Internal Market.<sup>5</sup> Rather than establishing its own distinct policy on the marine environment, the EU traditionally relied on different, often sectoral international regimes to protect the

---

<sup>1</sup> C. de Klenm, *Fisheries Conservation and Management and the Conservation of Biological Diversity*, in: E. Hey (ed.), *Development in International Fisheries Law*, The Hague: Springer, 1999, p. 447.

<sup>2</sup> D. Boß, *Umweltschutz und Fischerei*, in: H. W. Rengeling (ed.), *Handbuch zum europäischen und deutschen Umweltrecht –Band 2 (Teilband 2) Besonderes Umweltrecht*, Köln: Heymanns, 2003, pp. 1524-1525.

<sup>3</sup> N. Wolff, *Fisheries and the Environment*, Baden-Baden: Nomos, 2002, p. 177.

<sup>4</sup> See, for example, the broad terms of Art. 6 (2) of the Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora, OJ L 206, pp. 7-50 (as amended); Art. 4 of Directive 2009/147/EC on the conservation of wild birds, OJ L 20, pp. 7-25; see also Commission Communication Com (2001) 143 final to the Council and the European Parliament –Elements of a Strategy for the Integration of Environmental Protection Requirements into the Common Fisheries Policy, pp. 6-8.

<sup>5</sup> See, for example, Communication from the Commission to the Council and the European Parliament – Towards a strategy to protect and conserve the marine environment, COM (2002) 539 final, pp. 9-13.

marine environment.<sup>6</sup> As a result, most of the existing rules and standards are not designed to specifically protect the marine environment as a whole, but instead mainly address sectoral problems such as maintaining high fishing rates or guaranteeing the quality of fresh waters.<sup>7</sup> Existing EU marine environmental protection laws do not consider the effects of uses and environmental pressures on the marine environment as a whole, and do not take into account the cumulative effects or interdependencies of different pressures.<sup>8</sup> The reasons for the underdeveloped marine policy have been attributed to, *inter alia*, a lack of understanding of marine ecosystems, the cross-sectoral nature of marine issues, Member States' conflicting interests regarding ocean policies, and finally the fragmentation of institutions at the EU level.<sup>9</sup>

Since 2002, the EU has taken several actions to move towards a more coherent and integrated ocean policy. This includes the expansion of the institutional mandate of the DG Fisheries (since 2005 DG Mare), the development of a comprehensive action programme entitled "Integrated Maritime Policy" (IMP),<sup>10</sup> and the adoption of the "Marine Strategy Framework Directive" (MSFD).<sup>11</sup> The MSFD is now the central legal instrument that integrates and develops existing marine environmental protection law. It is the most developed part of the EU's emerging IMP and is widely referred to as its "environmental pillar".<sup>12</sup> The main goal of the MSFD is to establish a framework within which the "Member States shall take the necessary measures to achieve or maintain good environmental status in the marine

---

<sup>6</sup> *V. Frank*, *The European Community and Marine Environmental Protection in the International Law of the Sea*, Leiden: Brill Academic Publishers, 2007, pp. 84-85.

<sup>7</sup> *Ibid.*, p. 79; see also *T. Markus*, *European Fisheries Law – from Promotion to Management*, Groningen: Europa Law Publishing, 2009, pp. 65-261; *T. Markus*, *Towards sustainable fisheries subsidies: Entering a new round of reform under the Common Fisheries Policy*, *Marine Policy*, 2010, pp. 1117-1124.

<sup>8</sup> *T. Markus/S. Schlacke/N. Maier*, *Legal Implementation of Integrated Ocean Policies: the EU's Marine Strategy Framework Directive*, *The International Journal of Marine and Coastal Law* 2011, Issue 26, pp. 1-32.

<sup>9</sup> *V. Frank*, *supra* fn. 6, pp. 79-85; see also *L. Kramer*, *EC Environmental Law*, London: Sweet & Maxwell, 2007, p. 299.

<sup>10</sup> Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: Towards a future Maritime Policy for the Union – A European Vision for the Oceans and Seas, COM (2006) 275 final, Volume I, Brussels, 7 June 2006; Commission (EC), Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: An integrated Maritime Policy for the European Union, COM (2007) 575 final, Brussels, 10 Oct. 2007; See also Commission (EC), Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: An integrated Maritime Policy for the European Union, COM (2007) 575 final, Brussels, 10 Oct. 2007.

<sup>11</sup> Recital 3 of the Directive 2008/56/EC of the European Parliament and the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive), OJ L 164, pp. 19-40.

<sup>12</sup> MSFD, Recital 3; see also *T. Markus et al.*, *supra* fn. 8; *L. Juda*, *The European Union and the Marine Strategy Framework Directive: Continuing the Development of European Ocean Use Management*, 41 *Ocean Development & International Law* 2010, p. 44.

environment by the year 2020 at the latest”.<sup>13</sup> Regarding existing EU and Member State legislation on the protection of the marine environment, the MSFD states that it will “contribute to coherence between [...] the different policies, agreements and legislative measures which have an impact on the marine environment”.<sup>14</sup> In addition, the MSFD aims at “ensur[ing] the integration of environmental concerns”.<sup>15</sup> It also states that to achieve its goals, a “transparent and coherent legislative framework is required” and that this judicial framework in turn should provide an “overall framework for action” that “enable[s] the action taken to be coordinated, consistent and properly integrated” with “action under other Community legislation and international agreements”.<sup>16</sup> Therefore, the MSFD is not an extensive codification of existing marine protection regulations, nor does it instantaneously modify any existing laws or impose any comprehensive obligations on the Member States.<sup>17</sup> Its regulatory ambit operates as a supplementary legal framework within which existing and future marine conservation measures adopted by the European Community and Member States can be developed and enhanced.<sup>18</sup>

## 2. CONTENT AND RATIONALE OF THE COMMON FISHERIES POLICY

The CFP is one of the oldest and most developed EU policies.<sup>19</sup> It is concerned with the sustainable exploitation of living aquatic resources in EU waters (i.e., waters under the jurisdiction and sovereignty of EU member States).<sup>20</sup> This requires a broad range of political and legislative actions in a range of policy areas. To guarantee fishing at sustainable levels and safeguard the marine environment, the Community limits fishing opportunities by adopting total allowable catches (TACs), effort limitations, technical and control measures.<sup>21</sup> It also apportions the available resources among its Member States, which then allocate their share to their own fishers.<sup>22</sup> Rules adopted under the CFP also relate to the structure of the Community’s fisheries sector. ‘Structure’ basically refers to the equipment required for the production of fisheries products and the organisation of the production process.<sup>23</sup> The primary aim of structural policies is to support the fisheries sector in

---

<sup>13</sup> Art. 1 (1) MSFD.

<sup>14</sup> Art. 1 (4) MSFD.

<sup>15</sup> Art. 1 (4) MSFD.

<sup>16</sup> Recital 9 MSFD.

<sup>17</sup> See particularly restrictions in Art. 13 (5), 14 (1) to (4) and 15 (1) to (2) MSFD.

<sup>18</sup> See recital 11 MSFD: “Each Member State should therefore develop a marine strategy for its marine waters which, while being specific to its own waters, reflects the overall perspective of the marine region [...] concerned.”

<sup>19</sup> *R. Churchill/D. Owen*, *The EC Common Fishery Policy*, Oxford: Oxford University Press, 2010, p. vii; see also *T. Markus et al.*, *supra* fn. 7.

<sup>20</sup> See Art. 1 (1) of Council Regulation (EC) No. 2371/2002 of December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy, OJ 2002, L 358, pp. 59-80.

<sup>21</sup> Art. 4 (2) (d), (f), (g) of Reg. 2371/2002; other regulations and measures will be listed below.

<sup>22</sup> Art. 20 (3) of Reg. 2371/2002.

<sup>23</sup> *R. R. Churchill*, *EEC Fisheries Law*, Dordrecht: Nijhoff, 1987, p. 203.

adapting its production capacities to correspond to available resources, thereby guaranteeing efficient and sustainable production. It also aims at increasing the competitiveness of the sector and achieving socioeconomic stability and social cohesion within different fishing regions.<sup>24</sup> Public financial transfers to the fisheries sectors are considerable under the CFP. From 2000 to 2006, the Community allocated over € 4.1 billion to its fisheries sector.<sup>25</sup> Financial transfers to Member States from 2007 to 2013 are targeted at € 3.8 billion.<sup>26</sup> The CFP also regulates the common organisation of the market for fisheries products.<sup>27</sup> The Community takes measures to stabilise markets to mitigate the effects of an unstable supply of fisheries resources. It also aims at matching supply to demand. The Community is also responsible for the external relations of its fisheries policies, i.e., with non-Member States.<sup>28</sup> It has concluded several international agreements that allow Community vessels to fish in the waters of third countries.<sup>29</sup> Finally, the Community controls the implementation of CFP measures by Member States.<sup>30</sup>

However, since its inception, the CFP has been widely condemned for its short-sighted and inefficient fisheries management, its negative impact on the environment,<sup>31</sup> and its weak enforcement.<sup>32</sup> Reflecting these earlier criticisms, the Commission's 2009 "Green Paper on the Reform of the Common Fisheries Policy" states that a "dramatic change" is needed to reverse the current situation.<sup>33</sup> The content of the CFP is largely determined by the particular interests of the relevant stakeholders and the distribution of powers between the different EU

---

<sup>24</sup> Council Regulation (EC) No 1198/2006 of 27 July 2006 on the European Fisheries Fund, OJ L 223, pp. 1-44.

<sup>25</sup> European Commission, *Facts and Figures on the CFP 2006*, p. 25.

<sup>26</sup> European Commission, *The European Fisheries Fund 2007–2013*, 2006, p. 10.

<sup>27</sup> Council Regulation (EC) No. 104/2000 of 17 Dec. 1999 on the common organisation of the markets in fishery and aquaculture products, OJ L 017, pp. 22-52.

<sup>28</sup> Cases C-3/76, C-4/76 and C-6/76, *Kramer and others* [1976] ECR 1279, paras 30-33.

<sup>29</sup> See *T. van Rijn*, Art. 37 EGV, in: H. von der Groeben/J. Schwarze (eds), *Kommentar zum Vertrag über die Europäische Union und zur Gründung der Europäischen Gemeinschaft*, Baden-Baden: Nomos, 2004; agreements are listed and provided at the web-site of the DG Mare ([http://ec.europa.eu/fisheries/index\\_en.htm](http://ec.europa.eu/fisheries/index_en.htm)); see also on the membership in international fisheries organisations Commission Communication Com (1999) 613 final from the Commission to the Council and the European Parliament – Community participation in Regional Fisheries Organisations (RFOs) of 8 Dec. 1999.

<sup>30</sup> See Arts. 16 (1), 23 (4), 26 (3), 27 of Reg. 2371/2002.

<sup>31</sup> See, for example, *T. Markus*, Making Environmental Principles Work under the Common Fisheries Policy, *European Energy and Environmental Law Review* 2010, pp. 132-144; *R. Froese/A. Proelß*, Rebuilding fish stocks no later than 2015: Will Europe meet the deadline?, *Fish and Fisheries* 2010, pp. 194-202; House of Lords – European Union Committee, *The Progress of the Common Fisheries Policy*, London, 2008.

<sup>32</sup> Court of Auditors, Special Report 7/2007 on the control, inspection and sanction systems relating to the rules on conservation of Community fisheries resources together with the Commission's replies, OJ 2007, C 317, pp. 1-33; *D. C. Payne*, Policy-Making in Nested Institutions: Explaining the Conservation Failure of the EU's Common Fisheries Policy, *Journal of Common Market Studies* 2000, p. 318; *R. Long/P. A. Curran*, *Enforcing the Common Fisheries Policy*, Oxford: Fishing News Books, 2000.

<sup>33</sup> European Commission, *Green Paper – Reform of the Common Fisheries Policy*, COM (2009) 163 final, p. 5.

organs, Member States and the other actors. At the level of the Member States, fisheries management has correctly been described as neo-corporatist arrangement, where governments and fisheries industries closely negotiate and agree upon fisheries management.<sup>34</sup> This arrangement affects policy-making at the EU-level. Within the Council, the organ with the most authority over fisheries legislation,<sup>35</sup> the Member States basically promote their national interests of their own fishing industries regarding the allocation of fishing opportunities. As a result, short-term exploitation interests often outrank long-term economic and ecological objectives so that fishing opportunities are set at unsustainable levels.<sup>36</sup> In principle, the same conflict influences all measures and decisions that eventually determine the overall fishing pressure, such as the allocation of fisheries subsidies, the reductions of overcapacities, as well as the harmonization of sanctions against illegal fishing practices.<sup>37</sup> Nevertheless, over the past two decades many actions have been undertaken to improve management and promote ecological goals.<sup>38</sup>

### 3. PERSISTING DISINTEGRATION OF THE COMMON FISHERIES POLICY AND EU ENVIRONMENTAL POLICIES

The disintegration of fisheries policies and environmental policies refers to the failure of the CFP to adopt and implement effective management measures that adequately consider long-term conservation needs of the marine environment as a whole. Instead of concentrating management on single target species, an integrated approach to evaluating the CFP should take into account the effects of the policy on the entire marine ecosystem. Different aspects of fisheries measures adopted under the CFP such as the intended and unintended effects of quantitative, effort, area or technical restrictions should be considered and put into perspective with ecosystem requirements and other pressures that affect marine ecosystems. Although the EU has taken different actions to improve management and promote ecological goals, the overall failures of the CFP clearly indicate that the EU's fisheries management system is far from adequately and effectively managing fish stocks in accordance with ecosystem requirements.<sup>39</sup>

---

<sup>34</sup> *L. van Hoof/J. van Tatenhove*, EU marine policy on the move: The tension between fisheries and maritime policy, *Marine Policy* 2009, p. 728.

<sup>35</sup> Arts. 38–44, and art. 355 TFEU; until the entering into force of the Lisbon Treaty in December 2009, the relevant articles were arts. 32–38 of the Treaty – particularly art. 37 (2), third paragraph as well as on art. 299 (1) and (2); based on this competence, the Community negotiates and concludes international agreements according to the procedure laid down in art. 218 (ex art. 300) of the Treaty, *P. Nemitz*, *Fischereipolitik - Nach Art. 34 EGV*, in: *.C. O. Lenz/D. Borchardt* (eds), *EU- und EG-Vertrag*, Berlin: Bundesanzeiger Verlag, 4 Auflage, 2006, p. 583.

<sup>36</sup> There is a substantial body of literature on this; see *T. Markus*, *supra* fn. 7.

<sup>37</sup> *T. Markus*, *supra* fn. 7 and fn. 31.

<sup>38</sup> *R. R. Churchill/D. Owen*, *supra* fn. 19, pp. 258–265; *T. Markus*, *supra* fn. 7, pp. 72–75; *N. Wolff*, *supra* fn. 3, pp. 173–196.

<sup>39</sup> European Commission, *Green Paper on the Reform of the Common Fisheries Policy*, COM (2009) 163 final.



Disintegration of EU policies is maintained by three factors. First, since the inception of the CFP, Member States have not been able to agree on what its central purpose should be. While some Member States consider fisheries to be a social policy, others see it as an environmental, economic or regional policy.<sup>40</sup> Member States tend to promote their own interests (aligned with the interests of their national fishing industry) within the Council and often work against each other instead of jointly striving towards a common goal. Second, the disintegration is deeply engrained in the CFP's legal and institutional structures. The substantial scope of the CFP is based on the provisions on agriculture and fisheries in arts. 38–44 and art. 355 TFEU.<sup>41</sup> The EU holds an exclusive competence to regulate the conservation of marine biological resources.<sup>42</sup> Although its powers in the areas of structural policies and market organisation are not exclusive, they are far-reaching.<sup>43</sup> However, despite extensive legislative powers regarding the CFP, executive powers primarily lie with the Member States, who implement and enforce Community law.<sup>44</sup> A first consequence of this structure is that the regulation of fishing activities can only be done in accordance with the procedures laid down in the provisions of the Treaty on agriculture and fisheries. Arguably, this results in fisheries ministers weighing short-term economic interests over long-term economic and ecological interests. In addition, as a result of the competence order, the environmental laws of the EU or its Member States cannot restrict fishing activities in any way, even where this would serve environmental conservation purposes.<sup>45</sup> Second, given that Member States are mainly responsible

<sup>40</sup> *R. Priebe*, 8 Oct. 2009, Brussels, IIEA-TV at [http://wn.com/reinhard\\_priebe\\_on\\_common\\_fisheries\\_policy](http://wn.com/reinhard_priebe_on_common_fisheries_policy) (accessed on 06 Dec. 2012).

<sup>41</sup> Until the entering into force of the Lisbon Treaty in December 2009, the relevant articles were arts. 32–38 of the Treaty – particularly art. 37 (2), third paragraph as well as on art. 299 (1) and (2); based on this competence, the Community negotiates and concludes international agreements according to the procedure laid down in art. 218 TFEU (ex art. 300) of the Treaty; *P. Nemitz*, *Fischereipolitik – Nach Art. 34 EGV*, in: C. O. Lenz/D. Borchardt (eds), *EU- und EG-Vertrag*, Wien: Linde Verlag, 4. Auflage, 2006, p. 583.

<sup>42</sup> See arts. 2 (1) and 3 (1) (d) TFEU; see also Case C-804/79 *Commission v. United Kingdom* [1981] ECR 1045 para. 1; Case C-141/78 *France v. United Kingdom* [1979] ECR 2923 para. 1 (summary); Case C-405/92 *Mondiet* [1993] ECR I-6133 para. 12.

<sup>43</sup> *T. Markus*, *supra* fn. 7, pp. 37–38.

<sup>44</sup> See art. 23 (1) of Reg. 2371/2002; art. 4 (3) of the Treaty on European Union (which basically reiterates Art. 4 (3) Treaty of the European Union (ex Art. 10 of the EC Treaty)) provides that Member States have the obligation to implement and enforce Community law effectively; see also *S. Magiera*, *Durchsetzung des Europarechts*, in: R. Schulze/M. Zuleeg (eds), *Europarecht*, Baden-Baden: Nomos, 2006, p. 440.

<sup>45</sup> In *Mondiet*, the ECJ had to determine whether a regulation on driftnetting had to be based either on the Treaty's environmental or fisheries provisions. The regulation was challenged on the basis that it had been adopted for ecological reasons, namely, the protection of non-target species. Referring to its *centre of gravity theory*, the Court found that the regulation had to be based on the Treaty provision on agriculture, because it was 'adopted *primarily* in order to ensure the conservation and rational exploitation of fishery resources and to limit the fishing effort' (emphasis added); see Case C-405/92, *Mondiet v. Armentent Islais* [1993] I-6133, para. 24; *N. Wolff*, *Fisheries and the Environment*, Baden-Baden, Nomos 2002, p. 171. The Court of First Instance has only recently referred to fisheries and environment being two different kinds of policies, see Case T-37/04, *The Autonomous Region of the Azores v. Council*, paras. 133, 144 et seq., 164 et seq.; see also Commission Communication Com

for implementing EU fisheries laws, the rules of the CFP remain chronically under-enforced.<sup>46</sup> Third, there is ‘path dependency’ within the CFP, making it difficult to eliminate certain principles and structures that prevent the CFP from improving its entire fisheries management scheme. This is particularly true of the inefficient and ineffective allocation system for fishing opportunities (principle of relative stability) as well as the distribution of harmful fisheries subsidies.<sup>47</sup>

#### IV. THE MSFD: FROM GOOD ENVIRONMENTAL STATUS TO HEALTHY FISH STOCKS?

“Good environmental status” in the marine environment is obviously not imaginable without healthy fish stocks. However, *environmental* ministers and parliamentarians are not competent to directly regulate fishing activities at the EU level, and CFP rules often neglect ecosystem requirements. Despite this, for the first time in EU legislation, the MSFD aims at defining “good environmental status” for the marine environment and how it could be achieved. The next section shows how the actions taken in the context of the MSFD may eventually affect the CFP. It pays particular attention to the development of scientific assessment criteria and methodological standards at EU level to which Member States must for determining good environmental status.

##### 1. THE STRUCTURE OF THE MSFD

The MSFD requires Member States to take the necessary measures “to achieve or maintain good environmental status in the marine environment by the year 2020 at the latest”.<sup>48</sup> Member States are required to develop and implement marine strategies to protect and preserve the marine environment, prevent its deterioration, or, where practicable, restore marine ecosystems.<sup>49</sup> Strategies will also be developed to prevent and reduce inputs in the marine environment so as to ensure that there are no significant impacts on or risks to marine biodiversity from marine pollution.<sup>50</sup> National marine strategies must apply an ecosystem-based approach to the management of human activities,<sup>51</sup> and coordinate such efforts at the regional or sub-regional levels.<sup>52</sup> The Community’s role in this process is limited to guiding the strategic development that takes place at the national level by providing a

---

(2001) 143, pp. 7-8; see also Commission argumentation in *J. Clorley*, Relationship of the Common Fisheries Policy and the Habitats and Birds Directives, *J. Ritterhoff/S. Gubbay/C. Zucco* (ed.), *Marine Protected Areas and Fisheries – BfN-Skript 122*, Bonn, 2004, p. 60.

<sup>46</sup> *D. C. Payne*, supra fn. 32.

<sup>47</sup> *M. Sissenwine / D. Symes*, Reflection on the Common Fisheries Policy, 2009, available online at <http://www.cfp-reformwatch.eu/pdf/sissenwine-2007.pdf> (accessed on 06 Dec. 2012); *E. da Conceição-Heldt*, *The Common Fisheries Policy in the European Union*, New York: Psychology Press, 2004; *G. Majone*, *Dilemmas of European Integration – The ambiguities and pitfalls of integration by stealth*, Oxford: Oxford University Press, 2005, pp. 111-114.

<sup>48</sup> Art. 1 (1) MSFD.

<sup>49</sup> Art. 1 (2) (a) MSFD.

<sup>50</sup> According to art. 1 (2) (b) MSFD.

<sup>51</sup> Art. 1 (3) MSFD.

<sup>52</sup> Art. 5 (1) to (2) and art. 6 MSFD.

temporal, procedural and substantive framework. The MSFD only assigns coordinative and (somewhat restricted) controlling competences to the Commission.<sup>53</sup>

Member States have to take six procedural steps according to an “action plan”, which is further subdivided into two phases: a) preparation and b) establishing programmes of measures.<sup>54</sup> The preparation is comprised of four procedural steps:

- Initial assessment of the current environmental status in accordance with Article 8 of the MSFD (by 15 July 2012)
- Determination of good environmental status in accordance with Article 9 of the MSFD (by 15 July 2012)
- Establishment of a series of environmental targets and associated indicators, in accordance with Article 10 (1) of the MSFD (by 15 July 2012)
- Establishment and implementation of a monitoring programme for ongoing assessment and regular updating of targets, in accordance with Article 11 (1) of the MSFD (by 15 July 2014)

Setting up programmes of measures is comprised of two procedural steps:

- Development of a programme of measures designed to achieve or maintain good environmental status, in accordance with Article 13 (1) to (3) of the MSFD (by 2015)
- Entry into operation of the programme in accordance with Article 13 (10) of the MSFD (by 2016)

Where the status of the sea in a marine region is “so critical as to necessitate urgent action”,<sup>55</sup> Member States must devise a plan of action, which includes an earlier entry into operation of programmes of measures as well as possible stricter protective measures.<sup>56</sup> The provision on the development of the marine strategies in the MSFD is followed by a number of rules on exceptions,<sup>57</sup> coordination<sup>58</sup> and reporting obligations,<sup>59</sup> public consultations and information, and the updating of national strategies. Finally, the MSFD establishes provisions on the adaptation of the Annexes of the MSFD every six years,<sup>60</sup> as well as provisions for the regulation of methodological standards and technical formats for applying the Annexes.<sup>61</sup> Annexes include qualitative descriptors for determining good environmental status (Annex I), indicative lists of characteristics, pressures and impacts on marine waters

---

<sup>53</sup> See also caveat in recital 43 MSFD.

<sup>54</sup> Art. 5 (2) MSFD.

<sup>55</sup> The meaning of the phrase ‘where the status of the sea is so critical as to necessitate urgent actions’ must be interpreted in the light of the initial assessment and the definition of ‘good environmental status’ under arts. 3 (5), 8, and 9 MSFD, as well as in the light of the interpretation of art. 14 (1) to (4) MSFD, particularly the terms “significant risk” under Art. 14 (4) MSFD, see below.

<sup>56</sup> Art. 5 (3) MSFD.

<sup>57</sup> Art. 14 MSFD.

<sup>58</sup> Art. 15 and 16 MSFD.

<sup>59</sup> Art. 18, 20 and 21 MSFD.

<sup>60</sup> Art. 17 and Art. 24 (1) MSFD.

<sup>61</sup> Art. 24 (2) MSFD.

(Annex III), and an indicative list of characteristics to be taken into account for setting environmental targets (Annex IV).

## 2. DETERMINING GOOD ENVIRONMENTAL STATUS

The pivotal aim of the MSFD is that the Member States achieve good environmental status as defined in its Article 3 (5). According to Article 9 (1) of the MSFD, Member States shall describe “a set of characteristics for good environmental status” for their marine regions by reference to the initial assessment. This description should be based on the “qualitative descriptors listed in Annex I” and consider the indicative lists in Annex III Table 1 as well as the impacts or effects of human action mentioned in Annex III Table 2. Article 3 (5) of the MSFD puts forward a highly ambitious definition of “good environmental status”:

[T]he environmental status of marine waters where these provide ecologically diverse and dynamic oceans and seas which are clean, healthy and productive within their intrinsic conditions, and the use of the marine environment is at a level that is sustainable, thus safeguarding the potential for uses and activities by current and future generations.

This definition is complemented by additional criteria that require, e.g., that ecosystems “function fully” and that anthropogenic inputs “do not cause pollution effects”.<sup>62</sup> In the end, however, the content of the words “good environmental status” will be determined by the Member States themselves based on the descriptors set out in Annex I of the MSFD. Annex I lists eleven descriptors for determining good environmental status. The one relevant for this submission is Descriptor (3) on fisheries. It states that:

(3) Populations of all commercially exploited fish and shellfish are within safe biological limits, exhibiting a population age and size distribution that is indicative of a healthy stock.

To ensure coherence, consistency and comparability, the criteria and methodological standards for determining good environmental status are to be harmonised in accordance with the “Comitology Procedures” (regulatory procedure with scrutiny).<sup>63</sup> In September 2010, the Commission adopted the “Decision on criteria and methodological standards on good environmental status of marine waters”.<sup>64</sup> The Decision specifies the criteria and methodological standards for assessing the extent to which good environmental status is being achieved in relation to each descriptor listed in Annex I of the MSFD. Explanations and definitions are based on standards available under existing EU legislation or provided through the assessments of “Task Groups” set up and led by ICES and the Joint Research Centre as well as from consultations with regional seas

---

<sup>62</sup> Art. 3 (5) (a and b) MSFD.

<sup>63</sup> Art. 9 (3) and art. 25 (3) MSFD.

<sup>64</sup> European Commission Decision (EU) 477/2010 of 1 Sept. 2010 on criteria and methodological standards on good environmental status of marine waters, OJ L 232, pp. 14–24.

conventions.<sup>65</sup> While the Decision defines some criteria extensively, others still require further refinement. The Commission notes that there is “substantial need to develop additional scientific understanding for assessing good environmental status”.<sup>66</sup> It also states that a revision of the Decision should be carried out “as soon as possible” after the completion of the Commission’s assessment of the Member States’ notifications under Art. 9 (2), 10 (2) and 11 (3) MSFD.<sup>67</sup> The descriptor on fisheries will now be described in greater detail.

### 3. SPECIFYING THE GES WITH REGARDS TO FISHERIES – COMMISSION DECISION 477/2010<sup>68</sup>

As described above, Descriptor 3 of Annex I of the MSFD requires that “[p]opulations of all commercially exploited fish and shellfish are within safe biological limits, exhibiting a population age and size distribution that is indicative of a healthy stock”. Annex I of the MSFD establishes broad criteria on fisheries which refer to three important indicators of the health of the population: fishing pressure, reproduction capacity of fish stocks, and population age and size distribution. Fishing pressure is to be determined by two additional indicators: fishing mortality and catch/biomass ratio. Fishing mortality is defined in the Draft Decision, which states that “achieving good environmental status requires F values [(mortality rate)] are equal or lower than F-MSY, the level capable of producing Maximum Sustainable Yield”. An even lower mortality is defined for mixed fisheries. It should be noted that the MSY is usually defined as ‘the maximum annual catch which on average can be taken year after year from a fish stock without deteriorating the productivity of the fish stock’.<sup>69</sup> Where information on fishing mortality rates is not available, the catch/biomass ratio yielding MSY can be taken as indicative reference. “The value for the indicator that reflects F-MSY needs to be determined by scientific judgment [...]”. Alternatively, Member States may base their assessment on the *reproductive capacity of stocks* or *population age and size distribution*. While the primary indicator for the reproductive capacity is the spawning stock biomass “that would achieve MSY under a fishing mortality equal to F-MSY”, the secondary indicator termed the “biomass index” requires that there is a “high probability that the [respective] stock will be able to replenish itself under the existing exploitation conditions”. The final criteria refers to “population age and size distribution” as an indicator based on the idea that “healthy stocks” are characterized by high survival of old, large individuals (proportion of large fish, mean maximum length, 95 percentile of the fish length distribution observed in research vessel surveys, size at first sexual maturity).

---

<sup>65</sup> See Recital 2 and 5 of the Draft Commission Decision; DG Sanco was responsible for Descriptor 9, i.e. Contaminants in fish and seafood for human consumption.

<sup>66</sup> Recital 3 European Commission Decision (EU) 477/2010.

<sup>67</sup> Recital 4 European Commission Decision (EU) 477/2010.

<sup>68</sup> European Commission Decision (EU) 477/2010.

<sup>69</sup> See for example, European Commission, Green Paper on the Reform of the Common Fisheries Policy, COM (2009) 163 final, p. 5, fn. 2.

#### 4. ANALYSIS OF THE FISHERIES DESCRIPTOR AS DEFINED BY THE COMMISSION DECISION

The primary and secondary of the three alternative assessment and valuation criteria listed in Descriptor 3 of Annex I of the Commission Decision – fishing pressure, reproduction capacity – are based on the assumption that fishing at an MSY-level is an indicator of good environmental status.

The criterion of limiting fishing at MSY-levels cannot necessarily be regarded as an economically efficient and ecologically viable limit for quantitative catch limitations in fisheries management.<sup>70</sup> For example, while efficient fishing is deemed to be achieved at the so-called Maximum Economic Yield-level (MEY) (which implies less fishing than at the MSY-level), the criterion of MSY is also inadequate for multi-species fisheries management.<sup>71</sup> However, according to the Commission, 88% of commercially exploited fish stocks by EU fisheries are currently fished beyond the MSY-level.<sup>72</sup> Thus, it would be an important step in the direction of sustainable fisheries management to achieve fishing at MSY-levels in EU waters.

By deciding to use the MSY-level as the appropriate way of defining good environmental status, the Commission is promoting a policy endorsed since 2006 under the EU's Common Fisheries Policy (CFP), which establishes the MSY-level as a general limit for fishing opportunities.<sup>73</sup> Accordingly, one may read the proposal to use the MSY-level as an indicator of good environmental status as the Commission's way of circumventing the institutional, political and legal constraints that exist within under the CFP with regards to committing the EU to keep fishing pressure within sustainable limits.<sup>74</sup>

#### V. THE EFFECTS OF EU MARINE ENVIRONMENTAL CONSERVATION STANDARDS ON SECTORAL POLICIES

The MSFD provides ambitious goals and the Commission Decision provides guidance on how to assess and quantify these goals. However, The MSFD has been drafted in vague terms and includes a set of broadly drafted exceptions. The

---

<sup>70</sup> *S. Iudicello/M. L. Weber/R. Wieland*, Fish, Markets, and Fishermen – The Economics of Overfishing, Washington: Island Press, 1999, pp. 45–47; *T. Markus*, supra fn. 31, pp. 132–144; *R. Froese/A. Proelß*, Rebuilding fish stocks no later than 2015: will Europe meet the deadline?, 11 *Fish and Fisheries* 2010, pp. 194–202.

<sup>71</sup> See art. 61 (3) of the United Nations Convention on the Law of the Sea (Montego Bay, 10 Dec. 1982). The MSY-criterion has already been introduced to international fisheries law within the 1984 Convention on the Law of the Sea; already at that time it had been subject to criticisms, see *P. Birnie/A. Boyle/C. Redgwell*, *International Law & the Environment*, pp. 590–593, p. 717.

<sup>72</sup> European Commission, Green Paper – Reform of the Common Fisheries Policy, COM (2009) 163 final, p. 7.

<sup>73</sup> *Ibid.*, p. 15; European Commission, Communication from the Commission to the Council and the European Parliament – Implementing sustainability in EU fisheries through maximum sustainable yield COM (2006)360 final.

<sup>74</sup> *T. Markus*, supra fn. 7, pp. 27–58; *L. van Hoof/J. van Tatenhove*, supra fn. 34, pp. 726–732.

Commission Decision, in turn, is not intended to provide binding use restrictions, e.g. quantitative catch restrictions. The following section analyses the legal quality of the obligation to achieve good environmental status under the MSFD and the Commission Decision and its possible effect on the CFP.

## 1. THE MANDATORY FORCE OF THE OBLIGATION TO ACHIEVE THE GES: THE CASE OF FISHERIES

In principle, Art. 1 (1) MSFD obliges Member States to achieve or maintain good environmental status in the marine environment by the year 2020 at the latest. Member States are also required to determine the set of characteristics for good environmental status on the basis of the qualitative descriptors listed in Annex I MSFD. The MSFD mentions specific limits of quantitative catch limits. Descriptor (3) of Annex I on fisheries provides that “populations of all commercial exploited fish and shellfish are within safe biological limits [...]”. In addition, as a legally binding measure that applies to the Member States,<sup>75</sup> the Commission Decision 477/2010 sets out the criteria to be used by the Member States to assess and quantify the extent to which good environmental status is being achieved. As described above, the primary and secondary indicator for the state of fish stocks commercially exploited by EU vessels is exploitation at MSY-levels. Only the third indicator relates to age and size distribution.

Although the MSFD and the Commission Decision provide legally binding obligations, Member States have been left a wide margin of discretion regarding their own level of commitment. Regarding the general obligation to achieve good environmental status by 2020 Art. 9 (1) of the MSFD allows the Member States to determine the characteristics of good environmental status themselves. In addition, the Member States are responsible for designing and implementing environmental targets and measures.<sup>76</sup> Furthermore, the MSFD has included a number of broadly drafted exceptions that give Member States significant discretion to limit their commitment to taking concrete measures for achieving good environmental status.<sup>77</sup> The Member States are only required to act where there is a “significant risk” to the marine environment.<sup>78</sup> However, the legal concept of “significant risk” (“erhebliche Gefahr” or “risqué important”) from a comparative perspective remains somewhat unclear at this stage.

Although Commission Decisions are generally binding in their entirety (Art. 288 (4) TFEU) and although Art. 1 of the Commission Decision uses binding language, the aim of the Decision is not to impose specific limits for good environmental status in marine waters, but instead to provide guidance on how to assess and quantify marine ecosystems. Assessment criteria listed in the Commission Decision are to be used alternatively or not at all. If the Member States find one or more of

---

<sup>75</sup> Art. 288 para. 4 TFEU and art. 1 Commission Decision 477/2010.

<sup>76</sup> See arts. 5 (2), 10, 13 MSFD.

<sup>77</sup> Art. 14 MSFD.

<sup>78</sup> *T. Markus et al.*, *supra* fn. 8, p. 84.

the criteria to be inappropriate under the circumstances, they merely need to provide the Commission with a justification for not using them as a metric.<sup>79</sup>

## 2. THE MSFD'S LIKELY EFFECTS ON THE CFP

Despite the challenges regarding implementation and legal reservations under the MSFD and the Commission Decision, both instruments are likely to have significant long-term impacts on marine environmental policy and sectoral policies such as the CFP that are taken up by the European Union and its Member States. First, the Member States are required (no exemption) to make the initial assessment under the MSFD.<sup>80</sup> This will certainly increase their common understanding of their marine ecosystems and will most likely enhance the necessary cooperation and coordination among Member States in marine science and governance.

Second, although the Member States ultimately determine the characteristics of good environmental status, the Commission Decision provides basic concepts for understanding and evaluating the condition of marine ecosystems. The assessment of marine ecosystems by scientists, stakeholders and the Member States is largely determined by the prevailing concepts, assessment criteria and methodological standards available (“theory dependence of observation”).<sup>81</sup> For example, with regards to fisheries, the Commission Decision’s commitment to determining that good environmental status is being achieved where fishing mortality lies at MSY-levels will thus likely influence Member States’ decisions regarding the characteristics of good environmental status as well as their management programmes.

Third, although the Member States cannot restrict or regulate fishing activities to achieve good environmental status without infringing primary law as understood by the European Commission, they would have a strong argument for proposing amendments to the Commission to the fisheries rules set out in the CFP.<sup>82</sup> Art. 15 (1) of the MSFD states that

“[w]here a Member State identifies an issue which has an impact on the environmental status of its marine water and which cannot be tackled by measures adopted at national level, or which is linked to another Community policy or international agreement, it shall inform the Commission accordingly and provide a justification to substantiate its view. [...]”.

Art. 15 (2) of the MSFD continues by stating:

---

<sup>79</sup> See Part A, paragraph 8 Commission Decision.

<sup>80</sup> Art. 8 MSFD.

<sup>81</sup> *N. R. Hanson*, *Patterns of Discovery*, Cambridge: Cambridge University Press, 1985; see particularly Chapter 2 in *T. Kuhn*, *The Structure of Scientific Revolutions*, Chicago: Chicago University Press, 1970; see also *D. Demeritt*, What is the ‘social construction of nature’? A typology and sympathetic critique, 26 *Progress in Human Geography* 2002, pp. 767-790.

<sup>82</sup> See art. 15 (1) and (2) MSFD.



“Where action by Community institutions is needed, Member States shall make appropriate recommendations to the Commission and the Council for measures regarding the issues referred to in paragraph 1. Unless otherwise specified in relevant Community legislation, the Commission shall respond to any such recommendation within a period of six months and, as appropriate, reflect the recommendations when presenting related proposals to the European Parliament and to the Council”.

It might be problematic that the Member States only have the right to draw up *initiatives* as this might not lead to concrete action beyond the national level. The only action Member States can take is to provide supporting information to the appropriate Community organ or international entity in the hope that this cause will be taken up. However, Art. 15 (1) and (2) MSDF could also be interpreted as a clear indication that EU environmental law-makers increasingly recognise the need to make sectoral policies subject to environmental concerns. This would imply that the Member States should adopt ambitious environmental objectives and ask the Commission to propose legislation under the CFP to assist them in achieving their goals, if required.<sup>83</sup>

## VI. CONCLUSION

This article aims at elucidating the evolving legal and institutional relationship between EU marine environmental law and sectoral EU policies. The CFP was chosen as an example of a sectoral EU policy, because it is probably the most important and well-developed policy in the marine sector. EU marine environmental policy and fisheries policy pursue different objectives and are built on varying institutional and legal structures, and thus struggle with persisting inconsistencies. The question was posed whether the MSFD could help to overcome this legal, institutional and political divide. In principle, the MSFD leaves the Member States with a wide margin of discretion regarding their own level of commitment to marine conservation. Both the obligations and exceptions have been drafted in broad terms under this instrument. In addition, the Commission Decision only provides general guidance on how to assess, quantify and describe marine ecosystems, and does not impose specific exploitation or other use restrictions. Thus, both the CFP and MSDF do not directly and immediately affect or modify existing sectoral provisions, e.g., by restrict fishing. Nevertheless, it can be expected that the unambiguous obligation in the MSDF that Member States make an initial assessment of the marine environment will increase the common understanding and improve cooperation and coordination among Member States.

---

<sup>83</sup> This has been successfully practiced prior to the adoption of the MSFD when the United Kingdom wanted to establish a Special Area of Protection under the Habitats Directive 185 km northwest of Scotland. The UK asked the Commission to prohibit bottom trawling in order to protect sand and cold water mounds in that area (‘Darwin Mounds’). As a result, the Council agreed to a permanent ban on bottom trawling in the particular area in 2004; see Council Regulation (EC) No. 602/2004 amending Regulation (EC) No. 850/1998 as regards the protection of deepwater coral reefs from the effects of trawling in an area north west of Scotland, OJ L 97, pp. 30–31.

In addition, although of weak mandatory force, the Commission Decision contributes to establishing conservation oriented concepts for assessing and evaluating the condition of the marine environment. Moreover, the MSFD recognises the legal and institutional fragmentation of marine environmental and sectoral policies and provides a systematic approach for integrating environmental concerns. Thus the extent remains to be seen to which the Member States are really willing to commit themselves to marine conservation and thus determine good environmental status. It will also be highly important that the Commission takes up the environmental concerns of Member States in the context of sectoral policies such as the CFP.

# WHO OWNS THE NORTH POLE? CONCURRENT CLAIMS OF THE ARCTIC SHELF AND THE CHALLENGES FOR INTERNATIONAL LAW

Thomas Heinicke\*

## I. INTRODUCTION – THE ICE MELTS

For many centuries, the Arctic has fired mankind's desire to explore new worlds, driven by the ambition to seek knowledge and to face extraordinary challenges. Although the time of adventurous surface expeditions is long gone, the Arctic Region is once again moving into the focus of the international community: as the playing field for a new gold rush towards its vast mineral treasures.

The Arctic Ocean is in most parts covered by a layer of thick ice which always thawed and refroze with the seasons. In recent years this everlasting circle seems to have developed an imbalance. Scientists hold the global warming responsible for a decrease of the ice layer approximately by half in the last sixty years.<sup>1</sup> With the ice melting, the Arctic Shelf, which is supposed to hold a quarter of the world's undiscovered oil and gas resources, becomes accessible.<sup>2</sup> The dream of a future thawed Arctic led to a new gold rush among the nations bordering on the Arctic Shelf, namely Russia, Denmark, the USA, Norway and Canada, all intending to stake their claims on the ocean floor. A slice of the cake seems promising. The Russian oil and gas company Gazprom, which commenced the exploration of the Arctic Shelf as early as in 1979, recently revised its Shelf Development Programme, stating the company's intention to discover another 11 billion tons of oil equivalents on the shelf within the next twenty years. Thus, by the year 2030, Gazprom intends to produce an annual 200 billion cubic meters of gas and 10 million tons of oil on the Arctic Shelf.<sup>3</sup>

Even though the 19<sup>th</sup> century race of the nations to the North Pole is thought to be overcome in modern times, the Arctic dispute about the staking of the claims is rich in symbolism. In the summer of 2007, two Russian submarines undertook an exploration beneath the ice layer to the geographical North Pole. On arriving there, they planted a titanium-alloyed Russian flag on the sea ground, thereby asserting Russia's claim of the sea bed and its natural resources along the extension of Russia's continental shelf.

Still, the Arctic Region is much more than an economic playground for oil drilling companies and competing states. It also hosts a very vulnerable and fragile ecosystem, which is principally untouched by civilization. Impeding with it might have global consequences, since the Arctic Ocean functions as a gigantic water

---

\* Doctor of law, lecturer at the Carl von Ossietzky University Oldenburg.

<sup>1</sup> A. Proelss/T. Müller, *The Legal Regime of the Arctic Ocean*, ZaöRV 2008, p. 651, 653.

<sup>2</sup> A. Proelss/T. Müller, *supra* fn. 1, p. 653.

<sup>3</sup> Gazprom Press release dated 03 March 2011, <http://www.gazprom.com/press/news/2011/march/article109824/> (accessed on 05 Apr. 2011).

pump for the ocean conveyor belt which basically controls the world's climate. It is also home for about four million people, a high percentage of them indigenous and highly dependent on an intact arctic environment.

This paper will examine the balance act between the economic perspective on the one hand and the challenge for the international community on the other. It will thereby examine the rule of international law that applies to the exploitation of mineral resources on the Continental Shelf in general (II.). The different land claims to the Arctic will be examined as well as attention will be directed to the role of the Commission on the limits of the Continental Shelf (III.). With regard to the environmental issues and the high potential of conflict that arises from the right of the strongest (or fastest), suggestions for a reformation of the Commissions' role will be made (IV.) as well as the further development of a more specified Arctic regime will be examined (V.).

## II. THE LEGAL REGIME OF THE CONTINENTAL SHELF

Although oil drilling under the eternal ice still carries a notion of science fiction and future perspective, the underlying legal question of the coastal state's right to the seabed's resources are centuries old. It is worthwhile to consider their origin as well as to discuss their application to the Arctic Ocean. The latter shall be done with reference to the ongoing conflict between the coastal states to the Arctic Ocean.

### 1. LOOKING BACK: THE DEVELOPMENT OF SOVEREIGN RIGHTS ON THE MINERAL RESOURCES OF THE SEABED AND ITS SUBSOIL

Coastal states have been aware for a long time that the submerged seabed holds many mineral treasures.<sup>4</sup> Still, those treasures were beyond the coastal states' reach. By the first quarter of the 20<sup>th</sup> century, it was generally accepted that the coastal states' sovereign rights in the territorial sea extend to the submerged seabed and its natural resources hidden within, while the seabed under the high seas was considered not to be subject to unilateral claims.<sup>5</sup> Nonetheless, forthcoming unilateral claims to the seabed by France and the UK beyond their territorial seas were widely tolerated since they did not hamper navigational or fishing rights of other states. After the Second World War, President Truman made the first clear unilateral claim to the continental shelf and its resources for the USA. This example provoked other coastal states to make unilateral claims to their continental shelves in the 1950s. Some states annexed the shelf to their territory, while others included the water column in their claim or extended it to biological as well as mineral

---

<sup>4</sup> In Cornwall, submarine mining by tunneling from the shore was widely exercised in the 19<sup>th</sup> century.

<sup>5</sup> *R. Churchill/ V. Lowe*, *International Law of the Sea*, Manchester: Manchester University Press, 1999, p. 142.

resources.<sup>6</sup> This diverse state led to the First United Nations Conference on the Law of the Sea that drafted and finally concluded the Convention on the Continental Shelf which was opened for signature in 1958 and came into force in 1964. It granted sovereign rights to the resources of the continental shelf to a depth of 200 miles or – dangerously vague – to the limit to which the resources could be exploited. The Convention did not receive wide attention which is likely owed to the rapid technological development on the one hand, that fired expectations for further and deeper exploitation. Another important role can be asserted by the beginning period of decolonisation. The newly independent states demanded a higher degree of participation and involvement in economic issues than the Convention offered.<sup>7</sup> In 1969 the International Court of Justice ruled on the *North Sea Continental Shelf Cases* (Germany v. Denmark; Germany v. Netherlands). It held that the rights of a coastal state on the continental shelf arise inherently from its sovereignty over the land.<sup>8</sup> Thus, the continental shelf regime was part of customary international law that does not need to be actively claimed by a coastal state.

Against this historical background, the Third United Nations Conference on the Law of the Sea in the years from 1973–1982 chose a different approach than the two conferences before that failed in producing a widely accepted convention. The conference aimed at codifying customary international law on the base of consensus, and largely avoided voting.<sup>9</sup> This resulted in a complex, consistently and generally accepted codification of the law of the sea: the UN Convention on the Law of the Sea (UNCLOS) of 1982, which came into force in 1994.

## 2. THE PRESENT: EXPLOITATION OF MINERAL RESOURCES UNDER THE UNCLOS

### a) EXPLOITATION IN THE INTERNAL WATERS, THE TERRITORIAL SEA AND IN THE EEZ

The UNCLOS is a framework convention that provides generally accepted rules for the world's oceans, including the Arctic Ocean. In a holistic way, the convention aims at regulating all aspects of the resources of the sea and the uses of the ocean, such as navigational rights, territorial sea limits, economic jurisdiction, legal status of resources on the seabed beyond the limits of national jurisdiction, passage of ships through narrow straits, conservation and management of living marine resources, protection of the marine environment and a binding procedure for settlement of disputes between states.<sup>10</sup>

---

<sup>6</sup> Examples are noted by *R. Dupuy et al.*, A handbook on the new law of the sea, vol. 2, Leiden: Martinus Nijhoff Publishers, 1991, pp. 326 et. seq.

<sup>7</sup> *R. Dupuy et al.*, supra fn. 6, p. 329.

<sup>8</sup> International Court of Justice, 41 Int. Law Reports 29, p. 51.

<sup>9</sup> *G. Jaenicke*, „Die Dritte Seerechtskonferenz der Vereinten Nationen – Die neue Seerechtskonvention“, *Neue Juristische Wochenschrift* 1983, p. 1936.

<sup>10</sup> For an overview to history and content of the UNCLOS see UN Division for Ocean Affairs and the Law of the Sea, *The UN Convention on the law of the Sea: a historical perspective*,

The UNCLOS establishes different maritime zones in the ocean with gradational rights in respect to the mineral resources in the seabed. All waters and the landward side of the base lines are internal waters. In such waters only the domestic laws apply and the coastal state is free to exploit the resources found there. While state practice tends to push the baseline as far as possible from the shore, the internal waters of a coastal state can cover a significant size of the continental shelf. This is especially the case when the regime of straight baselines applies, which does not follow the low water line, as the normal baseline is supposed to do, but abstracts the shape of the coast.<sup>11</sup>

In a belt of up to 12 nautical miles<sup>12</sup> from the baseline on the seaward side, the coastal state may establish its territorial sea where the coastal state extends its sovereignty to the seabed and subsoil.<sup>13</sup> The coastal state may therefore engage in any exploitation activity it wishes.

Beyond and adjacent to the territorial sea, coastal states may declare an exclusive economic zone<sup>14</sup> that shall not extend beyond 200 nautical miles from the baselines.<sup>15</sup> Within this zone, the coastal state may exercise sovereign rights for the purpose of exploring and exploiting the natural resources of the seabed and its subsoil.<sup>16</sup> The UNCLOS also grants the coastal state the exclusive right to construct, authorise and regulate the construction, operation and use of artificial installations such as drilling stations, platforms etc. Those are subject to the coastal states' jurisdiction.<sup>17</sup> Since the rights in respect to the subsoil and seabed shall be exercised in accordance with the provisions regarding the continental shelf regime, the rights of the coastal state in its EEZ regarding the subsoil and the seabed are only of nominal importance. The relevant rules for the exploitation of mineral resources can be found in Part VI of the UNCLOS.

## b) EXPLOITATION ON THE CONTINENTAL SHELF

The UNCLOS establishes a specific continental shelf regime in Part VI of the convention. In nine articles on this topic, the convention addresses i.e. the definition of the shelf, its delimitation, the exploitation of its resources the installation of artificial constructions and drilling.

---

[www.un.org/depts/los/convention\\_agreements/convention\\_historical\\_perspective.htm](http://www.un.org/depts/los/convention_agreements/convention_historical_perspective.htm)  
(accessed on 06 Apr. 2011)

<sup>11</sup> According to art. 5 UNCLOS, the low water line is the normal baseline. In state practice the low water line is determined by the lowest astronomical tide that occurs every 18 years. Where the coast is shaped extraordinarily, art. 7 UNCLOS allows the drawing of straight baselines that must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters. In effect, the regime of straight baselines pushes the baseline into the ocean.

<sup>12</sup> Art. 3 UNCLOS.

<sup>13</sup> Art. 2 (1) and (2) UNCLOS.

<sup>14</sup> Art. 55 UNCLOS.

<sup>15</sup> Art. 57 UNCLOS.

<sup>16</sup> Art. 56 (1) lit. a UNCLOS.

<sup>17</sup> Art. 60 (1) and (2) UNCLOS.

With respect to the consensus approach of the conference and the different interests of the member states resulting from a wide variety of shapes of continental shelves, a political compromise needed to be found. The convention reflects all major approaches to the delimitation of the shelf that were discussed at the conference<sup>18</sup>. Since the coastal state may decide which method to apply, it can be assumed, that the most far-reaching method for the context for the state's coast will be chosen.<sup>19</sup>

The most crucial regulations concern the definition and delimitation of the continental shelf. These rules shall be outlined as follows. According to art. 76 (1) UNCLOS:

“the continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin”.

With the criterion of the “natural prolongation”, the text refers to a concept introduced in the Truman Declaration and later picked up by the International Court of Justice in the 1969 North Sea Continental Shelf cases. Thus, the text opens the door to a geomorphologic debate. It is unclear from a scientific point of view, what needs to be considered as a natural prolongation and where such prolongations end. The convention helps out by further describing the outer edge of the continental shelf which is the continental margin. According to art. 76 (3) UNCLOS, it

“comprises the submerged prolongation of the land mass of the coastal State, and consists of the seabed and subsoil of the shelf, the slope and the rise. It does not include the deep ocean floor with its oceanic ridges or the subsoil thereof”.

What sounds reasonable to a lawyer's ears raises scientific concern,<sup>20</sup> since it is in many cases at least difficult, if not arbitrary, to distinguish the ocean floor from the continental margin, for the margin builds plateaus and transitional areas to the ocean floor.<sup>21</sup>

For those coastal states that have steep and thus small continental shelves by the definition given above, art. 76 (1) UNCLOS provides a legal continental shelf of at least 200 nautical miles even in the absence of a natural shelf to that extent. Art. 76 (1) continues as follows:

“The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural

---

<sup>18</sup> R. Dupuy *et al.*, *supra* fn. 6, p. 352; G. Jaenicke, *supra* fn. 9, p. 1940.

<sup>19</sup> R. Lagonii, in: W. Graf Vitzthum (ed.), *Handbuch des Seerechts*, 2006, p. 188; M. Weber, *IJMCL* 2009, p. 653.

<sup>20</sup> For the contrast between the scientific and the legal perspective see C. Reichert, *Determination of the Outer Continental Shelf Limits and the Role of the Commission on the Limits of the Continental Shelf*, *IJMCL* 2009, p. 387, p.389 *et. seq.*; A. Cavnar, *Accountability and the Commission on the Limits of the Continental Shelf: Deciding Who Owns the Ocean Floor* International Institute for Law and Justice Emerging Scholars Papers 15, 2009, p. 10 *et. seq.*

<sup>21</sup> R. Lagonii, *supra* fn. 19, p. 190; T. Heidar, *The Legal Regime of the Arctic Ocean*, *ZaöRV* 2009, p. 635, pp. 637 *et seq.*

prolongation of its land territory to the outer edge of the continental margin or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance”.

The concept of a legal shelf fully departs from any scientific approach since it basically grants each coastal state a minimum continental shelf of 200 nautical miles without regard to the physical character of the ocean floor. This provision showed to be necessary in the processing of the third UN Conference on the Law of the Sea, since the regime of the exclusive economic zone, if so claimed, grants the same rights for the exploitation of mineral resources and the construction of artificial installations.<sup>22</sup>

A minimum continental shelf of 200 nautical miles irrespective of the seabed's shape did not satisfy the demands of such coastal states whose geological shelves extend the minimum breadth, e.g. Russia, the United States of America etc. Those states have to delineate the outer limits of their continental shelves by the means of a system of straight lines through fixed points on the ocean floor.<sup>23</sup> The coastal state must not determine those fixed points by discretion only, but has to comply with specific geological demands that relate to the physical shelf. According to art. 76 (4) lit a (i) UNCLOS, the fixed points must either be located where the thickness of sedimentary rocks is at least one per cent of the shortest distance from such point to the foot of the continental slope. This “Irish Formula” is extremely costly in its application since the coastal state has to engage in extensive drilling activities in order to determine the thickness of the sediment<sup>24</sup> while at the same time the chosen percentage is arbitrary and without scientific reference.<sup>25</sup> As an alternative, the “Hedberg Formula”, laid down in art. 76 lit. a (ii) UNCLOS, combines a geomorphological with a distance criterion. There, the fixed points must not depart more than 60 nautical miles from the foot of the continental slope, which shall be determined as the point of maximum change in the gradient at its base. Both formulas may be chosen in the coastal states' discretion,<sup>26</sup> but nonetheless have to comply with art. 76 (5) UNCLOS. Under this provision, the line drawn between the fixed points shall either not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured or shall not exceed 100 nautical miles from the 2,500 metre isobath, which is a line connecting the depth of 2,500 metres. Again, it is up to the coastal state's discretion as to which rule to apply. The second alternative shall however not be applicable in the case of submarine ridges, as expressed in art. 76 (6) UNCLOS, unless the submarine elevations are natural components of the continental margin, such as its plateaux, rises, caps, banks and spurs.

---

<sup>22</sup> Art. 56 (3) UNCLOS; focus on the relationship by *R. Dupuy et al*, supra fn. 6, p. 341.

<sup>23</sup> Art. 76 (7) UNCLOS; the lines must not exceed 60 nm in length.

<sup>24</sup> *R. Lagonii*, supra fn. 19, p. 191.

<sup>25</sup> *R. Dupuy et al*, supra fn. 6, p. 351.

<sup>26</sup> *A. Cavar*, supra fn. 20, p. 9.



Thus, in summary, the UNCLOS provides for a minimum as well as for a maximum continental shelf. The maximum extension of a coastal state's continental shelf can be found beyond the 350 nautical miles threshold depending on the geographical situation of the coastal state. In the process of delimitating a continental shelf beyond the threshold of 200 nautical miles, the convention established an advisory body, the Commission on the Limits of the Continental Shelf (CLCS).<sup>27</sup> According to art. 76 (8) UNCLOS:

“Information on the limits of the continental shelf beyond 200 nautical miles from the baselines (...) shall be submitted by the coastal State to the Commission (...) on the basis of equitable geographical representation”.

The delineation requires the coastal state to provide conclusive scientific data and evidence of its claim which involves costly and time consuming research on the ocean ground<sup>28</sup>. Furthermore, a submission can only be filed within a timeframe of ten years after accession<sup>29</sup>, which means that the research has to produce results soon. In order to share the costs, some coastal states engage in collaborative research projects<sup>30</sup> while at the same time the member states agreed in 2008 that the timeframe for submissions may be satisfied by providing preliminary information indicative of the outer limits of the continental shelf.<sup>31</sup> For the same reason partial submissions are possible.<sup>32</sup>

Art. 76 (8) UNCLOS continues to read that

“the Commission shall make recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf”.

Those recommendations are of solely technical nature since the Commission is set up as a technical body. The restraint of the Commission's expertise to technical issues is reflected in its composition since it consists of 21 experts in the field of geology, geophysics or hydrography.<sup>33</sup> Its function is to consider the submission of the coastal state and to make recommendations in accordance with art. 76 UNCLOS. Furthermore, it may provide scientific and technical advice, if requested by the coastal state concerned during the preparation of the submission.<sup>34</sup> The article states further that “the limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding”. This indicates that the recommendations of the Commission are not mandatory.<sup>35</sup> Still, the coastal state's delineation of the outer limits shall be based on the recommendation of the Commission; only than shall it be final and binding. This results in a pendulum procedure where a submission is followed by a recommendation that leads to a resubmission. This procedure is supposed to narrow down the differences. It is

---

<sup>27</sup> Art. 76 (8) UNCLOS.

<sup>28</sup> *A. Cavnar*, supra 20, pp. 9 f.

<sup>29</sup> Art. 4 of Annex II to the UNCLOS.

<sup>30</sup> *M. Weber*, supra fn. 19, p. 677.

<sup>31</sup> UN Doc. SPOLS/183 of 20 June 2008.

<sup>32</sup> Annex I, no. 3 of the Rules of Procedure of the Commission.

<sup>33</sup> Art. 2 of the Annex II to the UNCLOS.

<sup>34</sup> Art. 3 of the Annex II to the UNCLOS.

<sup>35</sup> *L. Nelson*, *The Settlement of Disputes Arising From Conflicting Outer Continental Shelf Claims*, IJMCL 2009, p. 409, p. 419.

however unclear, what the consequences of a final dissent between Commission and coastal state might be.<sup>36</sup>

Besides the lengthy and complicated issue of defining the outer limit of the continental shelf, part VI of the UNCLOS grants sovereign rights to the coastal state to explore and exploit its mineral resources on the continental shelf.<sup>37</sup> As if foreseeing the planting of the Russian flag, art. 77 (3) UNCLOS states that these rights do not depend on any form of occupation, but, as the International Court of Justice has pointed out, derive from the coastal state's sovereignty over its territory to which the shelf is a natural prolongation. Accordingly, the coastal state has exclusive drilling rights on the shelf,<sup>38</sup> as well as the right to construct artificial installations.<sup>39</sup>

The revenue of any exploitation of the shelf beyond the limit of 200 nautical miles is subject to payments and contributions to the International Sea Bed Authority, since an extensive continental shelf overlaps territory that would otherwise be regarded as the deep seabed, which the convention considers to be a common heritage of mankind.<sup>40</sup> These payments start in the sixth year of exploitation with an annual one percent of the value or volume of the production and rise annually by one percent to 7% in the twelfth year to finally remain at that level.<sup>41</sup> Against this legal background, the claims of the Arctic states shall be reviewed.

### III. LAND CLAIMS IN THE ARCTIC OCEAN

As outlined above, the procedure of claiming an extensive continental shelf involves the participation of the Commission. Since the technical and procedural rules of art. 76 UNCLOS cannot be considered to be part of customary international law,<sup>42</sup> only four of the five Arctic coastal states can issue a submission. The USA cannot initiate such a procedure, since they are not member to the convention.

Russia was the first of the five Arctic states to file a submission under art. 76 (8) UNCLOS to the CLCS. It did so in December 2001, claiming that the Lomonosov and the Mendeleev Ridges were extensions of its land territory. While the first is an underwater structure that spans across the Arctic Ocean and passes under the North Pole, the latter is an underwater ridge extending from the Siberian Shelf to central areas of the Arctic Ocean.<sup>43</sup> If the submission became the outer limits of the Russian continental shelf, it would cover an area of 460.000

---

<sup>36</sup> For possible interpretations see *A. Proelss/T. Müller*, supra fn. 1, pp. 674 et. seq., who favor a restrictive interpretation that leaves the ultimate decision with the coastal state.

<sup>37</sup> Art. 77 (1) and 77 (4) UNCLOS.

<sup>38</sup> Art. 81 UNCLOS.

<sup>39</sup> Art. 80, 60 UNCLOS.

<sup>40</sup> Art. 136 UNCLOS.

<sup>41</sup> Art. 82 (2) UNCLOS.

<sup>42</sup> *V. Golitsyn*, Continental Shelf Claims in the Arctic Ocean: A Commentary, *IJMCL* 2009, p. 401, p.405.

<sup>43</sup> *M. Watson*, Arctic Treaty: A Solution to the International Dispute over the Polar Region, *Ocean and Coastal Law Journal* 2010, p. 309, p. 314.

nautical square miles. This makes the Russian submission the largest of the Arctic states that have been filed so far.<sup>44</sup> This claim was later scientifically supported by data on the composition of the Lomonosov Ridge's crust which is identical with the rock foundation of the continental shelf but different from the rock found in the deep seabed.<sup>45</sup> Other Arctic States objected to the submission. The United States argued that the Mendeleev Ridge is a volcanic feature of oceanic origin and thus not part of any state's continental shelf,<sup>46</sup> while the Danish opposed the Russian claim to the Lomonosov Ridge which they consider to be linked to Greenland.<sup>47</sup> The submission was considered by the CLCS between December 2001 and June 2002. It did not reject the submission, but recommended further investigation by Russia on several technical matters.<sup>48</sup> Since then, no revised submission has been filed by the Russian government.

Norway followed the Russian submission five years later in 2006, its submission expanding the Norwegian Continental Shelf almost to the North Pole. The areas covered by the submission are part of the continental margin surrounding the mid-Northeast Atlantic island of Jan Mayen and the continental margin adjacent to mainland Norway and the Svalbard archipelago.<sup>49</sup> The submission is rooted in Norway's deep historical and cultural links to the Arctic Region. Norway received recommendations in 2009, and is to the present still revising its submission.

So far, Russia and Norway are the only Arctic States that have submitted their claims to the Commission. The two missing Arctic States that are members of UNCLOS, Canada<sup>50</sup> and Denmark<sup>51</sup> will have to file their submission until 2013 and 2014 to meet the ten years time frame set up by the Convention.<sup>52</sup> The United States are neither bound by any time frame nor by the requirement to file a submission to the Commission. It is regarded as advantageous for the United States that it will not subject its assertion of the outer limit of its continental shelf to the scrutiny of the Commission.<sup>53</sup> It is argued however, that they can make a claim with reference to the 1958 Geneva Convention on the Continental Shelf, to which the United States are party.<sup>54</sup>

---

<sup>44</sup> *M. Weber*, supra fn. 19, p. 660.

<sup>45</sup> *M. Watson*, supra fn. 43, p. 314.

<sup>46</sup> For a discussion see *A. Proelss/K. Müller*, supra fn. 1, pp. 666 et. seq.; *M. Watson*, supra fn. 43, p. 318.

<sup>47</sup> *M. Watson*, supra fn. 43, p. 324.

<sup>48</sup> *M. Watson*, supra 43, p. 314.

<sup>49</sup> For a description of the submission and the Commission's recommendation see *O. Jensen*, in: *Vidas, D. (ed), Law, Technology and Science for Oceans in Globalisation*, Leiden: 2010, pp. 521 et. seq.

<sup>50</sup> For a Canadian perspective see *Griffiths, F.*, *Towards a Canadian Arctic Strategy*, ZaöRV 2009, p. 579.

<sup>51</sup> For a Danish perspective see *T. Winkler*, *An International Governance Framework for the Arctic: Challenges for International Public Law – A Danish Perspective*, ZaöRV 2009, p. 641.

<sup>52</sup> *M. Weber*, supra fn. 19, p. 656.

<sup>53</sup> *V. Golitsyn*, supra fn. 42, p. 405.

<sup>54</sup> *Ibid.*

The existing submissions as well as the reactions especially to the Russian submission predict that most of the Arctic seabed will be under national jurisdiction, if the submissions are turned into delineations.<sup>55</sup> There will be a significant area of overlap in the central Arctic Ocean between Canada, Denmark and Russia.<sup>56</sup>

#### IV. WALKING ON THIN ICE – THE COMMISSION’S ROLE IN THE ARCTIC

With regard to such contrasting positions, the need for a moderator and decision-maker is obvious. Unfortunately, the CLCS in its present shape cannot fulfill this role for the following reasons:

1. The composition of the Commission hinders a holistic review of the coastal state’s submission. Especially in the Arctic context, the submissions directly involve environmental and cultural issues and ultimately affect legal rights of the coastal states as well as the deep seabed, which is considered to be a common heritage of mankind. Still, none of these issues is on the Commission’s agenda.
2. The Commission is blindfolded to the political and economic dimension of the claim since it reviews the submissions independently from each other and with almost no consideration of external comments on a submission.
3. The nontransparent decision-making procedure behind closed doors, the overarching confidentiality rules as well as the lacking obligation to publicly defend its findings hinders the acceptance of the Commission’s recommendations by the affected coastal states.
4. The appointment mechanisms of the commissioners leave them highly dependent on the goodwill of the delegating state. Furthermore, the funding provisions result in an underrepresentation of developing countries among the delegating states.
5. The absence of a judicial review panel leaves the interpretation of the open rules in art. 76 UNCLOS solely to the Commission.

All those arguments shall be dealt with in line.

##### 1. A SINGLE MINDED TECHNICAL COMMISSION

From an institutional point of view, the Commission’s approach is unsatisfactory since it solely focuses on the technical review, omitting all other relevant issues that are directly or indirectly linked to the assertion of an extensive continental shelf. Two of the omitted aspects are especially relevant: the protection of indigenous communities as well as of the Arctic marine ecosystem. Both issues are linked since an intact marine environment is vital for the further existence of indigenous communities.<sup>57</sup> The threat is twofold. On the one hand, announcements such as the plans of Gazprom indicate that the closed season for the Arctic is finally over

---

<sup>55</sup> *M. Weber*, supra fn. 19, p. 657.

<sup>56</sup> *Ibid.*

<sup>57</sup> *B. Yeager*, *Managing Towards Sustainability in the Arctic: Some Practical Considerations*, ZaöRV 2009, p. 567.

and exploitation of resources will increase significantly in the next decade, bringing along environmental degradation.<sup>58</sup> On the other hand, the Arctic is most highly affected by the climate change.<sup>59</sup> Both effects combined compose a major threat to the existence and future development of the communities as well as to the Arctic ecosystem itself and should be balanced against the unilateral interests of the coastal states.<sup>60</sup>

As for now, the CLCS is neither competent, nor entitled or willing in its self-understanding to consider such issues. While the self-understanding is derived from the underlying entitlements, both aspects remain subject to the will of the contracting parties. The lacking competence can only be addressed by the participation of external experts or stakeholders in the process of reviewing a submission or by a new composition of the Commission itself. In a more diverse assembly, the CLCS would leave its technical roots behind and face the related environmental, cultural as well as economic issues that are inevitably linked to any exploitation, once drilling in the ground of the Arctic Ocean will no longer be an adventurous expedition but a regular process. In the light of those questions, the solely technical issues that the Commission considers nowadays are clearly of lesser importance.

Besides broadening its view, the Commission needs to be rooted deeper in the international community. Its mandate is rather poor, as are its operation orders that can be derived from art. 76 UNCLOS. Due to its open wording, there is no international consent about the standards that have to be applied in the delineation process.<sup>61</sup> Against this background, the Commission is far more than an executive body applying the existing legal framework. In its work and with its recommendations it develops and shapes the framework of its own rules therefore providing it with the role of a continental shelf court.<sup>62</sup>

In its decision-taking, the Commission has to vote on legal issues. Furthermore, their recommendations directly affect the scope of the deep seabed, since every claim for an extensive continental shelf limits the floor under the high seas which is considered to be the common heritage of mankind. Still, neither a lawyer nor the International Sea Bed Authority is directly involved in the decision-making process.<sup>63</sup> This situation is especially unsatisfying since the two recommendations, already made in the Arctic context,<sup>64</sup> will precedent all later delineations.<sup>65</sup>

---

<sup>58</sup> See *A. Proelss/T. Müller*, supra fn. 1, pp. 683 et. seq.

<sup>59</sup> *B. Yeager*, supra fn. 57, p. 567.

<sup>60</sup> For the social changes in the Arctic see *R. Rasmussen*, *New Chances and New Responsibilities in the Arctic Region*, ZaöRV 2009, p. 559, pp. 561 et. seq.

<sup>61</sup> *A. Cavar*, supra fn. 20, p. 14.

<sup>62</sup> *Ibid.*, p. 16

<sup>63</sup> *U. Jenisch*, *Renaissance des Meeresbodens*, NordÖR 2010, p. 373, pp. 376 f.; *V. Golitsyn*, supra fn. 42, p. 407; critical to the demanded participation of the ISA: *L. Nelson*, supra fn. 35, pp. 415 f.

<sup>64</sup> See the recommendation for Norway dated 27 March 2009 and the recommendation for Russia dated 27 June 2002, available through [http://www.un.org/Depts/los/clcs\\_new/commission\\_recommendations.htm](http://www.un.org/Depts/los/clcs_new/commission_recommendations.htm) (accessed on 01 May 2011).

Although external advice may be sought on a case to case base,<sup>66</sup> a general recognition of environmental, cultural and economic concerns as well as mandatory legal monitoring should be required in the procedure.

## 2. THE NEED TO REVIEW SUBMISSION IN CONTEXT

The technocratic setup of the Commission leaves the coastal states alone with their conflicting interests. The Commission is principally not involved in negotiating delimitation conflicts between competing states, since it reviews all submissions independently from each other. The rules of procedure only require a coastal state to report a dispute between opposite or adjacent states or other cases of unresolved land or maritime disputes,<sup>67</sup> but allow for no general participation of other member states. The role of potentially affected member states is especially poor since the Commission only considers comments in relation to boundary disputes; all other affected states are not heard in the process<sup>68</sup> though their rights might be affected by the decision.<sup>69</sup> In the context of the far-reaching Russian submission, many comments will have to be left unconsidered by the Commission. The existing restrictions on the consideration of comments on a coastal state's submission might be due to the fact that a coastal state does not need to actively claim its continental shelf; instead it is regarded as the natural prolongation of the state's territory and is thus automatically encompassed by the coastal state's sovereignty.<sup>70</sup> In other words, the assertion on a continental shelf does not depend on international recognition which makes a participation procedure obsolete. The independent review of a coastal state's submission nonetheless omits the interdependencies that arise from different states' claims. Even though not neighbors, a common world market, economic and political alliances and the potentially hazardous environmental impacts of offshore drilling<sup>71</sup> are shared by a plentitude of states. It adds to the broader picture to enable the Commission to assess the submissions in context with each other and on the base of international reactions.

In this context, art. 76 (10) and art. 83 UNCLOS provide a mechanism to resolve conflicts between neighboring or adjacent states that might serve as a role model. The competing states are asked to reach consent about the delineation of the outer limits of their shelves on the base of equity. The principle of equity breaks with the unilateral view of the Commission while a mutual solution is in line with the consensus-based approach of the whole convention. With a broader reading of these rules, contractual delineations should be possible at regional or sub-regional

---

<sup>65</sup> C. Reichert, *supra* fn. 20, p. 392.

<sup>66</sup> Rule 57 of the Rules of Procedure of the Commission.

<sup>67</sup> Rule 56 of the Rules of Procedure, Annex I to the Rules of Procedure of the Commission.

<sup>68</sup> See A. Cavar, *supra* fn. 20, p. 20; to the participation in general see A. Elferink, The Establishment of Outer Limits of the Continental Shelf Beyond 200 Nautical Miles by the Coastal State: The Possibilities of Other States to Have an Impact on the Process, *IJMCL* 2009, pp. 565 et. seq.

<sup>69</sup> A. Cavar, *supra* fn. 20, p. 24; critical: L. Nelson, *supra* fn. 35, pp. 419 et. seq.

<sup>70</sup> V. Golitsyn, *supra* fn. 42, p. 402.

<sup>71</sup> E.g. the sinking of the oil drilling platform „Deepwater Horizon“ in April 2010, see P. Bethge *et al*, *Der Höllentrip*, *Der Spiegel* 19, 2010, pp. 128 et. seq.

levels. Those agreements could reflect both the regional interests and factual situation more precisely than the ruling of a distant global Commission and might lead to a more adapted solution. Still, such an approach would require coastal states to waive their rights to the unilateral delineation. The planting of the Russian flag does not leave much hope that contractual solutions will play an important role in the delineation process of the Arctic, since it clearly indicates that Russia will not accept equidistance-based boundaries on the shelf.<sup>72</sup> Besides the urgent need to include other states and their submissions in the review process, the delineation of extensive shelves inevitably results in the narrowing of the deep seabed and thus affects all member states. This requires the regular participation of the International Sea Bed Authority.<sup>73</sup>

### 3. INTRANSPARENCY OF THE COMMISSION'S WORK

Another point of criticism is the lacking transparency of the Commission's work. The Commission is bound by strict rules of confidentiality concerning all material that the coastal state classifies.<sup>74</sup> So far, most of the submitting states have classified their submissions.<sup>75</sup> Due to this, neighboring or otherwise affected states will not receive the submission itself for consideration. The coastal state is only obliged to issue an executive summary of its submission which is released to all member states.<sup>76</sup> On this base, the potentially affected member states have to raise their concern to the Commission within three months, before the review process begins.<sup>77</sup> The review procedure itself mostly takes place behind closed doors.<sup>78</sup> Generally, neither the submitting state is allowed to attend the Commission's plenary meetings, nor are any potentially affected member state or independent spectators. Two hearings of the submitting state are, however, provided for in the procedure: at the Commission's first meeting and at the end of the preliminary procedure with the sub-commission before the submission is reviewed by the entire Commission. Since the plenary sessions of the Commission are not open to the public and the concerned issues are confidential, no formal written records of the sessions exist. Once the Commission issues their recommendation, other states than the submitting one will not receive its text. This leaves uncertainty as to the equal application of the rules to all submissions and hinders other states to anticipate the commission's position to their own submission, especially since the complex rules of art. 76 UNCLOS leave much room for discretion.<sup>79</sup>

---

<sup>72</sup> *M. Weber*, supra fn. 19, p. 673.

<sup>73</sup> *L. Nelson*, supra fn. 35, p. 421 discusses the idea of an *action popularis* in regard of the ISA.

<sup>74</sup> See Nr. 2 (1) of Annex II to the Rules of Procedure of the Commission.

<sup>75</sup> *A. Cavar*, supra fn. 20, p. 18.

<sup>76</sup> See Guidelines of the Commission, Nr. 09.1.4 and Rule 50 of the Rules of Procedure of the Commission.

<sup>77</sup> Rule 51 of the Rules of Procedure of the Commission.

<sup>78</sup> *U. Jenisch*, supra fn. 63, pp. 373 et. seq.

<sup>79</sup> *V. Golitsyn*, supra fn.42, p. 408.

Up to now, complaints of the member states as well as the Commissioners for a more intense participation have not led to a change in the review process.<sup>80</sup> Still, improvements on transparency and accountability would help in the acceptance of the Commission's decision and add to the long-term aim of a stable and accepted delineation of the continental shelves.

#### 4. THE APPOINTMENT OF THE COMMISSIONERS

Another open flank in the Commission's setup are the rules for appointing the Commissioners. The Commissioners are proposed by the member states. They also provide for their funding. Commissioners are elected for a renewable period of five years, but since voting at UN level is often dominated by political means, the Commissioners practically hinge on nomination and support of their sponsoring state.<sup>81</sup> In the past the costs have impeded developing countries from nominating Commissioners.<sup>82</sup>

Especially the distorted representation in the assembly of the Commission has to be overcome. In order to ease the financial consequences of a nomination, UN parties have created a voluntary trust fund.<sup>83</sup> Apart from the funding issue, the link between the nominating states and the Commissioner remains strong. Although incompatibility rules exist for the assembly of sub-commission, all Commissioners vote in the plenary sessions. In the light of many potential conflicts of interest, the incompatibility rules need to be strengthened as well as nominating and funding could be accomplished by the UN.

#### 5. THE ABSENCE OF A JUDICIAL PANEL

Finally, concern is raised about the lacking judicial review of the Commission's decisions.<sup>84</sup> The recommendations or approvals of the Commission directly affect the rights of the submitting coastal state. Still, no provisions are made for reviewing the decision by a judicial panel.<sup>85</sup> While a review mechanism creates a strong incentive for the lawful application of the provisions, it might at the same time weaken the coastal state's willingness to cooperate with the CLCS. Furthermore, the affected questions are not solely legal but technical at the same time. Any appellat body would have to ensure the technical expertise necessary to assess the recommendations adopted by the Commission.<sup>86</sup> This would result in a second Commission, whose verdict might be or might not be better than the

---

<sup>80</sup> *A. Cavar*, supra fn. 20, p. 25.

<sup>81</sup> *Ibid.*, p. 34.

<sup>82</sup> *Ibid.*, p. 27.

<sup>83</sup> *Ibid.*

<sup>84</sup> *A. Proelss/T. Müller*, supra fn. 1, pp. 679 et. seq.; *A. Cavar*, supra fn.20, p. 42.

<sup>85</sup> For examples of international arbitrations for the settlement of boundary maritime delimitation disputes see *K. Noussia*, On International Arbitrations for the Settlement of Boundary Maritime Delimitation Disputes and Disputes from Joint Development Agreements for the Exploitation of Offshore Natural Resources, *IJMCL* 2010, pp. 63 et. seq.; *L. Nelson*, supra fn. 35, pp. 409 et. seq.

<sup>86</sup> *W. Tan*, After the Ice Melts: Conflict Resolution and the International Scramble for Natural Resources in the Arctic Circle, *Journal of Politics and Law* 2010, p. 91, p. 94.



Commission's original decision. The missing incentive for cooperation however supersedes the potential benefits of a judicial panel.<sup>87</sup> Still, as an integral part of the review process, lawful application must be ensured and legal expertise sought.

In summary, the Commission can assist in the delineation process of a coastal state in many ways and at many occasions. In the Arctic context however, much more than solely technical expertise is needed. The CLCS in its present shape can hardly provide the solutions to the Arctic conflict. As for the delineation of the continental shelf, the rules of art. 76 UNCLOS leave enough loopholes for unilateral interests from a scientific as well as from a legal point of view, so that in the end it is within the coastal state's discretion, how to line the outer limits of its continental shelf. This raises general questions to the continental shelf regime.

## V. IS THERE A NEED FOR A NEW ARCTIC REGIME?

The UNCLOS aims at providing a global codification for all oceans. Still, the vulnerable Arctic Ocean is hardly comparable to other oceans since the potential threats of interfering with the fragile ecosystem might have global consequences.<sup>88</sup> Against this background, concern arises whether the overarching legal framework of the UNCLOS provides sufficient answers and leadings to the specific issues that are related to the Arctic Ocean – or in other words – if time has come for a specific Arctic Treaty.

Such a specific regional treaty could be drafted to the model of the Antarctic Treaty System.<sup>89</sup> There are indeed some similarities between the Arctic conflict and the situation around Antarctica about five decades ago when seven competing nations had claims on Antarctica. The Antarctic Treaty came into force in 1961 and suspended the claims of the nations, preserving Antarctica for peaceful and scientific purposes only. Today, Antarctica is also affected by climate change, although seemingly to a lesser degree than the Arctic.<sup>90</sup> Besides the similarities, the factual and situational differences prevail. While Antarctica comprises a whole continent in itself, being a landmass that is surrounded by ocean, the Arctic consists of an ocean that is surrounded by foreign states with territorial sovereignty.<sup>91</sup> Antarctica is unpopulated, while the Arctic is home to indigenous people and plays a vital role for the global climate as well as in the global ocean circulation system.<sup>92</sup> Given these differences and taking into account that a full moratorium for the economic exploitation of the Arctic would put an end to the gold rush and

---

<sup>87</sup> So *A. Cavar*, supra fn. 20, p. 42.

<sup>88</sup> *M. Watson*, supra fn. 43, pp. 327 f.

<sup>89</sup> Discussed in *U. Jenisch*, supra fn. 63, p. 378; *F. Griffith*, supra fn. 50, pp. 582 et. seq.; *L. De la Fayette*, *A New Regime for the Conservation and Sustainable Use of Marine Biodiversity and Genetic Resources Beyond the Limits of National Jurisdiction*, IJMCL 2008, p. 531, pp.553 et. seq.

<sup>90</sup> *M. Watson*, supra fn. 43, p. 327.

<sup>91</sup> *M. Weber*, supra fn. 19, p. 657.

<sup>92</sup> WWF (ed), *Arctic Climate Feedbacks: global implications*, 2009, [http://www. Worldwildlife.org/climate/Publications/WWFBinaryitem15234.pdf](http://www.Worldwildlife.org/climate/Publications/WWFBinaryitem15234.pdf) (accessed on 01 May 2011).

interfere with the sovereign rights of the Arctic states, any role-modeling of the Antarctic Treaty would equal daydreaming. This is especially the case since the Arctic states have already declared in the 2008 *Ilulissat* Declaration that they see no need for a specific Arctic convention and remain committed to the UNCLOS.<sup>93</sup>

In the *Ilulissat* Declaration, the Arctic States stress their stewardship role for the Arctic Region. They commit themselves to a responsible management in which they will work together to ensure the protection and preservation of the fragile marine environment of the Arctic Ocean. The Arctic States stress the existing initiatives at regional level and wish to strengthen them and hold up the principles of mutual trust and transparency.

Against this background, solutions to the Arctic conflict best ought to be found at the regional level.<sup>94</sup> The convention itself encourages regional cooperation for the protection and preservation of the marine environment in art. 197 UNCLOS. Many regional initiatives already exist in the Arctic, e.g. the Arctic Council, the Barents Euro Arctic Council or the Northern Forum. Conflicts are best addressed by those who are directly affected by it. In the Arctic context, this must include environmental stakeholders as well as representatives of the indigenous people and representation of the international community by the International Seabed Authority. As for the way to such a solution, it seems about time to return to the consensus principle that made UNCLOS possible in the first place.<sup>95</sup> The role model can be found in art. 76 (10) UNCLOS, as examined above.

Finding a solution to the conflict can, however, not mean to solely negotiate a distribution of the ocean floor among the Arctic States that is acceptable.<sup>96</sup> Instead, a solution must balance the purely economical interests against the possible threats of environmental pollution in the Arctic and the consequences for indigenous people as well as the international community.<sup>97</sup> Thus, the coming decisions have to make strong reference to modern principles of international law, such as the precautionary principle and the principle of sustainable development,<sup>98</sup> since the convention itself fails in the recognition of the rights of people.<sup>99</sup> When – not if – the economic exploitation of the Arctic comes at great scale, the key question is whether it meets the needs of the present without compromising the ability of future generations to meet their own needs, as the classical *Brundtland* definition

---

<sup>93</sup> The *Ilulissat* Declaration, Arctic Ocean Conference Ilulissat, Greenland, 27–29 May, 2008, published in *ZaöRV* 2009, p. 743.

<sup>94</sup> *T. Heidar*, supra fn.21, p. 640; *P. Taksoe-Jensen*, An International Governance Framework for the Arctic: Challenges for International Public Law, *ZaöRV* 2009, p. 625, pp. 631 et. seq.; *T. Winkler*, supra fn. 51, pp. 643 et. seq.

<sup>95</sup> *F. Griffiths*, supra fn.50, pp. 584 et. seq.

<sup>96</sup> The issue of conflict management is addressed by *W. Tan*, supra fn. 86, pp. 93 et. seq.

<sup>97</sup> Yeager stresses the involved interests of the international community, see *B. Yeager*, supra fn. 57, pp. 577 et. seq.

<sup>98</sup> *B. Yeager*, supra fn. 57, pp. 567 et. seq.

<sup>99</sup> *R. Rasmussen*, supra fn. 60, pp. 561.

states.<sup>100</sup> One will have to remind the Arctic states of their stewardship role, which they deliberately took on in the *Ilulissat* declaration.<sup>101</sup> This role can only be fulfilled if the entitled states restrain themselves to a sustainable use of the Arctic resources.<sup>102</sup> Such a use has to consider the effects of mineral exploitation on the environment as well as on indigenous communities and on the international community.

From today's point of view, especially the Russian submission overstrains the rules for the delineation of the continental shelf. An expansion of its shelf to the North Pole sends the wrong signals to the Arctic Region as it leads the UNCLOS rules ad absurdum.<sup>103</sup> A first step must be to review the submissions in context with each other and under consideration of environmental as well as social aspects of the claim. Time is running. The offshore mining industry is developing fast and pushing further down the continental shelf. States such as China, India and South Korea are already exploiting their maritime treasures on the shelf at a large scale.<sup>104</sup> It is a question of time before the gold rush runs towards the North Pole, as the plans of Gazprom clearly indicate. If the international community is willing to influence this process, it should hurry. The ice is melting.

---

<sup>100</sup> United Nations, "Report of the World Commission on Environment and Development", General Assembly Resolution 42/187, 11 Dec. 1987.

<sup>101</sup> *P. Taksoe-Jensen*, supra fn. 94, p. 633; generally pleading for stewardship *F. Griffiths*, supra fn. 50, pp. 602 et seq.

<sup>102</sup> Griffiths remarks that modern states have much to learn from Inuit: 'unlike ours, their cultures and practices are embedded in nature', see *F. Griffiths*, supra fn. 50, p. 615.

<sup>103</sup> *U. Jenisch*, supra fn. 20, p. 378.

<sup>104</sup> *Ibid.*, p. 373.



# COASTAL PROTECTION PLANNING IN THE WADDEN AREA THE ROLE OF FACILITATING LEGAL SYSTEMS

Ulrich Meyerholt\* and Wabbe de Vries\*\*

## I. A HISTORY

As long as people have been living in the coastal zone of the Wadden Area, the Wadden Sea and the North Sea have been considered as a friend as well as an enemy. It is seen as a friend, because it functions as a food resource, as a route of transport to other regions and because floods (of the sea) have deposited fertile sediment. It is also regarded as an enemy, because floods are threatening lives and goods.<sup>1</sup> Therefore, people have always lived up to approximately five kilometres from the edge of the lower area adjacent to the marine deposits.<sup>2</sup> In the larger areas with marine deposits, the people constructed dwelling mounds. In the Netherlands, the first dwelling mounds were developed during the Roman era. From the Middle Ages onwards, dwelling mounds were connected with dikes, constructed by the local inhabitants and, on a larger scale, by cloisters.<sup>3</sup> These dikes, parallel with the coastline, were constructed not only for protection, but later also for land reclamation. Travelling in the Wadden Area, dwelling mounds and dike structures parallel with the coastline and remnants thereof, can be observed throughout the landscape.

## II. RECENT DEVELOPMENTS

Coastal protection is still at least as important in current times as it was in the past. With climate change, it is obvious that the sea level will rise, though no one knows to which height. A number of institutes gave a prognosis for the coming period up to the year 2100. The IPCC commission predicts a sea level rise of up to 60 centimetres, the Dutch royal meteorological institute of up to 85 centimetres and the Dutch Delta Commission predicts a sea level rise of up to 120 centimetres. The Potsdam Institute gave a prognosis of a sea level rise from 50 to 200 centimetres.<sup>4</sup>

---

\* Doctor of law, Carl von Ossietzky University Oldenburg.

\*\* Doctor of law, Hanzehogeschool Groningen.

<sup>1</sup> From 838 to 2010, 52 floods flooded large regions in the Wadden Area. In 1164 the Jadebusen, near Wilhelmshaven was formed by the Saint Juliana flood. The Marcellus flood in 1362 caused the loss of an enormous number of lives and ruined the city of Rungholt, drowning approximately 30.000 people in this city alone. With the Damianus flood in 1509, the Dollard reached its largest size.

<sup>2</sup> Five kilometer is the walking distance of about one hour, this daily travelling distance was considered as the maximum.

<sup>3</sup> The cloister of Aduard, east of the city of Groningen, constructed large dikes, and was an important owner of large arable land.

<sup>4</sup> *M. Venneer/S. Rahmstorf*, Global sea level linked to global temperature, 49 Proceedings of the National Academy of Sciences of the United States of America, 2009, p. 106.

Coastal protection is necessary, not in the last place because nowadays millions of people live and work in the coastal zone adjacent to the Wadden Sea and the North Sea and because the economic capital in this territory is astronomically high.<sup>5</sup> The expected sea level rise makes coastal protection even more important. Coastal protection, however, is not only in the direct interest of the people who live, work and recreate here. It is also in the interest of nature and cultural heritage of past generations, which need to be protected. Taking account of the legal principle of intergenerational equity, the history of the past generations, which becomes visible in physical elements in a territory, must be protected and maintained for future generations.<sup>6</sup> In addition, developments in the North Sea instigate different claims by humans. On the North Sea, economic interests, such as the desire to develop shipping lanes, wind farming, fishing and extraction of natural gas may collide with the desire to live in safety and to protect landscape values. These economic activities may also have an impact on coastal protection planning.<sup>7</sup> Coastal protection is therefore currently one of the key instruments of environmental policy for the Wadden Area and does not stop at the border of countries.

### III. INTERDISCIPLINARY ACTIONS

It is obvious, that timely and adequate measures regarding coastal planning should be carried out. Planning of coastal protection requires careful preparation, including consulting and assessment procedures. These procedures prior to the implementation of coastal protection cost time; carrying out the necessary measures, including those for consulting, planning and assessments is time-consuming. Coastal planning, however, is not just a matter of raising and increasing dykes. The coastal area adjacent to the Wadden Sea, but also the Wadden Sea, the islands and the adjacent zone of the North Sea are interrelated and influence one another mutually. Not only specific natural values and scenery elements of the landscape, but also cultural and historical values can be attributed to this area. Therefore, the procedure for coastal protection is complex. It concerns safety objectives for human lives and capital, but it also has to take account of the natural, scenic and cultural historical values in and near to the coastal area. The Commission for the world heritage recognizes the importance of the character of the Wadden Sea. On 26 June 2009, the Wadden Sea was listed as a cultural

---

<sup>5</sup> The city of Hamburg alone has millions of inhabitants and an enormous capital has been invested in harbour facilities and industries.

<sup>6</sup> This has already been stated in a number of international declarations of which the Rio de Janeiro was a decisive one. This declaration was the result of the United Nations convention in 1992 at Rio de Janeiro. The 'Brundtland report' of the World Commission on Environment and Development (WCED) of 1987 was also important.

<sup>7</sup> At the moment there is a strong discussion about CCS technologies and storage of CO<sub>2</sub> in the offshore area; see also <http://www.geomar.de/de/forsch/aktuelle-projekte/detailansicht/pri/2271/> (accessed on 21 Jan. 2013). We refer to Directive 2008/56/EC establishing a framework for community action in the field of marine environmental policy, OJ L 164, pp. 19-40.

heritage territory.<sup>8</sup> The designation of the Wadden Sea as a cultural heritage area, urges the Netherlands and Germany to protect the values in this area; wind farming, for instance, should not be allowed.<sup>9</sup> When the obligations resulting from this designation, are not met, the status of a world heritage site may be withdrawn.<sup>10</sup> In planning the coastal protection, these natural and cultural-historical elements will be taken into account in the German and Dutch Wadden Area.

The different economic interests, among others, fishery, drilling activities for natural gas, sand extraction, wind turbine parks, sea high ways, agriculture, industry and tourism, may collide with the natural and cultural historical values as open horizons, dune landscapes, darkness, quiescence, but also tidal harbours, small villages, old buildings, dike structures, watercourses and dwelling mounds. These interests, economical as well as natural and cultural historical, may have contradictory objectives. It is conceivable that conflicting objectives and interests lead to a delay in the procedure of coastal protection planning because parties cannot agree on procedures and measures. This may frustrate coastal protection planning procedures and might even lead to legal proceedings before courts, which cost a lot of money and, even worse, might lead to an enormous delay of the process of coastal protection. Coastal protection planning, therefore, will take account of these typical natural and cultural historical elements in this area and should not only be restricted to the strengthening of dike constructions and commercial interests.

#### IV. THE ROLE OF LAW

From what is said above, it becomes clear that, in our opinion, coastal protection planning requires an interdisciplinary approach. In this context, legal systems play an important role in the process of planning projects, like coastal protection planning. Legal systems, as facilitating systems, cannot only set out the framework of the procedure, but also the framework conditions for negotiating and consulting procedures. They can define the minimum criteria to which parties must adhere. In addition, they can offer procedures in order to avoid legal proceedings. This also implies that legal experts should be independent, neutral individuals, able to guide the process. However, they must realize that they have no expertise with regard to the content of a project and its disciplines. Therefore, a legal system should be characterized as a facilitating legal system. Facilitating, in the sense that it sets out framework conditions to prevent and recognize disputes at an early stage and, if necessary, resolves these disputes.

---

<sup>8</sup> In the Dutch key planning decision (Planologische Kernbeslissing; PKB) for space and for the Wadden Sea, as well as the draft of a Dutch governmental decree for spatial planning, this is stated. The provincial regulation for spatial planning of the province of Groningen and the draft regulation of the province of Fryslan describes the values of the landscape and the cultural historical values in this region very explicit.

<sup>9</sup> In the Dutch key planning decision on the Wadden Sea, wind farming as well as drilling from gas in the Wadden Sea is prohibited.

<sup>10</sup> In 2009, the World Heritage Commission withdrew this status from the Elbe valley due to the building of a bridge across the Elbe.

In addition to an interdisciplinary approach, management of the Wadden Area, including the territorial part of the North Sea and the Exclusive Economic Zone, needs a joint approach, between Denmark, Germany and the Netherlands.<sup>11</sup> This approach in establishing regulations is necessary due to conflicting interests in the Wadden Sea and the North Sea, which occur in the territories of these countries in an equal way. This also follows from International and Community law. One should cooperate. Problems may not be solved by causing damage to other countries.<sup>12</sup>

After the discovery of economic resources in the North Sea, the bordering countries developed a legal system that was in the beginning based on international law. For example, after the discovery of mineral resources, the Convention on the Continental Shelf established country rights along the median line. The ocean floor border between the Netherlands and Germany was drawn on the basis of a judgment of the International Court of Justice. However, regulation concerning the marine environment and the coastal protection was only rudimentary in the past. Yet, due to the conflicts among the different stakeholders, there is an urgent need for additional law regulation now.

## V. LEGAL ASSESSMENT FRAMEWORK

In order to assess whether a legal system offers a sufficient guarantee for the development of plans and projects, criteria will be set out against which legal systems can be tested.<sup>13</sup> These criteria should be practical and objective. It is obvious and unavoidable that aspects, even the procedural ones, based on different views and values can be interpreted in a different way. In our view, these aspects concerning coastal protection planning in the Wadden Area, can be divided into three categories: criteria related to procedural aspects law, to substantive aspects and to the perception of values of the landscape.

## VI. PROCEDURAL CRITERIA

An assessment framework against which legal systems can be tested should include procedural criteria. In this section, we will discuss these criteria.

It must be clear to natural and legal persons, which authorities in a procedure are competent, and what this competence includes.<sup>14</sup> Information held by or for the competent authority, which is relevant for the forming of the opinion of legal subjects, should be disseminated and a right for legal subjects to request for information should be guaranteed. It must also be clear to which authority a

---

<sup>11</sup> North Sea Continental Shelf Cases [1969], International Court of Justice, [www.icj-cij.org](http://www.icj-cij.org) (accessed on 12 Nov. 2012).

<sup>12</sup> R. Wolf, *Eingriffsregelung in der AWZ*, 7-8 Zeitschrift für Umweltrecht 2010, p. 365.

<sup>13</sup> These systems concern coastal protection planning in Germany and the Netherlands, as well as planning on the European level.

<sup>14</sup> For instance, in matters of imminent threat it must be clear which authority has the coordinating responsibility and which authority should carry out measures and take decisions.



request for information can be submitted. If necessary, the information should be provided in an anonymous or general version. Related to this, legal persons should have the opportunity to participate in the process of planning. They should have the right to submit their views and be involved in consulting procedures. Legal persons should therefore be informed about this participation procedure.

It is of great importance that legal persons who are directly affected in their interests by administrative binding decisions, have the opportunity to submit their case to an independent court of justice.<sup>15</sup> To the extent that legal persons can demonstrate that they are affected in their individual interests, they should have this opportunity of access to justice. These proceedings should be timely, efficient and adequate and should have no financial barriers.

Projects and plans, which probably have a negative impact on the environment, including the physical elements in the landscape and the scenery of the landscape should be assessed on their impact. An assessment report should be made, including a zero-alternative, and this report should be assessed on its quality by an independent authority.<sup>16</sup> Only with serious arguments and in extreme circumstances may the competent authority deviate from such an urgent advice.

A legal system should include provisions related to prevention and damage repair concerning actions performed by legal persons. Expenses made by public authorities will be recovered on the perpetrator.<sup>17</sup> A legal system should include provisions in criminal law in order to protect the environment, including physical elements in the landscape and its scenery. These provisions will relate to both natural as well as legal persons as perpetrators of environmental offences and crimes.<sup>18</sup>

A legal system should ensure that public authorities in all their procedures take into account procedural standards. These standards should include, inter alia, a careful procedure including reasonable time limits, well justification, a balanced weighing

---

<sup>15</sup> We refer to the Aarhus convention of 25 June 1998 and the convention for the protection of human rights; we also refer to Directive 2003/4/EC of 28 Jan. 2003 on public access to environmental information, OJ L 41, pp. 26-32; Directive 2003/35/EC of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice, OJ L 156, pp. 17-24; and the communication of the European Commission Communication (COM) 2003/624 final on access to justice in environmental matters 2003/0246 (COD).

<sup>16</sup> *We refer to the Espoo convention of 25 Feb. 1991, the Kiev protocol of 21 May 2003, Directive (EEC) 85/337 of 27 June 1985, on the assessment of the effects of certain public and private projects on the environment OJ L 175, pp. 40-48; and Directive (EC) 2001/42 of 27 June 2001, on the assessment of the effects of certain plans and programmes on the environment OJ L 197, pp. 30-37. For the Wadden Sea or the Waddenarea, we favour an independent covering authority for the area in the territories of Denmark, Germany and the Netherlands.*

<sup>17</sup> See also Directive (EC) 2004/35 of 21 Apr. 2004 on environmental liability with regard to the prevention and remedying of environmental damage, OJ L 143, pp. 56-75.

<sup>18</sup> We refer to Directive (EC) 2008/99 of 17 June 2008 on the protection of the environment through criminal law OJ L 328, pp. 28-37.

of interests in compliance with all the information that is necessary for a decision. The decision must be notified to those involved, where the legal force of the decision shall not arise prior to the publication of the decision. These decisions shall be announced publicly.<sup>19</sup> In unforeseen circumstances, which might damage the physical elements in the landscape a central coordination authority shall be responsible for the carrying out of measures. We pledge for a coordinative authority for the Wadden Sea, including the islands and the adjacent territories of the North Sea. This authority should consist of experts from the concerned countries.

## VII. SUBSTANTIVE CRITERIA

The physical elements in the landscape of the Wadden Area can be divided into natural and cultural-historical elements. A legal system that aims to protect these elements must be clear about the kinds of elements to be protected. With regard to nature values, the *habitat approach* as formulated in European Community law can be followed.<sup>20</sup> A legal system should include provisions concerning the protection of physical cultural-historical elements in the Wadden Area, in particular those elements which are closely linked to the historical and cultural developments in this area, including architectural and archaeological monuments.<sup>21</sup> These elements tell the history of the development of this area, they form a part of the cultural heritage and as such, should be protected.<sup>22</sup> A facilitating legal system related to coastal protection planning should include criteria which aim to strengthen the quality and quantity of these physical elements, both separately as well as in conjunction with each other and with the natural surroundings. These provisions need to be tested against objective criteria that are included in the assessment framework.

## VIII. CRITERIA ON LANDSCAPE CHARACTERISTICS

Much of the Wadden Area is characterised by the existence of a wide-open landscape with panoramic views and open horizons. In addition, large parts of this area are characterised by the absence of noise produced by human intervention and by the absence of nightly radiation of light caused by man. The rather sharp demarcation between urbanized, built-up areas and rural areas can be regarded as important in the Wadden Area.<sup>23</sup> It is, however, not easy to set out objective

---

<sup>19</sup> We refer to the Dutch Algemene wet bestuursrecht (Awb) and the German Bundesverwaltungsverfahrensgesetz (BVwVfG).

<sup>20</sup> Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OJ L 206, pp. 7-50; in international law, reference can be made to the convention on wetlands of international importance especially as waterfowl habitat of 2 Feb. 1971 and the convention on the conservation of European wildlife and natural habitats of 19 Sept. 1979.

<sup>21</sup> Reference is made to the convention for the protection of the architectural heritage of 3 Mar. 1985 and the convention for the protection of the archaeological heritage of 16 Jan. 1992.

<sup>22</sup> See also the trilateral Wadden Sea Plan, p. 29 as adopted at the Trilateral Ministerial Conference of State on 22 Oct. 1997.

<sup>23</sup> *Supra* fn. 6.

criteria related to these characteristics. The value of these characteristics is difficult to measure and depends on individual perception. In establishing such criteria, questions arise such as: To what extent can we speak of a wide-open landscape? When do we speak of quiescence or nightly darkness? Although these characteristics can be described as rather subjective, a legal system for the protection of physical elements in the landscape of the Wadden Area should also address these characteristics. In the coastal protection planning procedure, account should be taken of these characteristics. The mentioned criteria are also important for the Wadden Sea and for the North Sea. This results from the OSPAR convention, the RAMSAR convention, and Directive 2008/56/EC.<sup>24</sup> These documents emphasise the value of marine waters and the need to protect them.

## IX. CONCLUSION

Coastal protection planning in the Wadden Area needs an interdisciplinary and international approach, taking account of, among others, the natural and cultural-historical elements in the landscape and the scenery of the landscape. The procedure of coastal protection planning needs a supporting legal system. This system should meet with criteria, which can be measured objectively. Because the Wadden Area, including the Wadden Sea and the islands, is an area of outstanding beauty with unique characteristics, but also with continuing economic processes and developments, it can be stated that this area deserves a special approach, also with regard to the legal systems applicable in this area.

It is interesting to examine whether the Hanse Law School, within its curriculum, will pay specific attention to legal systems that are applicable to the Wadden Area with a distinctive Wadden Area approach.

---

<sup>24</sup> The OSPAR convention dates from 22 Sept. 1992; the RAMSAR convention dates from 2 Feb. 1971.

## Friday, 28. May 2010

Session VII Chair: Hylke Boerstra, Honorary Consul of the Netherlands, Bremen

### 13.00 – 13.45 European Integration via Tertiary Law Making

- Prof. Dr. Herman Broering, Groningen
- Prof. Dr. Josef Falke, Bremen

### 13.45 – 14.15 Marine Law

- Dr. Till Markus, Bremen
- Dr. Kars de Graaf, Groningen

### 14.15 – 14.45 Coastal Protection Planning

- Dr. Ulrich Meyerholt, Oldenburg
- Wabbe de Vries, Groningen

### 14.45 – 15.15 Coffee Break

Session VIII Chair: Dr. Hansjörg Pielh, Alpmann-Fröhlich, Emsdieten

### 15.15 – 16.00 Panel Discussion:

**Internationalization of Teaching and Research: What can be done for improvement?**

- Impuls Statement of Maitre de conférences Jean-Marc Delagnieu, Le Havre
- Prof. Diane de Bellescize, Le Havre
- Prof. Dr. Herman Broering, Groningen
- Dr. Jaap Dijkstra, Groningen
- Prof. Dr. Christine Godt, Oldenburg
- Prof. Dr. Christoph Schmid, Bremen
- Prof. Dr. Franz Werro, Fribourg/Washington

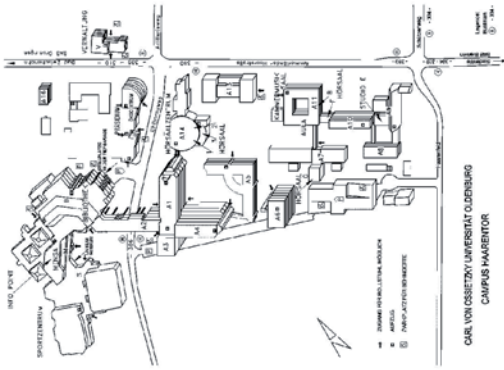
16.00 – 16.15 Closing Words, Prof. Dr. Christine Godt, Oldenburg

## Conference

**Hanse Law School in Perspective**  
Legal Teaching and Cross Border Research under Lisbon

Venue: University of Oldenburg, Senate Hall, Ammerländer-Heerstraße 112  
Organisation: Prof. Dr. Christine Godt, University of Oldenburg

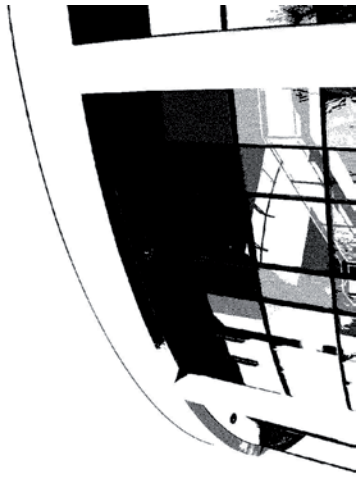
**27./28. May 2010**



CARL VON OSSIETZKY UNIVERSITÄT OLDENBURG  
CAMPUS MARKIERUNG

## Carl von Ossietzky Universität Oldenburg

Hanse Law School, Fakultät II,  
Institut für Rechtswissenschaften, Gebäude A 5,  
Postfach 2503, 26111 Oldenburg



## Thursday, 27 . May 2010

11.00 – 11.30	<b>Welcome/Introduction</b> <ul style="list-style-type: none"> <li>• Prof. Dr. Babette Simon, President of the University Oldenburg</li> <li>• Prof. Dr. Christine Godt, Director Hanse Law School, Oldenburg</li> </ul>	<b>Session III Chair:</b> Dr. Frank van Es, Neue Hanse Interregio, Oldenburg  <b>16.00 – 16.30</b> <b>Energy Law – Carbon Capture &amp; Storage</b> <ul style="list-style-type: none"> <li>• Dr. Avellien Haan-Kammingsa, Groningen</li> <li>• Dipl.-Oec. Andreas Keller, Oldenburg</li> </ul>	<b>Session V Chair:</b> Staatsrat Prof. Dr. Matthias Stauch, Senator of Justice, Bremen  <b>9.00 – 9.30</b> <b>European Criminal Law</b> <ul style="list-style-type: none"> <li>• Prof. Dr. Felix Herzog, Bremen</li> <li>• Maike Frommann, LL.M., Bremen</li> </ul>
<b>Session I Chair:</b> <b>Min.R. Dr. Barbara Hartung</b> Ministry of Science & Culture, Lower Saxony, Hannover	<b>16.30 – 17.15</b> <b>European Innovation Law</b> <ul style="list-style-type: none"> <li>• Prof. Dr. Hans-H. Vedder, Groningen</li> <li>• Prof. Dr. Christine Godt, Oldenburg</li> </ul>	<b>9.30 – 10.15</b> <b>Comparative Property Law</b> <ul style="list-style-type: none"> <li>• Prof. Alison Clarke PhD, Surrey</li> <li>• Prof. Dr. Christine Godt, Oldenburg</li> </ul>	<b>10.15 – 10.30</b> <b>Coffee Break</b>
<b>11.30 – 13.00</b> <b>The Prospects of Comparative Legal Analysis</b> What is to be gained from comparative research and teaching?  <b>Comments:</b> <ul style="list-style-type: none"> <li>• Prof. Dr. Gert Brüggemeier, Bremen</li> <li>• Acc. Prof. Dr. Dr. Aurelia Colombi Ciacchi, Bremen</li> </ul>	<b>17.15 – 17.30</b> <b>Coffee Break</b>	<b>Session VI Chair:</b> Prof. Dr. Reto Weller, Director Hanse Wissenschaftskolleg, Delmenhorst  <b>10.30 – 11.15</b> <b>Governance &amp; Public Health</b> <ul style="list-style-type: none"> <li>• Prof. Dr. Friedhelm Hase, Bremen</li> <li>• Dr. Albertjan Tollenaar, Groningen</li> </ul>	<b>11.15 – 12.00</b> <b>Good Governance in Public and Private Perspective</b> <ul style="list-style-type: none"> <li>• Prof. Dr. Gref-Peter Calliess, Bremen</li> <li>• Prof. Dr. Dick Lubach, Groningen</li> </ul>
<b>13.00 – 14.00</b> <b>Light Lunch</b>	<b>Session IV Chair:</b> Jean Möhring, Deutsch-Niederländische Gesellschaft, Cologne  <b>17.30 – 18.00</b> <b>European Legal Integration</b> <ul style="list-style-type: none"> <li>• Prof. Dr. Michelle Everson, London- Birbeck</li> <li>• Prof. Dr. Laurence Gormley, Groningen</li> </ul>	<b>12.00 – 13.00</b> <b>Light Lunch</b>	
<b>Session II Chair:</b> Dr. Martin Wachovius, EWE, Head Quarter Oldenburg	<b>18.00 – 18.30</b> <b>European Economic Integration – Issues for Research in the North-West Region</b> <ul style="list-style-type: none"> <li>• Prof. Dr. Oscar Couwenberg, Groningen</li> <li>• Prof. Dr. Jürgen Taeger, Oldenburg</li> </ul>		
<b>14.00 – 14.45</b> <b>Private Law in Comparative Perspective</b> <ul style="list-style-type: none"> <li>• Prof. Dr. Christoph Schmid, Bremen</li> <li>• Prof. Dr. Leon Verstappen, Groningen</li> </ul>	<b>19.30</b> <b>Joint Dinner</b> (Klinkenberg, Oldenburg)		
<b>14.45 – 15.30</b> <b>Public Law in Comparative Perspective</b> <ul style="list-style-type: none"> <li>• Prof. Dr. Dr. h. c. Götz Frank, Oldenburg</li> <li>• Prof. Gilles Lebreton, Le Havre</li> <li>• Prof. Diane de Bellesclée, Le Havre</li> </ul>	<b>15.30 – 16.00</b> <b>Coffee Break</b>		

## Friday, 28. May 2010

# HANSE LAW SCHOOL

*Fortiter in re , suaviter in modo*