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Rethinking European Law's Supremacy

CHRISTIAN JOERGES

with Comments

by

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Preface

The clear rejection of the European Constitutional Treaty by the French and Dutch electorates seems to reflect, at least in part, the uneasiness of many European citizens with a Europe which they perceive to govern “from above” with insufficient legitimacy, and without an adequate balance of free market vs. social concerns.

The doctrine of supremacy may be viewed as the classic doctrinal emanation of such a Europe “from above”, which, moreover, tends to favour a market-biased system due to the type of competences allocated to the European level. Against this background, alternatives which may create more legitimacy and allow for the strengthening of the social dimension are particularly badly needed now.

Christian Joerges calls for an idea of European law as a type of supranational law of conflict of laws based on American conflict of laws methodology to organise the European *unitas in diversitas*. His paper originates from a seminar series in the academic year 2004/2005. The seminar was on risk regulation in the EU (“*Playing with Nature I*”), and at international level (“*Playing with Nature II*”). Time and again, we became engaged in debates beyond the disciplines which were dealing with, *i.e.*, European law (in particular, administrative law) and WTO law. Christian Joerges was explaining a vision he had started to defend a decade ago¹ and which he was now seeking to bring to WTO level. Florian Rödl contrasted these ideas with the theoretical framework of his PhD project,² which deals with European social and labour law, but which primarily addresses the Europeanising community of private international law scholars. The seminar participants were mainly patient, sometimes bemused, sometimes curious, and, at the end, made a concrete demand: please put your argument in writing so that it becomes more accessible.

After some reflection, it was agreed to organise a round table in the concluding seminar session with a broader range of commentators, including Jean Monnet Fellow Robert Wai, Marie Curie Fellow Rainer Nickel and Christoph Schmid, former Jean Monnet Fellow and now Co-Director of the *Zentrum für Rechtspolitik* (ZERP) in Bremen/Germany. At the

¹ Die Europäisierung des Privatrechts als Rationalisierungsprozeß und als Streit der Disziplinen. Eine Analyse der Richtlinie über mißbräuchliche Klauseln Verbraucherverträgen, *Zeitschrift für Europäisches Privatrecht* 1995, 181-201 [= The Europeanisation of Private Law as a Rationalisation Process and as a Contest of Legal Disciplines - an Analysis of the Directive on Unfair Terms in Consumer Contracts, *European Review of Private Law* 3 (1995), 175-192]

² The preliminary title is “*Conflicts Justice in and for the European Union*”

end of the round table, the idea of the discussion paper emerged, which we herewith submit (unfortunately without the contribution of Christoph Schmid). Damian Chalmers from the London School of Economics, a Jean Monnet Fellow in 2003/2004, was not present at the workshop. However, he had commented at another occasion and was kind enough to agree to this publication, which does what a working paper is supposed to do, namely, document an on-going discussion. And we would appreciate it if our readers also became involved.

Ultimately, we would like to thank Chris Engert and Jennifer Hendry for their professional and benevolent treatment of our use of the English language.

Christian Joerges, Florian Rödl

Rethinking European Law's Supremacy: A Plea for a Supranational Conflict of Laws*

CHRISTIAN JOERGES**

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* A very preliminary version of this paper was presented in November 2003 at the conference on "Debating the Democratic Legitimacy of the European Union", at the Mannheim Centre for European Social Research (MZES), and commented upon there by Damian Chalmers (London) and Erik O. Eriksen (Oslo). The present version emerged gradually thanks to the round-table discussion in Florence in February 2005, and a conference on "'Judicial Governance' im europäischen Privatrecht. Die Anforderungen an die europäische Judikative als Überforderung?", at the University of Luzern, at which Joseph Corkin (London) commented on it. I am hence indebted to many commentators and would also like to thank Jennifer Hendry for her manifold assistance in the production of this essay. The final version will be published in Beate Kohler-Koch/Berthold Rittberger (eds.), "Debating the Democratic Legitimacy of the European Union", (Lenham, MD: Rowman and Littlefield).

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The exercise that this paper undertakes may look defensive, but it is hopefully also innovative. I will defend the assertion that “Deliberative Supranationalism” offers a viable alternative in the search for the Constitutionalisation of Europe, because it can be understood as a response to the legitimacy problems of transnational governance in post-national constellations.¹ This type of elaboration, however, appears to demand complex and lengthy explanations; it is, consequently, unlikely to render the message more accessible, and thus what I undertake here is basically to present the gist of my thesis. I am following this advice in that I am simply restating my plea for a new (European) species of conflict of law, without contrasting it with competing or neighbouring projects.² Notwithstanding this, I was still unable to make my argument quite as brief as I was requested to, or as accessible to non-lawyers as had been conceived.³ Instead, I have deliberately chosen to prioritise my argument and its underlying logic, which is a chronological reconstruction of its genesis. Indeed, my starting point is to consider the judicial origin of the very notion of Deliberative

1 For an extension of this line of argument in terms of the WTO, see Christian Joerges and J. Neyer, Politics, ‘Risk Management, World Trade Organisation. Governance and the Limits of Legalisation’, *Science and Public Policy* 30 (2003), 219-225, and two related papers: Christian Joerges, ‘Freier Handel mit riskanten Produkten? Die Erosion nationalstaatlichen und die Emergenz transnationalen Regierens’, in: Stephan Leibfried and Michael Zürn (eds.), *Vom Wandel des Staats zur Staatlichkeit im Wandel*, (Frankfurt a.M.: Suhrkamp), ch. 5 (forthcoming 2006); ‘Free Trade: The Erosion of National and Birth of Transnational Governance’, in Stephan Leibfried and Michael Zürn (eds.), *Transformations of the State*, (Cambridge: Cambridge University Press 2005), 93-118; Christian Joerges, ‘Juridification Patterns for Social Regulation and the WTO: A Theoretical Framework’ (Conference on Legal Patterns of Transnational Social Regulation and International Trade, EUI/RSCAS, Florence, September 2004, organized by Christian Joerges and Ernst-Ulrich Petersmann), available as TranState Working Paper No. 17 (Sfb 597 Transformations of the State) at: <http://www.sfb597.uni-bremen.de/index.php?SPRACHE=de&SEITE=pages/pubAp.php>.

2 See, first and foremost, Gunther Teubner’s perspectives for a legal reconstruction of (his version of) systems theory in a conflict of laws terminology: ‘Altera Pars Audiatur: Das Recht in der Kollision anderer Universalitätsansprüche’, *Archiv für Rechts- und Sozialphilosophie*, Beiheft 65, (1996), 199-220; ‘De collisione discursum: Communicative Rationalities in Law, Morality and Politics’, *Cardozo Law Review* 17 (1996), 901-918; Globale Zivilverfassungen: Alternativen zur staatszentrierten Verfassungstheorie, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 63 (2003), 1-28 [English version, ‘Societal Constitutionalism: Alternatives to State-centred Constitutional theory?’, in Christian Joerges, Inger-Johanne Sand and Gunther Teubner (eds.), *Constitutionalism and Transnational Governance*, (Oxford: Hart, 2004), 3-28]; Gunther Teubner and Andreas Fischer-Lescano, ‘Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law’, *Michigan Journal of International Law* 25 (2004), 999-1046. See, also, Marc Amstutz, ‘Zwischenwelten. Zur Emergenz einer interlegalen Rechtsmethodik im europäischen Privatrecht’, in: Christian Joerges and Gunther Teubner (eds.), *Rechtsverfassungsrecht – Recht-Fertigung zwischen Privatrechtsdogmatik und Gesellschaftstheorie*, (Baden-Baden: Nomos, 2003), 213-237; Thomas Vesting, ‘Die Staatsrechtslehre und die Veränderung ihres Gegenstandes. Konsequenzen von Europäisierung und Internationalisierung’, in *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 63 (2004), 41-70.

3 I have attempted this previously: ‘Deliberativer Supranationalismus’, 6 *Zeitschrift für Internationale Beziehungen* (1999), 185-242, [English version: “Deliberative Supranationalism” - A Defence’, *European Integration online Papers (EIoP)*, Vol. 5, No. 8, (July 4, 2001)]; ‘Deliberative Supranationalism’- Two Defences’, *European Law Journal* 8 (2002), 133-151; ‘Comitology and the European Model? Towards a Recht-Fertigungs-Recht in the Europeanisation Process’, in: Erik O. Eriksen, Christian Joerges and Jürgen Neyer (eds.), *European Governance, Deliberation and the Quest for Democratisation*, EUI-RSCA/Arena, (Arena Report 2/2003, Oslo), 501-540.

Supranationalism in a discipline much older than that of European law, that of conflict of laws; namely, in a specific approach to the choice-of-law problem (I.). The second section will then turn to legal theory and recall the debates on the crisis of legal interventionism in the 1980s and the search for a post-interventionist legal theory and methodology (II.). It is only on this basis that we will, in section III, enter the European arena. European law should be understood as a new species of conflict of laws – this is the thesis building on step 1. In addition, this new type of law should learn from the lessons of step 2 and proceduralize Europe’s legal responses to the integrationist agenda. European law should adopt a conflict-of-laws methodology, and this methodology should incorporate the/a critique of legal interventionism; this synthesis of conflict of laws and legal theory should lead to a “law of law production” in the integration process, thus ensuring its law-mediated legitimacy.

I. Conflict of Laws *vs.* Private International Law and International Public Law

For students of international relations and European integration, international law and European law represent the legal dimension of their inquiries. But the legal system is much richer: each and every field of law (private law, economic law, labour law, administrative law) has an international branch, and private international law (PIL) figures as the queen mother of all of them. The (recent) legal history of international law and PIL is part of the political history of the sovereign nation state, and the conceptualisation of international relations by the various legal disciplines is based on the same paradigm as traditional theories of international relations. International law (*ius gentium*) was traditionally confined to an ordering of interstate relations, and its contents and validity were based on their “will”. National public law, in particular, the administrative law of nation states, was perceived from “outside” and in transnational contexts as an emanation of sovereignty. A truly “international” public law was inconceivable, because the very notion of an authority higher than that of the sovereign nation state was inconceivable. Instead, all “international” public and administrative law, all mandatory law, was engaged in the one-sided delineation of the sphere of application of national provisions. This is because a state may recognize another sovereign, but cannot exercise that state’s sovereign power.⁴

⁴ See Klaus Vogel, *Der räumliche Anwendungsbereich der Verwaltungsrechtsnorm*, (Frankfurt a.M-Berlin: Metzner, 1965), 176-239; for alternative traditions, see Christian Tietje, *Internationales Verwaltungshandeln*, (Berlin: Duncker & Humblot, 2001). See, also, Christian Joerges, ‘Vorüberlegungen zu einer Theorie des Internationalen Wirtschaftsrechts’, *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 43 (1979), 6-79, at 8 ff.; for a surprisingly similar recent reconstruction, see Christoph Humrich, Legalization

In contrast, private international law (PIL) in the von Savigny tradition was more universalistic in its orientation. This universalism was based upon an understanding of private law as the organiser of strictly private relations in what was, by definition, an apolitical (civil) society, *i.e.*, *Gesellschaft*, and an application of foreign private law was not perceived as a threat to the sovereignty of the forum state. This ensuing type of PIL universalism is fully compatible with the refusal to support foreign regulatory objectives, considering such “political” dimensions to be beyond the scope of private law.

Private international law has, of course, developed enormously since its so-called classical era, but, in Germany in particular, the prevailing view has retained its Savignian legacy. It will suffice here to restate the main points as given in the leading textbook.⁵

PIL determines the applicable law in cases with foreign elements, *i.e.*, the “links” to or relationships with different legal systems. Its rules of rule-selection are, in principle, indifferent as to the contents of the potentially applicable laws. In this respect, PIL-justice is categorically different from substantive justice: what it seeks to determine is not which law is better or more just but, rather, which legal system should govern. It is exactly this indifference towards content that enables national courts to accept and apply foreign law; indeed, it is thanks to this indifference that PIL’s selection rules can be accepted by all jurisdictions, thus furthering the equality of decisions over legal controversies all over the world (“*Entscheidungseinklang*”). This type of universalism, however, is conceivable only in private law because only in private law, where the rules are dedicated to justice between private parties and are thus apolitical, was it assumed that sovereignty is not affected by the application of a foreign law. In contrast, in all fields of public law, and wherever political objectives are pursued through law, all the courts can do is to determine unilaterally their own law’s scope of application; they are not supposed to implement the commands of a foreign sovereign. As Germany’s *maître penseur* puts it so succinctly: “Every State is an association of the citizens within it.... Every State promotes its own commonwealth in its own country, is

and the Evolution of Law in International Society: A Habermasian approach (5th Pan-European International Relations Conference in The Hague) 17 ff, available at www.sgir.org/conference2004. Humrich restricts his — otherwise enormously rich — analysis to ‘international law in the narrow sense of interstate law’ (at 3). In this respect, international law and international relations scholars tend to share the same benign neglect of international economic law (*Wirtschaftskollisionsrecht*) that accompanied the transformation from the liberal to the interventionist state.

⁵ Gerhard Kegel and Klaus Schurig, *Internationales Privatrecht*, 9th ed., (München: C.H. Beck, 2004), *passim* and, in particular, 4 on the definition of PIL, 131 ff. on PIL-justice, 139 on uniformity of decision-making.

free (master in its own house), accepts no orders from outside, and tolerates no judge over itself”.⁶

This is not, however, the notion of conflict of laws I want to suggest should be brought to bear in the law of the European Union. On the contrary, as Europe and its law have, in effect, overruled the very principles cited above. The most visible break with the tradition is Article 28 (ex Art. 30) and the duty to “recognize” (*i.e.*, to apply) the law of other Member States; however, this rule responds to a conflict of laws. The discrepancy that exists between PIL traditionalism and European law has not done away with the necessity of developing rules to deal with differences between legal systems. Norm collisions are omnipresent within the EU, where diversity has become a value with constitutional status,⁷ and it is not the elimination of diversity and norm collisions, but the responses to diversity and the treatment of collisions that characterize the post-national quality of EU law.

In explaining my thesis, I need to take a detour and present an American alternative to the Savignian tradition in PIL. In 1959, Brainerd Currie published an article in which he summarized his “misgivings concerning our method of handling problems in the conflict of laws”.⁸ In what was an important move, Currie started to make such misgivings public in 1958, continuing to do so until 1973, and he was successful in that he provoked intense debates, primarily in the US, but occasionally also abroad.⁹ Indeed, this move can be considered all the more successful by the fact that Currie’s insights and queries have even had an impact on competing approaches and still continue to this day to preoccupy the agenda of the discipline.

This strength of this influence need not concern us here in any detail;¹⁰ however, two elements of his approach are of crucial importance to my argument. The first is quite simple: all law, even our private law, has become “politicised”, in the sense that we understand it as a response not only to private quarrels but also to issues of social significance. This is why we

6 Kegel and Schurig, *Internationales Privatrecht*, at 1094.

7 Cf., Article I-8 of the Treaty Establishing a Constitution for Europe, OJ C 310/1 of 16-12-2004: The motto of the Union shall be ‘United in Diversity’.

8 Brainerd Currie, ‘Notes on Methods and Objectives in Conflicts of Laws’, (1959), in *idem*, *Selected Essays on the Conflict of Laws*, (Durham, N.C.: Duke University Press, 1963), 177-187.

9 For example, Christian Joerges, “Zum Funktionswandel des Kollisionsrechts. Die ‘Governmental Interest Analysis’ und die ‘Krise des Internationalen Privatrechts’”, (Berlin-Tübingen: de Gruyter - Mohr: Siebeck, 1971); Anton K. Schnyder, *Wirtschaftskollisionsrecht*, (Zürich: Schulthess/Schaffer, 1990).

10 The most constructive contributions to this tradition that I am aware of are by Larry Kramer, ‘More Notes on Methods and Objectives in Conflict of Laws’, *Cornell International Law Journal* 24 (1991), 245-278, and *idem*, ‘Rethinking Choice of Law’, *Columbia Law Journal* 90 (1990), 277-345.

can attribute “policies” to private law rules and even talk of the “interest” of a polity in the application of its policies. Currie utilised the (rather unfortunate) term “governmental interest” for this commitment, stating that:¹¹

“1. Normally, even in cases involving foreign elements, the court should be expected, as a matter of course, to apply the rule of decision found in the law of the forum.

4. [“False problems”] If the court finds that the forum state has no interest in the application of its policy, but that the foreign state has, it should apply the foreign law.

5. [“True conflicts”] If the court finds that the forum state has an interest in the application of its policy, it should apply the law of the forum, even though the foreign state also has an interest in the application of its contrary policy...”

All of these directives, amounting as they did to an assault on the most precious values and achievements of PIL, namely, its tolerance towards foreign law, provoked heated debates. They brought a political dimension into the citadel of private law without indicating how the law could cope with this unruliness, and these objections caused Currie to modify his position somewhat in his later writings, in which he conceded that, in cases of “true conflicts”, especially where their own jurisdiction was “disinterested”, courts should resort to a “moderate and restrained interpretation”, thus avoiding conflicts.¹²

Nevertheless, despite this moderated stance, Currie’s second query, namely his concern about the epistemic and constitutional limits of the judiciary, remains in place:

“[C]hoice between the competing interests of co-ordinate states is a political function of a high order, which ought not, in a democracy, to be committed to the judiciary: ... the court is not equipped to perform such a function; and the Constitution specifically confers that function upon Congress.”¹³

Currie is not as hostile towards foreign public law as traditional PIL. But his call to accept the reign of foreign policies in the forum is based upon a kind of “supremacy” of governmental interests and policies over law: in cases of false and avoidable conflicts, the forum state does not need to decide upon a conflict of laws proper, but simply respects the

11 Currie, *Selected Essays* (note 1), 183-184; see, also, his Comment on *Babcock vs. Jackson*, *Columbia Law Review* 63 (1963), 1233 and 1242 ff.

12 Brainerd Currie, ‘The Disinterested Third State’, *Law & Contemporary Problems* 28 (1963), 754, 763. The term avoidable conflicts is, however, from David F. Cavers’s *The Choice-of-Law Process*, (Ann Arbor: Michigan University Press, 1965), 73.

13 Brainerd Currie, ‘The Constitution and the Choice of Law: Governmental Interests and the Judicial Function’, (1958), in *Selected Essays*, 188-282, at 272.

concerns of states. In a more legalized terminology: the forum does not apply legal principle, but exercises *comitas*.¹⁴

European law, however, cannot tolerate this type of indifference towards the mandatory law of European Union Member States, which amounts to blunt rejection in cases of true conflicts, but it is unable to overcome the epistemic *impasses* of adjudication and enhance the policy-solving capacities of courts by means of treaty amendments or legislative fiat. Instead, European law has to resort to alternative legal strategies and institutional devices, and this has, in fact, already been accomplished to a substantial degree. The explanation of this optimistic statement requires a second brief detour, this time into legal theory.

II. Concepts of a Post-interventionist Law: Reflexive Law, Proceduralization, the Discovery Procedure of Practice and the Turn from Government to Governance

The legal debates of the late 60s and most of the 70s, in Germany and elsewhere, were focussed on the critique of legal formalism and the search for a new “substantive” or “material” legal rationality, which would further a socially progressive agenda. The optimism of this period, however, was not to last for long. There was widespread disappointment over the implementation of “purposive” legal programmes aimed at social change problem-solving (“*Zweckprogramme*”),¹⁵ and a growing concern regarding the law’s “intrusions into the life-

14 This is an ancient doctrine with a complex history and an ambivalent heritage, critically reviewed by J. Paul, *Comity in International Law*, *Harvard Journal for International Law* 32 (1991), 1-79. Its dark side is a subordination of law under political prerogatives and the denial of legal duties to respect foreign law and interests. Its brighter side, which we recall, are commitments that do not arise out of juridified obligations but, rather, out of friendship and trust among nations. For a recent re-discovery, see P. Späth, ‘Zum gegenwärtigen Stand der Doctrine of Comity im Recht der Vereinigten von Amerika’, *Praxis des Internationalen Privat- und Verfahrensrechts* (2005), 3 (forthcoming). Florian Rödl has made me aware of one important voice that addresses this problem directly and with admirable clarity: Andreas F. Loewenfeld, ‘The Limits of Jurisdiction to Prescribe’, in *idem*, *International Litigation and the Quest for Reasonableness. Essays in Private International Law*, (Oxford: Clarendon Press, 1996), 15-28, at 18-20. In my view, Loewenfeld is going a step too far in his equation of reasonableness and law for two reasons. First, the law and its courts cannot master the political dimension of the international system like courts applying the principle of good faith in a much more consolidated national polity. Second, reasonableness may require the integration of non-legal expertise needs to be backed by appropriate institutional provisions. Cf., II.4 *infra* and, for an elaboration, see Christian Joerges, ‘Freier Handel mit riskanten Produkten? Die Erosion nationalstaatlichen und die Emergenz transnationalen Regierens’, (note 1 *supra*).

15 This is famously summarised and analysed by Gunther Teubner in ‘Juridification – Concepts, Aspects, Limits, Solutions’, in *idem* (ed.), *Juridification of Social Spheres*, (Berlin-New York: de Gruyter, 1987), 3-48.

world”¹⁶ through social policy prescriptions. It became common ground in “sociological jurisprudence” and among the proponents of “law and...” studies that economic processes were embedded within societies in far more complex ways than a simple market-state dichotomy might have suggested.

The normative and pragmatic critiques of both purposive programmes and command-and-control regulation motivated a search for alternatives, such as self-regulation, soft law, and what is now called “governance” arrangements. In terms of legal theory, all this movement stimulated the development of the theory of “reflexive” law¹⁷ and of “proceduralization” as a new legal paradigm,¹⁸ and both of these concepts based themselves upon more indirect and organisational forms of legal programming through which the law could avoid overburdening itself.

At this point, a related, albeit not as famous, idea should also be mentioned: one that much later inspired my discovery and interpretation of comitology. In contrast to the mechanisms that Friedrich A. von Hayek praised as the “discovery procedure of competition”,¹⁹ complex democratic societies resort to co-ordinated forms of problem-solving, to a “discovery procedure of practice” in which political and societal actors accommodate their interests and balance conflicting policy goals, while the law has to content itself with supervising the fairness of such activities.²⁰

All of the concepts mentioned “delegate” problem-solving endeavours to non-legal operations and re-integrate their outcome into the legal system by assigning legal validity to the solution found. They use law as an organiser and supervisor of processes, but do not expect that exercises in classical legal methodologies suffice to generate the answers that the

16 Jürgen Habermas, Law as Medium and Law as Institution, in Gunther Teubner (ed.), *Dilemmas of Law in the Welfare State*, (Berlin: deGruyter, 1985), 203-220; also, Jürgen Habermas, *Theorie des kommunikativen Handelns*, (Frankfurt a.M.: Suhrkamp, 1981), vol. I, 332-368; vol II, 257-296 and esp. 504-521.

17 Gunther Teubner Substantive and Reflexive Elements in Modern Law, *Law and Society Review* 17 (1983), 239-285.

18 Rudolf Wiethölter, Proceduralisation of the Category of Law, in Christian Joerges and David M. Trubek (eds.), *Critical Legal Thought: An American-German Debate*, (Baden-Baden: Nomos 1989), 501-510; Jürgen Habermas, *Faktizität und Geltung*, (Frankfurt a.M.: Suhrkamp 1992), 516-537; Jürgen Habermas, ‘Paradigms of Law’, in Michael Rosenfeld and Andrew Arato (eds.), *Habermas on Law and Democracy: Critical Exchanges*, (Berkeley, CA: University of California Press, 1998), 13-25.

19 Friedrich A. von Hayek, ‘Wettbewerb als Entdeckungsverfahren’ (1968), in *Freiburger Studien. Gesammelte Aufsätze*, (Tübingen: Mohr/Siebeck, 1969), 249-265.

20 Christian Joerges, *Verbraucherschutz als Rechtsproblem*, (Heidelberg: Recht und Wirtschaft, 1981), 111-115; Christian Joerges, ‘Quality Regulation in Consumer Goods Markets: Theoretical Concepts and Practical Examples’, in Terence C. Daintith and Gunther Teubner (eds.), *Contract and Organization*, (Berlin: de Gruyter, 1986), 142-163.

law has to produce.²¹ The term “governance” was not yet *en vogue* at the time, but what we are by now used to calling governance arrangements were already widely established. Since then, the debate on the “legitimacy” (the “constitutionalisation”, as I prefer to characterise this task) of these practices has become deeper and more differentiated.²² The theoretical moves of the 1980s have not become outdated, however, but continue to inspire the search for yardsticks and criteria with which governance arrangements have to comply if they are to “deserve recognition”.

The links between our notes on the debates of the 1980s and the previous and following sections should be stressed here. Firstly, conflicts between the policy objectives pursued by legislatures are by no means restricted to international constellations; instead, these conflicts are a constitutive feature of the law of democratic societies -- law has to endure pluralism and ongoing contestation. The legal systems of such polities cannot and should not prioritise one objective over others but, instead, should take account of the fact that the wisdom and power of the law are limited. In terms of conflict resolution, therefore, the law should encourage the concerned actors themselves to take up the search for problem-solving and interest-mediation. It should ensure that their activities respect principles of fairness, enhance their deliberative quality, and then eventually acknowledge such societal norm generation. It is in this way that law can respond to collisions and contestations, and it can thus be characterized as conflict of laws.

III Europeanization as Process: Deliberative vs. Orthodox Supranationalism

You cannot have it all. Europe cannot aspire to become a unitary state underpinned by a unitary cultural identity and, at the same time, defend its diversity, its post-state quality and cultural diversity. Nicolaus von Cues’ *unitas in diversitas* is the most appealing formula -- “united in diversity”²³ being its proper translation. How could this appealing formula be substantiated?

21 Rudolf Wiethölter captures this point elegantly in his term *Recht-Fertigungs-Recht* (law of law production); see his “Recht-Fertigungen eines Gesellschafts-Rechts”, in Christian Joerges and Gunther Teubner (eds.), *Rechtsverfassungsrecht. Recht-Fertigung zwischen Privatrechtsdogmatik und Gesellschaftstheorie*, (Baden-Baden: Nomos, 2003), 13-21. The term *Gesellschafts-Recht* (societal law) points to the generation of law and the involvement of societal actors.

22 For a recent instructive and thoughtful account of primarily German contributions, see Gunnar Folke Schuppert, *Governance im Spiegel der Wissenschaftsdisziplinen*, in Wissenschaftszentrum Berlin (ed.), *Schriften zur Governance-Forschung*, Bd.1, (Baden Baden: Nomos, forthcoming 2005).

23 Preamble of the Treaty Establishing a Constitution for Europe, OJ C 310/1 of 16-12-2004, paragraph 4.

1. *Conceptualising the EU*

As lawyers, we have heard the messages so often and, indeed, (some of us) have taken them seriously: Europe is no federation, but it is more than a regime.²⁴ It is a “heterarchical” multi-level system *sui generis*²⁵ that has to organise its political action in networks.²⁶ And since the powers and resources for political action are located at various and relatively autonomous levels in the EU, coping with functionally interwoven problem-constellations will depend on communication between the various actors. This observation concerns something like a “normative fact”, suggesting as it does that the inter-dependence of the concerned actors will produce a normative fabric that can exert factual power. In his account, Jürgen Neyer posits that the EU-specific conditions for political action favour a deliberative mode of communication that is bound by rules and principles, where arguments are only accepted if they are capable of universal application,²⁷ and such considerations can be easily reconstructed in the language of the law. The European legal framework is neither designed merely to secure fundamental freedoms, nor to create a new European state. Instead, the purpose of European law is to discipline the actors within the Community in their political interactions and to guide strategic action towards a deliberative style of politics. European law should leave “vertical” (“orthodox”) supranationalism behind and, instead, found its validity as law on the normative (deliberative) quality of the political processes that create it.²⁸ That said, it is also clear that no state in Europe can make or refrain from making

24 William Wallace, ‘Less than a Federation. More than a Regime: The Community as a Political System’, in Helen Wallace and William Wallace (eds.), *Policy-Making in the European Community*, (Oxford: Oxford University Press, 1983), 403-436.

25 Instructive are contributions from Arthur Benz (ed.), *Governance – Regieren in komplexen Regelsystemen*, (Wiesbaden: Verlag für Sozialwissenschaften, 2004); Marcus Jachtenfuchs and Beate Kohler-Koch (eds.), *Europäische Integration*, (Opladen: Leske and Budrich, 2nd ed. 2003); for earlier summaries, see Markus Jachtenfuchs, ‘The Governance Approach to European Integration’ in *Journal of Common Market Studies* 39 (2001), 221-240, and Fritz W. Scharpf, ‘Notes Toward a Theory of Multi-level Governing in Europe’, in *Scandinavian Political Studies* 24 (2001), 1-26.

26 Cf., for an adaptation in legal science, Karl-Heinz Ladeur, ‘Towards a Legal Theory of Supranationality – The Viability of the Network Concept’, *European Law Journal* 3 (1997), 33-54; and Gunther Teubner, *Netzwerk als Vertragsverbund. Virtuelle Unternehmen, Franchising, Just-in-time in sozialwissenschaftlicher und juristischer Sicht*, (Baden-Baden: Nomos, 2004), 17-22 and *passim*.

27 Jürgen Neyer, ‘Discourse and Order in the EU, A Deliberative Approach to Multi-Level Governance’, *Journal of Common Market Studies* 41 (2003), 687-706; more detailed in his habilitation thesis, *Postnationale politische Herrschaft: Vergesellschaftung und Verrechtlichung jenseits des Staates*, (Baden-Baden: Nomos, 2004).

28 See Christian Joerges and Jürgen Neyer, ‘From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology’, *European Law Journal* 3 (1997), 273-299; Christian Joerges, ‘Good Governance’ in the European Internal Market: Two Competing Legal Conceptualisations of European Integration and their Synthesis, in Armin von Bogdandy, Pedros Mavroides and Yves Mény (eds.), *European Integration and International Co-ordination. Studies in Transnational Economic Law in Honour of Claus-Dieter Ehlermann*, (Den Haag–London–New York: Kluwer Law International, 2002), 219-242.

decisions without causing “extra-territorial” effects on its neighbours.²⁹ Provocatively put, perhaps, but brought to its logical conclusion, this means, in effect, that nationally organised constitutional states are becoming increasingly incapable of acting democratically. They cannot include all those who will be affected by their decisions in the electoral processes, and *vice versa* citizens cannot influence the behaviour of the political actors who are taking decisions on their behalf. It would, therefore, appear to be a legitimate step for Europe to require its Member States to design their national laws with the view of accommodating Community law. In the same vein, it would also seem sensible to afford to citizens of Member States legal rights that are truly European, given that they allow national citizens to compare their own laws with laws and experiences in other Member States.

These normative claims of “Deliberative Supranationalism” should not be portrayed as wishful thinking, for they are, albeit in other terms, both well documented and somewhat canonised in real existing European law in doctrines such as the following: the Member States of the Union may not enforce their interests and their laws unboundedly; they are bound to respect European freedoms; they may not discriminate; they may only pursue “legitimate” regulatory policies approved by the Community; they must co-ordinate in relation to what regulatory concerns they can follow, and they must design their national regulatory provisions in the most Community-friendly way.

So, what is the meaning of all this for the relationship between European and national law in general, and the Europeanization of private law in particular? How do these very abstract suggestions relate to the conflict of laws *problématique* outlined in Section I and to the theoretical debates referred to in Section II To answer these questions, I will, first of all, begin with a presentation of a rough typology of conflict constellations, and then restate an analytical distinction, namely, the distinction between Deliberative Supranationalism I (DSN I, *infra* 3) and Deliberative Supranationalism II (DSN II, *infra* 4).³⁰

2. Three Types of Conflicts

(1) “*Bundesrecht bricht Landesrecht.*” European law trumps national law. This supremacy suggests a *vertical* conflict between European law and national law; indeed, supremacy is a

29 See Christian Joerges, ‘The Impact of European Integration on Private Law: Reductionist Perceptions, True Conflicts and a New Constitutionalist Perspective’, *European Law Journal* 3 (1997), 378-406.

30 Christian Joerges and Inger-Johanne Sand, ‘Constitutionalism and Transnational Governance’, (the background paper to the Conference on Constitutionalism and Transnational Governance, at the European University Institute, Florence, December 2001, organized by Christian Joerges, Inger-Johanne Sand and Gunther Teubner).

conflicts rule, the advocates of which have justified it again and again so successfully that we tend to take it for granted. But are not there some limits? Does this conflicts rule actually mean that European secondary law trumps national constitutional law? Was it really surprising that the German Constitutional Court in its Maastricht judgment claimed a competence in the interpretation of the fundamental rights of Germany's basic law?³¹

(2) *Horizontal* conflicts between national legal systems are no longer governed exclusively by traditional PIL rules and principles. European law, especially through its non-discrimination provisions, can exert corrective effects. Most importantly in the present context, European law cannot tolerate the principled refusal not to apply another Member State's "public" law. It even empowers European citizens with the right to expose the laws enacted by their own "sovereign" to judicial scrutiny.³² To this conflict-of-laws revolution, we will return under the heading of "Deliberative Supranationalism I".³³

(3) In terms of its problem-solving ambitions and capacities, European law is typically incomplete; it cannot cover all aspects of interdependent problem constellations, and this can be illustrated by means of two very simple examples: European competition law may legalise the contractual conditions of distribution agreements that national contract law holds to be unfair and thus invalid, and European law may approve a new drug when it is national law that decides on the remuneration of patients by national insurance schemes. Such conflict constellations I have called *diagonal*.³⁴ They result from the assignment of competences to different levels of governments and, in these cases; it follows from the principle of enumerated European competences that the supremacy rule must not be applied.

3. The Notion of "Deliberative Supranationalism I" Restated: Constitutionalizing Europe's unitas in diversitas Through Conflict of Law Rules and Principles

The principles and rules mentioned at the end of the sub-Section III.1 are to illustrate how a "deliberative" supranationalism responds to differences between laws. I will (a) first restate

31 Judgment on the Maastricht Treaty of 12 October 1993, *Entscheidungen des Bundesverfassungsgerichts* 89, 155, (1994).

32 See Christian Joerges, 'The Challenges of Europeanization in the Realm of Private Law: A Plea for a New Legal Discipline' (Herbert Bernstein Memorial Lecture 2003), *Duke Journal of Comparative and International Law* 24 (2005), 149-196; also at <http://www.iue.it/PUB/law04-12.pdf>. (Sections II 2 and III).

33 See Section 3(3) below.

34 See Christian Joerges, 'The Impact of European Integration on Private Law: Reductionist Perceptions, True Conflicts and a New Constitutional Perspective', *European Law Journal* 3 (1997), 378-406 (Section IV A 2); Christoph Schmid, 'Vertical and Diagonal Conflicts in the Europeanisation Process', in Christian Joerges and Oliver Gerstenberg (eds.), *Private Governance, Democratic Constitutionalism and Supranationalism*, Luxembourg: European Commission COST A 7 EUR 18340, 1998, 185-191.

the normative foundations before (b) explaining how this perspective changes our perception of European primary law and Europeanization.

a) The Case Against Orthodox Supranationalism

The basic claim of this paper is that “Deliberative Supranationalism” offers a revised understanding of the supremacy of European over national law. It conceptualizes a form of European law that responds to differences in the laws of the EU Member States by resorting to principles and rules that are acceptable to all the national polities concerned. The normative basis for this correction of democratic polities is a “nation-state failure”; this failure comes to bear in the extra-territorial effects that any “closed” polity is bound to produce.³⁵

Deliberative Supranationalism can hence be conceptualized as a supplement to the model of the constitutional nation-state. It respects the nation-state’s constitutional legitimacy while simultaneously clarifying and sanctioning the commitments arising from its inter-dependence with equally democratically legitimate states, and with the supranational prerogatives that the institutionalization of this inter-dependence requires. The legitimacy of supranational constraints imposed upon the sovereignty of constitutional states seems obvious: extra-territorial effects of national policies might be (un-)intended; however, they are real and unavoidable in an economically and socially inter-dependent community. This raises the question of how a constitutional state can legitimize the burden it unilaterally imposes upon its neighbours. An old question, but one that poses itself with new urgency. The globalization of markets has led to an even greater intensity in the interchange of extra-territorial effects between states, such as environmental costs and the energy used in the production of goods for export, and, in such a view, territorial boundaries have become an ambiguous category of polity-boundaries. The principle of “no taxation without representation” can claim universal validity because the very idea of democratic constitutionalism requires that constitutional states apply this principle against themselves and hence take the interests and concerns of extra-territorial stake-holders into account; a supranational constitutional charter, therefore, does not need to represent a new “state”. Nor does supranationalism require democracies to concede a right to vote to non-nationals, but it does require that the interests and concerns of non-nationals be considered even within the national polity. In this sense, supranationalism does convey political (procedural) rights – not

35 Similarly, Michael Zürn, ‘The State in the Post-national Constellation – Societal Denationalization and Multi-Level Governance’, ARENA Working Paper No. 35/1999 (1999).

just economic freedoms – to Community citizens. In this reading, supranationalism is a fundamentally democratic concept.

The “supremacy” of European law should be re-interpreted as giving a voice to “foreign” concerns and imposing corresponding constraints upon Member States. Supremacy calls for the identification of rules and principles to ensure the co-existence of different constituencies and the compatibility of these constituencies’ objectives with the common concerns they share.

“Supremacy” is not properly understood if it is ascribed to some transnational body of law. European law requires the identification of rules and principles that ensure both the co-existence of different constituencies and the compatibility of these constituencies’ objectives with the common concerns they share. In this sense, it is “supreme”.

b) Juridifying Deliberative Supranationalism

A legal framework should be provided by Community law to structure political deliberation around precisely these issues. The ECJ has a constitutional mandate to protect such legal structures and principles, and to resolve controversies surrounding their contents. Here, we will have to refrain from presenting our evidence in much detail and simply claim that European law has repeatedly managed to civilize national idiosyncrasies, with good reasons and considerable *de facto* success.³⁶

One legendary example may serve to illustrate these contentions: in 1979, the *Cassis de Dijon* case³⁷ saw the European Court of Justice declare a German ban on the marketing of a French liqueur - the alcohol content of which was lower than its German counterpart - to be incompatible with the principle of free movement of goods (Article 30 EC Treaty, now Art. 28 EC). The ECJ’s response to the conflicts between the French and German policies was as convincing as it was trifling: any confusion on the part of German consumers could be avoided, and a reasonable degree of protection against erroneous decisions by German consumers could be achieved simply by disclosing the low alcohol content of the French liqueur. With this observation, the Court re-defined the constitutional competence to review the legitimacy of national legislation which presented a non-tariff barrier to free intra-Community trade, a move that was of principled theoretical importance and had far-reaching practical impact.

³⁶ See Miguel Poiares Maduro, *We the Court*, (Oxford: Hart, 1998), 150-220.

³⁷ ECJ (1979), Case 120/78, ECR [1979] 649 - *Cassis de Dijon*.

To translate the argument into the language of conflict of laws, what the ECJ did was, in effect, to identify a “meta-norm” that both France and Germany, as parties to the conflict, could accept. Since both countries were committed to the free trade objective, they were also prepared to accept that restrictions of free trade must be based on credible regulatory concerns.

The implicit rejection of the legacy of traditional doctrines on the treatment of foreign public law has become a necessity because product regulation, market-creating and market-correcting regulatory policies are nothing exceptional. There is no such thing as an unregulated product. Trade with ever more sophisticated products “requires” the development of regulatory machinery which ensure the “trustworthiness” of such products – and the Member States of the EU have to recognize these concerns mutually. And the ECJ has, in fact, dealt with these implications quite sensitively, acknowledging that the autonomy of the Member States deserves recognition, but also, as Fritz Scharpf³⁸ has put it, that its exercise must be community-compatible.

Two further discrepancies between European and traditional law of conflict of laws should be underlined. European law does not typically choose between the given rules of two jurisdictions, but requires amendments of national law. These changes may look marginal, but they can have far-reaching effects. European conflict solutions have an instigating function: they require changes, initiate learning, further transformations – they organise diversity. To conclude with a defensive remark: DSN I is not about constituting some transnational democracy; conflict of laws has never aspired such a thing. Instead, DSN I is about the respect of constitutional democracies and the limitation of one of their failures. It is neither anti-democratic nor technocratic; indeed, this second point can be better explained in the context of the discussion of comitology.

4. The Notion of “Deliberative Supranationalism II” Restated: Cognitive and Normative Openings of Conflict Resolution through New Modes of Governance

Member States are being asked to make changes to their legal systems – changes that should, in principle, take place in order to guarantee effectively that Europe’s innovative impact will help national legal systems to evolve sensibly. European secondary law is widely understood as an alternative to the organisation of the *unitas in diversitas* just described. It is perceived

38 Fritz W. Scharpf, ‘Community and Autonomy, Multi-Level Policy-Making in the European Union’, *Journal of European Public Policy* 1 (1994), 219-242.

and studied as the building up of a transnational legal *corpus* which needs to be “implemented” and requires “compliance”. This perception, however, perpetuates nation-state visions of law, and fails to recognize the evolutionary specifics of European law. One objection is obvious: texts adopted in the European legislative process cannot reflect a uniform understanding. These legislative acts always and necessarily look different from the perspective of national legal systems simply because the adaptation of each of the national systems to the European prerogatives must reflect national traditions and be incorporated into non-unitary contexts. This is why comparative studies on “compliance” with European directives have revealed significantly different compliance patterns in Europeanization processes which mirror Europe’s diversity quite faithfully.³⁹ For precisely this reason, European legislation has been content with adopting “directives” and, especially in the realm of regulatory politics, legislative frameworks which did not foresee just one central authority, but gave rise to the infamous committee system that organises the the “implementation” of Community law as an ongoing process. Diversity is just one reason for this phenomenon. The second is the “nature” of the problems to which this type of legislation has to respond. Adequate responses to the complexity of the issues that the integration process poses again and again cannot be programmed by rules stabilising normative expectation. They require cognitive and pragmatic openings of decision-making processes. The failures of legal interventionism which have preoccupied legal theory and sociological jurisprudence since the early 1980s and prompted the turn from government to governance⁴⁰ are all present at European level, and they are particularly burdensome here because the Community lacks the competences and the resources to build up some genuine administrative machinery of its own. The difference between “Deliberative Supranationalism I” and “Deliberative Supranationalism II” corresponds to that between traditional (“conditional”) legal programmes and a proceduralized law at national level. “Deliberative Supranationalism II” complements the European Conflict of Laws response to the unity in the diversity paradox. It operates through institutionally unforeseen governance arrangements. It does not, however, establish a technocratic machinery “ruled” by some transnational administrative law. “Deliberative Supranationalism II” has to respect and to organise diversity, just as European conflict of

39 Cf., very instructively, Gerda Falkner *et al*, *Complying with Europe? The Impact of EU Minimum Harmonisation and Soft Law in the Member States*, (Cambridge: Cambridge University Press, 2005 forthcoming).

40 See Section II *supra*.

laws does. Only then can it ensure the development of law-mediated governance practices and conflict resolutions which “deserve recognition”.⁴¹

a) New Modes of Transnational Governance in the EU

To repeat, it seems unsurprising that Europe has developed transnational governance structures, and that these have unfolded their own logic and significance. The dynamics of this development cannot be described comprehensively here, let alone analysed in their full complexity.⁴² In order to characterize the differences between the adaptation processes that European law initiates at the national level of governance and the level of transnational dynamics, and the process of co-ordination between both levels, it is necessary to reiterate – and to restate -- the distinction between DSN I and DSN II that I have been making since 2001,⁴³ namely, that “DSN I” can be understood as a new type of law of conflicts, while “DSN II” is a law that responds to the apparently irresistible transformation of institutionalised government into transnational governance arrangements. This differentiation is not meant to overrule the grounding of Deliberative Supranationalism in a conflict of laws methodology, but instead pays tribute to what has been characterized above⁴⁴ as Brainerd Currie’s second concern, namely, his reluctance to accept any judicial evaluation of conflicting foreign policies and “governmental interests”.⁴⁵ We can update his terminology and restate his concern: courts have neither the legitimacy to subject their home jurisdictions to some transnational governance arrangement, nor are they equipped with the management capacities and epistemic resources needed to find out what “good” transnational governance might require. However, while these are all still valid in principle, what Currie did not observe, and could hardly have predicted, was the transformation and evolution of regulatory practices during the last decades – and, in particular, the turn from government to governance, which both enabled and forced the legal system to content itself with proceduralized controls.

41 The formula is taken from Jürgen Habermas, Remarks on Legitimation through Human Rights, in *idem, The Postnational Constellation. Political Essays*, (Cambridge, MA: MIT Press, 2001), 113-129.

42 For a generalising overview, see Christian Joerges and Michelle Everson, ‘The European Turn to Governance and Unanswered Questions of Legitimacy: Two Examples and Counter-intuitive Suggestions’, in Christian Joerges, Bo Stråth and Peter Wagner (eds.), *The Economy As A Polity: The Political Construction of Modern Capitalism*, (London: UCL Press, forthcoming); for a critical discussion of the OMC, see Christian Joerges, ‘What is Left of the European Economic Constitution?’, EUI Working Paper LAW 2004/13, <http://www.iue.it/PUB/law04-13.pdf>. (2004) and comprehensively Milena Büchs, Dilemmas of post-regulatory European social policy co-ordination. ‘The European Employment Strategy in Germany and the United Kingdom’, Ph.D thesis (Humboldt University Berlin, 2005).

43 Ch. Joerges and I.-J. Sand, Constitutionalism and Transnational Governance (note 30).

44 Section I.

45 Currie, *Selected Essays*, 188-282, at 272.

This turn has affected national legal systems substantially,⁴⁶ but the case for governance proved to be even more compelling at European and international levels. This is because institutional frameworks to establish the common European market and to ensure the functioning of both international trade and a globalising economy are required, and these frameworks cannot be built upon the administrative infrastructures that nation states have at their disposal. The forms vary enormously. Within Europe, we witness the establishment of ever more “agencies”, the design of ever-new regulatory strategies and forms of co-operation between and across all levels. What they have in common, however, is that they “delegate” problem-solving to non-legislative levels, and engage experts and societal experts in the consideration of these responses.

The paradigmatic institutional setting in Europe is a broad legislative framework with generalising answer of such vagueness that the implementation process will require additional decision-making, which cannot be adequately understood as a mere “application” of the legislatively approved principles. Can such a process be understood in the terms of conflict of laws? Yes, if one subscribes to the characterizations substantiated above. To reiterate, conflict of laws is not about the selection of rules, the proper choice among a given set of ready-made responses to regulatory issues. It is about the search for a response to legal diversity that ensures compatibility with Community concerns while at the same time respecting the autonomy of democratically legitimated actors.⁴⁷ What else, then, is at stake when “implementation” is delegated to a composite of European and national governmental and non-governmental actors? The answer will depend on the governance arrangements under scrutiny, and cannot be comprehensive and general. The only case that will be addressed here is comitology, a case that, it is submitted, fits into the conflict-of-laws paradigm.⁴⁸

b) The Example of the Committee System (Comitology)

Comitology is just one of the new modes of governance, albeit a particularly prominent one. Its institutional history is old and well documented⁴⁹ and our knowledge as to its functioning

⁴⁶ Cf., Section II *supra*.

⁴⁷ Cf., Section III 3 (b) *supra*.

⁴⁸ The same holds true for diagonal conflicts (see section III 1 *supra*). Such conflict constellations require a co-ordination of national with Europeanised competencies. Uniform substantive rules cannot provide adequate answers. For an exemplary discussion, see Christian Joerges, *The Challenges of Europeanization in the Realm of Private Law...* (note 32), Sections II.3 and III.3

⁴⁹ For example, see Josef Falke, ‘Comitology and Other Committees: A Preliminary Empirical Assessment’, in Robert H. Pendler and Guenther F. Schaefer (eds.), *Shaping European Law and Policy: The Role of Committees and Comitology in the Political Process*, (Maastricht: EIPA, 1996), 117-165.

is comparatively solid.⁵⁰ The academic debate, however, is intensive as comitology is a moving target, within which all institutional actors continue to pursue their particular strategies:⁵¹ the European Parliament pleads for more supervisory powers, whereas the European Commission would like to become the head of Europe's regulatory machinery and work with "executive" agencies rather than committees in which the Member States remain influential. The Draft Constitutional Treaty, in Articles 32-36, has adopted the recommendations of Working Group XI of the Convention on "simplification",⁵² in which three types of non-legislative acts are listed: delegated regulations, European implementing regulations, and European implementing decisions to be adopted by the Commission.⁵³

It is difficult to see what is to be "simplified" by these proposals. And it would be misleading to present the suggested substitution of comitology by Commission-led European administrative machinery as a purely technical innovation. It seems safe, however, to predict that the proposed amendments will have very limited effects. Their framing and wording can only camouflage, but cannot remove the political and normative dimensions of "implementing" acts. The assignment of these acts to the Commission cannot overcome the objections and anxieties which have so far been articulated through representatives of the Member States. It thus appears to be certain that the issues discussed in the debates on comitology will remain on the European agenda.

These issues all concern Europe's aspiration to realize its *unitas in diversitas*, and four points in particular deserve to be mentioned:

- (1) Is it reasonable or even conceivable to conceptualize unitary European market governance? The comitology system had fostered a bundling of resources and the involvement of the national level of governance while retaining the supervisory and ultimately autonomous decision-making powers of the Member States.

50 For example, Christian Joerges and Josef Falke, *Das Ausschlußwesen der Europäischen Union. Praxis der Risikoregulierung im Binnenmarkt und ihre rechtliche Verfassung*, (Baden-Baden: Nomos, 2000); Jane Trondal, 'Administrative Integration Across Levels of Governance. Integration through Participation in EU-Committees', Arena Report N.7/2001, Oslo; Annette Töller, 'Der Beitrag der Komitologie zur politischen Steuerung in der europäischen Umweltpolitik', in Edgar Grande and Markus Jachtenfuchs (eds.), *Wie problemlösungsfähig ist die EU? Regieren im europäischen Mehrebenensystem*, (Baden-Baden: Nomos, 2000), 313-342 (all with further references).

51 For a topical overview, see Ellen Vos, 'The Role of Committees in European Governance', in Deirdre Curtin and Wolfgang Wessels (eds.), *Good Governance in the European Union: Concept, Implications and Applications*, (Antwerpen: Intersentia, 2005 forthcoming).

52 The Amato-Report – CONV 424/02, <http://european-convention.eu.int/>.

53 See Ellen Vos, 'The Fall of Committees?', in J. de Swaan, J. Jans, F. Nelissen (eds.), *The European Union – An Ongoing Process of Integration. Liber Amicorum F. Kellermann*, (Den Haag: Asser Press, 2004), 111-121.

- (2) The type of activity performed via comitology does not fit into our inherited understandings of legislation, adjudication and rule-bound administration. This phenomenon both mirrors and embodies the functional, structural and normative tensions that characterise modern markets. These markets are “politicised”; politically accountable and economic actors cannot simply disregard the concerns and anxieties of market citizens (“consumers”). However, neither the political nor the legal systems can provide the epistemic and managerial capacities that would ensure their effective functioning and social responsibility. Hence, it is unsurprising that comitology is composed of technical experts and (“political”) governmental bodies, and also that societal actors take an interest in its functioning. Comitology hovers between “technical” and “political” considerations, between functional needs and ethical/social criteria. Indeed, the system actually represents an “underworld”,⁵⁴ albeit one that ensures the social embeddedness of markets, without which Europe’s common market would cease to function. Therefore, to link these observations and theses to the introductory sections on conflict of laws and on legal theory, it can be stated that:

Comitology responds to the non-unitary social embeddedness of the European “common” market. In the European constellation, market governance continues to require that the concerns of various jurisdictions be accommodated, and these responses can be neither produced nor attributed to some superior and unitary authority. Instead, they result from the search responses that the polities concerned can endorse. In view of its affinities to the horizontal conflict of laws in the EU, comitology can be understood as a conflict of laws mechanism.

The committees have to respect the pertinent legal framework within which they operate as well as the general principles of European law; however, they cannot deduce the contents of their responses from these texts, but, instead, need to be productive. This is why their search activities can be understood as a “discovery procedure of practice”,⁵⁵ – although this is, of course, not to say that these searches will always be successful!

54 J.H.H. Weiler, ‘In der Unterwelt der Ausschüsse’ (Interview), *Die Zeit*, Nr. 44, 22 October 1998, 9.

55 See the very early and productive sociological study by Thomas Roethe, ‘EG-Ausschußwesen und Risikoregulierung: Ein Problem von Handlungsstruktur und Rationalität’, EUI Working Paper LAW 94/7.

- (3) The third issue is the thorniest one: does comitology deserve recognition. If so, how can its legitimacy be enhanced? Some objections are easy to refute, others less so:

(i) *Comitology as technocratic governance*

National and European administrators and all kinds of experts are involved in comitology. This composition looks *kafkaesque*; indeed, its critique as a technocratic machinery suggests this itself. The point that comitology appears to be technocratic, and operates within a hegemonic organisational structure has often been repeated, most recently by Hauke Brunkhorst.⁵⁶ However, this is not what Jürgen Neyer and I observed and described almost a decade ago.⁵⁷ To restate a later defence: “[C]ommittees do not just have the so-called ‘implementation’ function of Community framework provisions to deal with (‘comitology proper’), they also operate much more comprehensively as *fora* for political processes and as co-ordinating bodies between supranational and national and governmental and social actors.”⁵⁸ Competing scientific schools of thought, risk management strategies, and public concerns raised by public bodies and societal actors need to be and are, in fact, addressed.

(ii) “*Quark*”

“*Comitology* is not a discreet phenomenon which occurs at the end of the decision-making process It is more like the discovery of a new sub-atomic particle, a neutrino or a quark, affecting the entirety of molecular physics which requires an account of both the phenomenon itself and the way it impacts upon the rest of nuclear understanding. *Comitology* argues for a rewriting of the entire decision-making field because of the importance of the committee particle in all its stages.” J.H.H. Weiler’s observations⁵⁹ are valid, and often approvingly registered,⁶⁰ but what follows from them? Do they simply rephrase what I have characterized as the social

56 Hauke Brunkhorst, ‘Demokratie in der globalen Rechtsgenossenschaft. Einige Überlegungen zur poststaatlichen Verfassung der Weltgesellschaft’, *Zeitschrift für Soziologie, Sonderheft Weltgesellschaft*, (forthcoming 2005).

57 Ch. Joerges and J. Neyer, ‘From Intergovernmental Bargaining to Deliberative Political Processes’... (note 28), 273-299.

58 Christian Joerges, ‘Deliberative Supranationalism’- Two Defences (note 3), 141.

59 J.H.H. Weiler, ‘Epilogue: ‘Comitology’ as Revolution – Infranationalism, Constitutionalism and Democracy, in Christian Joerges and Ellen Vos (eds.), *EU Committees*, (Oxford: Hart, 1999), 339-350, at 340.

60 Most prominently, perhaps, Ernst-Joachim Mestmäcker, ‘Wandlungen in der Verfasstheit der europäischen Gemeinschaft’, in *idem*, *Wirtschaft und Verfassung in der Europäischen Union. Beiträge zu Recht, Theorie und Politik der europäischen Integration*, (Baden-Baden: Nomos, 2003), 49-77, at 69-71.

embeddedness of markets? If it is true that the economy and society are being infused with ever more norms, the constant noise about de-regulation and liberalisation notwithstanding, then we are not free to “reject” such phenomena but should, instead, try to understand their causes and aim to cure their deficiencies. The turn to governance even within constitutional states, as we have argued repeatedly, is a response to the politicisation of markets and to the saliency of concerns that the state regulatory machinery is unable to cope with.⁶¹ Comitology is an accompanying phenomenon in the European market-building process, a mode of generating resources and organising interaction that supports and domesticates market-building. If these assumptions have some *fundamentum in re*, it seems all the more important to explore the potential of law to ensure the legitimacy of the committee system.

(iii) Comitology is un-democratic

Rainer Schmalz-Bruns was the first to underline the fact that Deliberative Supranationalism cannot be equated with democratic governance⁶² and, since then, many others have followed suit.⁶³ His observation is, of course, valid; it would indeed be absurd to interpret “deliberative” modes of interaction within comitology as the advent of deliberative democracy in the EU. The conflict-of-laws approach to European law and comitology governance, which I have restated here, cannot and does not claim to establish what the protagonists of the theories of deliberative democracy have in mind. Does it follow, then, that conflict of laws is undemocratic? A better question is: Is it conceivable to practice conflict of laws in general and comitology in particular in a democracy-compatible way?

- (4) “Constitutionalisation”: This final question restates the challenge which Jürgen Neyer and I have addressed in our quest for a “constitutionalisation” of comitology.⁶⁴ What is at issue from a conflict-of-laws perspective is not the establishment of a European constitutional state within which governance arrangements could be

⁶¹ See, especially, Section II *supra*.

⁶² Rainer Schmalz-Bruns, ‘Deliberativer Supranationalismus’, in *Zeitschrift für Internationale Beziehungen* 6 (1999), 185–242.

⁶³ For example, Oliver Gerstenberg and Charles S. Sabel, ‘Directly-Deliberative Polyarchy, An Institutional Ideal for Europe?’ in Christian Joerges and Renaud Dehousse (eds.), *Good Governance in Europe's Integrated Market*, (Oxford: Oxford University Press, 2002), 289–341 at 295; Hauke Brunkhorst, *op. cit.* (note 56), 22.

⁶⁴ Joerges and Neyer, ‘From Intergovernmental Bargaining to Deliberative Political Processes’... (note 28), 273–299.

supervised in the same way as within national democracies; our queries concern the normative legitimacy of a conflict of laws approach to transnational governance. Only from this perspective does it make sense to explore in detail the legal structuring of the discovery procedures through which we expect comitology to arrive at responses to complex conflict constellations: to consider the composition of and interaction between committees, the openness of their agenda, the access of concerned societal actors, the pluralism of expertise, judicial protection, safeguard procedures, the supervision of the whole process by national and European parliamentary bodies, and, last but not least, exit options in cases where conflicts cannot be resolved.⁶⁵

The validity of this approach does not depend on the gradual rise or sudden fall of comitology. Instead, Deliberative Supranationalism strives for a conceptualisation of the *unitas in diversitas* formula; it seeks to conceptualise Europeanisation as a process, methodologically speaking, and a discovery procedure of practice in which law generates and supervises public power. The conflict of laws approach to the *problématique* of good transnational governance has certainly its *lacunae* and deficiencies but, to cite Brainerd Currie again,⁶⁶ let me stick to it “until someone else comes along with a better idea”.

65 Christian Joerges, ‘Good Governance’ Through Comitology?, in Christian Joerges and Ellen Vos (eds.), *EU Committees: Social Regulation, Law and Politics*, (Oxford: Hart, 1999), 311-338, at 326-338.

66 Brainerd Currie, Comment on *Babcock vs. Jackson*, *Columbia Law Review* 63 (1963), 1233, at 1243.

Deliberative Supranationalism and the Reterritorialisation of Authority

DAMIAN CHALMERS*

I. Introduction

Joerges has remarked that his is not an essay about deliberative democracy, but one about the relationship between law and the authority of public power. To be sure, the subject-matter is the reconceptualisation of the European Union, yet the central concern is the control of public power. He is particularly concerned with the legal limitation of territorial power: both how law may control its abuse within the European law and also how law is contributing to its unbundling within the European Union. Joerges' work, however, and this is part of its genius, is also about the limits of law. Law cannot effectively control territorial power through setting out substantive policies. Instead, law's legitimacy derives from its being able to set out the places where choices about these policies are made and the procedural terms under which these choices are made. The innovativeness and multi-dimensionality of his approach, combined with the rich detail of his case studies, has led to Joerges' work being the most significant and interesting in helping us understand how institutional power is restructured and played out within the European integration process. This essay will argue that his natural modesty has perhaps led him to understate the radical potential of his work.

The unconfined and poly-faceted nature of supranational governance has led not so much to its limiting the territorial power of the nation-state as to its undercutting territoriality's claim to be the central source of political and legal authority within the European Union. The traditional territorial sovereign has increasingly little say in the constellations of norms that will apply to an expanding array of disputes within its territory. This affects how one views the constellations of power emerging within the European Union more radically than Joerges implies, as the unbundling of territoriality makes territorial/extra-territorial dichotomies increasingly difficult to apply.

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It also affects how one views the authority of law. Territoriality has been the central pillar upon which law's claim to have the capacity to exercise authority has traditionally rested. If it can no longer do this, law must look to other structures to enable it to exercise authority over its subjects. This essay will argue that two such structures have emerged in the world of supranational governance. One is the reduction of contestation: actors accept the authority of law as it allows them to confine contestation to manageable proportions. The other is problem-solving. Law's authority stems from its enabling actors to come together to solve problems. Yet, just as the territorial authority of law excluded extra-territorial stakeholders, this essay will argue that these two new sources of authority generate their own patterns of exclusion and division, which are no less problematical than those raised by territoriality, and it is increasingly to these that the mission of 'democratic legitimacy' must turn its eye.

II. Deliberative Supranationalism: An Essay about Territorial Power?

Although Joerges does not make it explicit, there is a strong link here between his work on deliberative supra-nationalism and his work on the influence of National Socialism in European law.¹ National Socialism sacralised the 'political' as a form of public power in quite terrible ways, but was also alert to the repressive and invidious consequences of other forms of public power, most notably techno-administrative power.² By contrast, his interest in supra-nationalism rests in the ways it has problematised the territorial power of the state. Territoriality, the assertion of control over a geographical area, allows two forms of intense public power to be harnessed.³ It is the basis for state sovereignty: that coercive power which impacts so directly upon the senses of its subjects that territorial sovereignty has become the power to let live. It is also the basis for governmental power. Territory provides the jurisdiction over which a government acts over its subjects for the benefit of its subjects, and, which through its panoply of welfare and regulatory institutions, government has traditionally, induced broader patterns of routinisation, hierarchy and proto-organisation on the parts of its subject.⁴

1 Ch. Joerges & N. Ghaleigh (eds.) *Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism over Europe and Its Legal Traditions*, (Portland-Oxford: Hart, 2003).

2 On the latter and the Nazi notion of 'honour', see J. Whitman, 'On Nazi Honour and New European Dignity', 243-266 in Ch. Joerges & N. Ghaleigh (eds.) *Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism over Europe and Its Legal Traditions* (Portland-Oxford: Hart, 2003).

3 R. Sack, *Human Territoriality: Its Theory and History* (Cambridge: CUP, 1986) at 19.

4 On territoriality and the modern state, see M. Mann, 'The autonomous power of the state: its origins,

Joerges, on my reading, is concerned with the authority of these forms of power: authority both as something which constitutes an institutionally recognized right to influence the actions of others, and as something which provides subjects with good reasons, other than fear, to obey these forms of power. Traditional accounts have done this through locating the authority of both state sovereignty and government in the constituent power of the ‘people’. Sovereignty’s existence depends upon its acceptance by its collective subject,⁵ so the sovereignty of EC law is contingent for its existence upon its acceptance as such by its subjects. Doubts lie, therefore, in part, in the contestation of its power by national courts and others, and, in part, in the lack of any clear constituent power which can be ascribed to confer sovereignty upon EC law. The authority of governmental power rests in its public nature. It is done in the ‘public interest’ and the government is accountable to the ‘people’ and can be changed by the people. It is done for a public subject and is accountable to a public subject. Administrative power exercised for private ends is seen as corruption, whilst governments no longer hold power once they have been voted out of power.

The position of the foreigner poses real challenges for the authority of these two types of power. Not considered to form part of the ‘public subject’, there are no clear reasons that can be given for her, the foreigner, to accept the authority of either, other than brute force. The solution of the Westphalian system to this bind was to deny her existence. Individuals were not treated as legal subjects in international law. They were not part of an international society with reciprocal rights and duties. She existed only as the chattel of states who could choose whether to intervene upon her behalf. Even then, the forms that diplomatic protection could take were extremely limited as the central organising principle of international law was non-intervention and non-aggression. The foreigner could not, thus, ask her home state to intervene too directly on her behalf.

EU law changes this through the granting of legal subjectivity to the foreigner. *Van Gend en Loos* created the idea of a European legal subject, who could invoke certain indefeasible rights wherever she is in the territory of the Union.⁶ They can be invoked against her home state or against other states. To be sure, these rights are highly partial ones. The European legal subject is not a free-standing subject, but is constituted by the patchwork of

mechanisms and results’ (1984) 25 *European Journal of Sociology* 185; P. Taylor, ‘The state as container: territoriality in the modern world-system’ (1994), *Progress in Human Geography* 151.

5 A. Pottage, ‘Power as an art of contingency: Luhmann, Deleuze, Foucault’ (1998) 27 *Economy & Society* 1, 16.

6 Case 26/62 *Van Gend en Loos vs. NederlandsAdministratie der Belastingen* [1963] ECR I

rights given by substantive provisions of EU law. Nevertheless, the change is revolutionary. The foreigner's subjectivity is recognised and the national administration must now provide reasons to her why she should accept its authority, and these reasons must be regarded as good reasons by an independent arbiter, namely, EU law. This characterisation of EU law has been the central determinant on most writing on supra-nationality. Supranationality is seen a corrective against boundary abuse by the nation-state. Weiler has argued that it acts to prevent three types of abuse: violence against other states; actions where the state invokes the images of nationhood for ends that are clearly not the public good, and abuses against strangers who do not form part of the collective 'Us'.⁷ Similar reasoning has been used by other writers, most notably Maduro and Somek. Maduro conceives supra-nationalism, therefore, as curbing representation deficits that emerge from the insular perspectives of the nation-state. It acts to protect the interests of foreigners where these have not been represented or have been unrepresented.⁸ Somek, by contrast, has argued that supranationality curbs those disadvantages, which are a systemic consequence of the co-existence of nation-states. He argues, most notably, that states cannot prohibit discrimination on grounds of nationality without denying their existence. Supranationality is concerned to do something that the nation-state cannot do: prohibit discrimination on grounds of nationality. Somek is concerned, in particular, with securing equality around two sorts of entitlement that he sees as the prerogative of the modern liberal state. The first derives from what he terms the constitution of liberty, and includes classic civil liberties and property rights. The second derives from the 'constitution of inclusion', and includes all the social rights that correct disadvantages and externalities that emerge from the functioning of the market.⁹

Joerges can be characterised as a skilful exponent of this tradition. If the others focus on the policing of imagined communities, institutional malfunction and membership rights, his concern is the limits of territorial authority in an inter-dependent world. His two models of deliberative supra-nationalism parallel, in this regard, two dimensions of territoriality problematised by the European Union.

Deliberative Supranationalism I (DSN I) reflects the manner in which territorial integrity has been compromised in the modern world. Territorial integrity is historically

7 J. Weiler, "The Constitution of Europe. 'Do the New Clothes have an Emperor?' and Other Essays on European Integration", (Cambridge: CUP, 1999) at 99.

8 M. Poiares Maduro, *We, the Court: The European Court of Justice & the European Economic Constitution*, (Oxford: Hart, 1998) at 166-174.

9 A. Somek, 'On Supranationality', *European Integration Online Papers* Vol No 5. (2001) No. 3.

central to state self-government. It implies that the state has complete freedom over the actions that take place on its territory, whilst respecting the equivalent freedom of other states over their territories. Joerges observes that the extra-territorial effects of state actions, whether they like it or not, compromise that integrity. They compromise other states' capacities to govern themselves and affect the interests of 'extra-territorial' stakeholders who lose the capacity to govern themselves. DSN I responds to this bind by requiring a state to respect the rights that extra-territorial stakeholders have acquired in their home territory, provided these do not impair the state's capacity for self-government legitimately carried out for the general good.

DSN II concerns itself with the problem of territorial unity. Territorial unity would require that the law be applied equally across the territory of the Union. Joerges observes that this is impossible for Union law for a number of reasons. When seen from the national context, Union law must accommodate a number of 'non-unitary contexts'. These pull it in diverse ways in different territories. In addition, there is the problem of 'diagonal' law. Union law rarely comprehensively regulates a legal problem.¹⁰ Instead, it intersects with different legal provisions, which will result in unique constellations of legal norms governing any individual problem. DSN II responds to there being one more than legal authority governing any part of the territory of the Union. It seeks to secure compatibility with Union concerns whilst respecting the autonomy of democratically legitimated actors. Joerges observes that governance has been the turn that has allowed this. Governance is concerned with mediating these concerns. It is characterised, on the one hand, by a multiplicity of forms, and, on the other, by a shared use of experts and societal experts (e.g. NGOs, industry) to co-ordinate decision-making between these centres of power.

Even at this level, Joerges' work operates at a level of sophistication that is unmatched. The location of supranationalism around territoriality allows it to be seen as something that polices not only nation-states (DSN I) but also centre-periphery relations in the exercise of Union competencies (DSN II). It is a norm governing all political decision-making within the Union rather than simply targeted at the nation-state. It also operates at a level of reconstructive sophistication that none of the other work musters, in that it is based

¹⁰ C. Schmid, 'Diagonal Competence Conflicts between European Competition Law and National Regulation: A Conflict of Laws Reconstruction of the Dispute on Book Price-fixing' (2000) 8 *European Review of Private Law* 155; Ch. Joerges, 'On the Legitimacy of Europeanising Private Law: Considerations on a Justice-making Law for the EU Multi-level System' vol 7.3 *ELECTRONIC JOURNAL OF COMPARATIVE LAW*, (September 2003), <http://www.ejcl.org/ejcl/73/art73-3.html>.

on detailed case studies of institutional practice. As a consequence, it can suggest the ends and means for the realisation of supranationalism in far more convincing and practical ways than almost all other writing.

Interpreted in this way, Joerges' model of Deliberative Supranationalism is still one that rests within, rather than challenges, classic liberal political theory. Deliberative Supranationalism is seen as something external to the state, which does not challenge the state's traditional constitutional authority. It merely engages in an exercise of enfranchisement by granting the classical liberal rights and duties that states have traditionally granted to their own citizens to extra-territorial stakeholders. However, supranationalism is constructed, in this way, as something which is built on and external to the nation-state. It does not reconstitute nation-state authority in any deep way, but is, at times, a check on it and, at other times, an important alternate centre of political gravity. Joerges suggests, therefore, that Deliberative Supranationalism does not challenge the constitutional legitimacy of the nation-state. Some critics have taken this interpretation as the basis for their criticism. They claim that Deliberative Supranationalism is too timorous from a liberal perspective. It exalts technocratic arguments and interests, and is insufficiently attentive to either the range of interests or the plurality of arguments required by deliberative democracy. Only Weiler has taken an alternative interpretation. He has argued that the central dynamics of Deliberative Supranationalism are 'infra-national' ones. The dynamos of decision-making are not Community versus nation-state, but those of sectoralism, functionalism and managerialism.¹¹ Yet, even Weiler then considers that it is a quark that must be tamed according to the traditional values of the nation-state. The task is to infuse it with the political values of equality of access, transparency and political accountability.¹²

I wonder if such views are not too concerned with the formal architecture of decision-making, and take, consequently, too static an interpretation. They fail to take account sufficiently of the material dimension of these phenomena. That is to say that they are government practices concerned with doing things, structured, above all, by the contingency and parameters of the events with which they deal. They are not merely novel spatially, insofar as they re-territorialise law and politics. They are also novel materially in that they are reacting to new challenges. Some of these are inspired by technology (e.g. biotechnology,

11 J.H.H. Weiler, "Epilogue: 'Comitology' as Revolution – Infranationalism, Constitutionalism and Democracy", 399, 341-342, in Ch. Joerges and E. Vos (eds.) *EU Committees*, (Oxford: Hart, 1999).

12 Ibid. 346.

internet regulation, futures markets in financial services) whilst others are inspired by the need to create new public goods (e.g., the single market, the precautionary principle). The consequence is that these phenomena are too diverse and fluid to be fitted into neat territorial versus extra-territorial stakeholder packages. Three scenarios can illustrate this point: none of which fit comfortably into the models suggested by Joerges.

Domestic Redistribution through Foreign Law: The first scenario is one set out in *Cassis de Dijon*.¹³ To be sure, one has a situation where a foreign good is marketed in Germany according to conditions largely set by French law. But is this really a case of Deliberative Supranationalism? A case where Germany is being required to take account of non-German stakeholders? The case was, after all, not between the French producers of Cassis de Dijon and the German authorities. The parties to the dispute were exclusively German. It was between Rewe, a German distributor, and the German regulatory authorities. It was not only the parties to the dispute that were domestic, the centre of gravity of the dispute was also domestic. *Cassis de Dijon* is not a widely sold drink. Instead, it was used as the touch paper to resolve a wider redistributive question between German distributors and German producers: namely, whether the former could increase their profits through selling a wider array of alcoholic drinks at the expense of the latter's profits. It is difficult to see the centre of the dispute as one protecting marginalised stakeholders. Instead, the more interesting question is why a dispute between two constellations of powerful domestic interests should be determined by the law of another Member State.

Domestic Redistribution through De-regulation: *Cassis de Dijon* concerned a distributor. It was therefore relatively easy to point to a foreign good that they were distributing, which imported its legal regime with it. Increasing number of cases involving the economic freedoms do not involve distributors, but retailers. In these cases, the choice is not whether to apply German or French law in the German court, but whether to regulate legally or not to regulate legally. *Anomar* is a case in point. The Portuguese Gambling Machines Association (Anomar) challenged a Portuguese law which provided that gambling machines could only be operated in casinos in designated areas.¹⁴ They argued that it breached Article 49 EC, the provision requiring the free movement of services. The matter appeared wholly Portuguese in nature, as it was a case brought by Portuguese companies against a Portuguese law. It was also essentially a redistributive domestic dispute. Casinos had historically monopolised the

13 Case 120/78 REWE-Zentral AG vs. Bundesmonopolverwaltung für Branntwein [1979] ECR 649.

14 Case C-6/01 *Anomar vs. Estado Português* [2003] ECR I-8621.

market for gaming machines, and Anomar wished to break this stranglehold. The Court held that, for Article 49 EC to apply, it was unnecessary to point to particular foreign service providers who might be unable to operate gambling services, if there were identifiable foreign operators who might do so. If the measure fell within Article 49 EC, the Court observed, it would still be lawful, as it could be justified as necessary to meet a variety of public interests, notably the protection of consumers, the prevention of fraud and crime, and the protection of public morality. The extra-territorial interest protected in this case is so small as to be almost invisible. More interestingly, the choice of laws regulating the conditions of competition between machine operators is not between Portuguese law and another state's law, but between Portuguese law and no law. The case is one about the limits of legal authority.

De-nationalisation and Re-territorialisation: The final scenario concerns the possibility of EU law creating its own territorial unities. Joerges gives comitology as an example of a mechanism to deal with the lack of territorial unity within the Union, whereby the Committees overseeing the Commission are a mixture of national representatives, social experts and technical experts. What happens, however, when one of these dimensions becomes so powerful that it dominates the other two? There is, indeed, a strong suspicion that increasingly the process is becoming colonised by scientific expertise at the expense of values of national representation and societal pluralism. The Commission is increasingly bound by the views of the Scientific Committees or regulatory agencies that it is required to consult in adopting draft measures.¹⁵ These bodies are increasingly unrepresentative bodies.¹⁶ To be sure, the measures must pass the Standing Committees before they can be adopted as law. These are composed of national representatives, but studies have shown that processes of socialisation have led to these becoming increasingly deliberative *fora* rather than terrains for negotiating representative interests.¹⁷ In such circumstances, a territorial unity is created. It is created not by representative institutions but by scientific expertise, and is a *Grossraum* centred around the political virtue of expertise, which, insofar as its remit is based upon more general beliefs, transcends and incorporates the Union.¹⁸ The central questions within this

15 Case T-13/99 *Pfizer Animal Health vs. Council* [2002] ECR II-3305.

16 For example, the GMO Panel of the European Food Safety Authority contains 4 Britons, 3 Germans, 3 Dutch, 2 Danes and then 1 from Belgium, Greece, Spain, France, Italy, Austria, Finland, Sweden and Ireland, http://www.efsa.eu.int/science/gmo/gmo_members/catindex_en.html, accessed 10 March 2005.

17 J. Trondal & F. Veggeland, 'Access, Voice and Loyalty: The Representation of Domestic Civil Servants in the EU Committees', *ARENA Working Paper 00/8*.

18 On the Schmittian idea of *Grossraum* as a territory governed by a hegemony of belief, see Ch. Joerges, 'Europe a *Grossraum*? Shifting Legal Conceptualisations of the European project', in Ch. Joerges & N. Ghaleigh (eds.) *Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism over*

Grossraum are not the accommodation of different centres of power and plural societal interests, but rather the boundaries of its operation: to what extent is rule by law being replaced by rule by expertise, and to what extent are technical experts replacing representatives in the making of collectively-binding decisions.

The consequence is that the scenarios discovered by Joerges are much more multiple, contingent and fluid than he suggests. They involve a wider array of interests, a wider variety of legal norms, wider forms of social conflict, and also conflicts between legal and other forms of institutional norm. It becomes impossible, thus, to see these conflicts as something that occurs beyond the nation-state. They happen within the nation-state and are transforming institutional authority within the nation-state. Representative surpluses, where actors who can arbitrage between different *fora* are enfranchised at the expense of those who cannot, are as much a problem as representative deficits.¹⁹ Consequently, territoriality ceases to be constitutive of legal and political authority.²⁰ It is not merely that a variety of norms apply over the territory of any Member State and that these govern a wide array of matters, but that the choice of the applicable norm to apply is highly uncertain and contingent. The slightest difference in factual circumstances can alter which norm is applicable. Consequently, if a Member State or the Union no longer has the power to determine which norms apply within its territory, it becomes difficult for it to harness the resources which allow and justify both sovereign and governmental authority. It can neither determine authoritatively the circumstances when the coercive power of the state will be brought to bear down upon the individual nor does it have the capacity to allocate power for the realisation of public goods, as this is now dispersed to a wide variety of actors, each with their own powers of norm-setting and organisation.

III. Deliberative Supranationalism and the Rediscovery of the Authority of Law

Law's authority cannot rely upon the background territorial power of the state, but must depend upon some other power. Joerges' concern with Brainerd Currie's work on the conflicts of law suggests this is also beginning to trouble him. Conflicts of law is unlike other

Europe and Its Legal Traditions (Portland-Oxford: Hart, 2003).

19 J. de Areilza, 'Sovereignty or Management? The Dual Character of the EC's Supranationalism – Revisited', *Jean Monnet Working Paper* 95/2.

20 Unsurprisingly, this was realised first by international relations scholars for whom territoriality had been the building block of their trade. J. Ruggie, 'Territoriality and beyond: problematising modernity in international relations' (1993) 47 *International Organisation* 139.

forms of legal specialisation as it is concerned with the limits of legal authority. In what circumstances should a legal norm have authority? By drawing upon Currie's work, Joerges is concerned to show that this question is extra-legal, not simply because, logically, the authority of law cannot be a legal question, but also because the matter is one of the highest political importance. Yet, if this matter should not be left to courts, then how does the law control the public power making this choice? For, in a world of multiple sources of normative authority, this power is as dangerous as the power to set and apply the norms themselves.

In controlling this power, Joerges argues that the law must recognise its limits. The failure of goal-oriented law as a project entails that the setting of broad policy-objectives would be counter-productive. Law should, instead:

‘encourage the concerned actors themselves to take up the search problem-search and interest mediation. It should ensure that their activities respect principles of fairness, enhance their deliberative quality, and then eventually acknowledge such societal norm generation. It is in this way that law can respond to collisions and contestations, and it can thus be characterised as conflicts law’.²¹

Law is thus not to make active choices itself, but bounds the arenas in which these choices are made and sets the rules for how these choices are made. This begs the question as to what gives law the authority to do even this: the taken-for-granted qualities that lead actors to accept it. If it is such a big task, why should law do this and why should actors accept its place here? Joerges' work leaves this question largely unexplained: possibly, it is the next project in his amazing intellectual odyssey. But what are the political and sociological bases for the place of law in his model of the Union? I think that the authority of law in his model can be explained by the emergence of two phenomena which are beginning to replace territoriality in the EU as the basis for law's right to determine the terms of conflict resolution.

The first is the bounding of conflict. Joerges rightly notes that the presence of conflict and contestation is a necessary and desirable part of a plural society. They cannot, however, be too much conflict. Nobody wants the Hobbesian jungle where anarchy leads merely to the survival of the fittest. Law's authority derives, in part, from its ability to contain and channel conflict. It sets out the places and forms in which this can legitimately take place. Recognition by all the central parties of the undesirability of the alternatives provides strong reasons for law's authority. This authority increases as societies become more complex and inter-

²¹ See pp 12.

dependent. In the era of primitive, atomised societies, it is merely the avoidance of physical harm to human beings. The growth of the liberal, territorial state led to concerns about avoidance of territorial conflict; intra-administrative conflict between different parts of government and conflicts between the state, society and economy. Class differentiation deriving from both the dispersion of the means of consumption and production has led to further complexity. Finally, the increased differentiation and re-coupling of social systems has led to new sources of contestation.

In such circumstances, law is the only institution that can hold everything together in balance and prevent the tensions from becoming unmanageable. All parties have a strong interest in this because of their inter-dependence. The paradox of modern societies is that most interests, values, and systems are irreducibly opposed to each other: economy versus society, capital versus labour, France versus Germany. They cannot be integrated into some synthetic unity. Their proximity combined with the potential for the destruction of each by the other leads to the terms of co-operation.²²

The bounding of conflict leads to law acquiring two other qualities that bolster its authority. One is coherence. Law only retains its authority if it is seen to be formally fair (*e.g.*, treat like cases alike). Parties defect if they feel they are not treated equally before the law. It must produce results, therefore, which seem mutually supportive. Through this, law creates a narrative that ‘makes sense’ of the whole enterprise. The other is value and interest pluralism. Parties defect from law if they consider that it has not taken their interests into account. This leads to law having to be concerned with balance. No interest, value or system can predominate over the others.²³

The second phenomenon supporting law’s authority is the growth of problem-solving. Problem-solving is a form of politics that accords a high degree of normative force to empirically derived knowledge.²⁴ It either involves setting out an identifiable ill that must be resolved or an identifiable good that is seen as attainable through collective action. Knowledge is at the heart of both forms of problem-solving. As we know more, we become more aware of what needs to be averted and what can be averted with the consequence that

22 E. Balibar, *We, the People of Europe? Reflections on Transnational Citizenship*, (Princeton, NJ: Princeton University Press, 2004) 222-224.

23 J. Broome, *Weighing Goods: Equality, Uncertainty and Time*, (Oxford: Blackwell, 1991).

24 F. Ewald, ‘Justice, Equality, Judgment: On Social Justice’, in G. Teubner (ed.) *Juridification of Social Spheres: A Comparative Analysis in the Areas of Labour, Corporate, Antitrust and Social Welfare Law* (Berlin-New York: de Gruyter, 1987) 91, 104-105.

the expansion and specialisation of knowledge has led to an increase in this forms of politics. In a world of contestation, law becomes integral to the realisation of this project in two ways. It sets out the patterns of co-operation and the role of the parties that enable collective action. Crucially, as many problems take time to solve, law's stickiness and its difficulty to change also limits inter-temporal problems by making it difficult for parties to act on a unilateral change of preferences. Equally importantly, law sets out the ideals and teleologies that justify party participation in problem-solving and provides a set of commitments against which defection and good faith can be measured.²⁵ Parties have to argue for the poverty of these goods, namely, that they are not worth pursuing if their defection is to be taken seriously by other parties. This restricts the types of arguments that may be used and provides new space for debate. A governance regime on 'safe food', for example, limits arguments about food to questions of safety, but it also leads to the notion of safety being explored more richly, with debates extending to questions of nutrition and to whether 'ethically unsafe' food should be produced.

IV. Challenging Deliberative Supranationalism

If the need to contain conflict and to solve problems are the central pillars which enable law to find its place and its authority in the world of trans-national governance, these bases raise further challenges for law and suggest its position is not unproblematic.

One challenge emerges from the sheer plurality of the sites of governance. To be sure, law might be the vehicle for the broad visioning of a governance regime, setting its overall direction and goals.²⁶ It is also dragged into the micro-capillaries of every dispute in every single arena. Within such disputes, parties rarely lift their eyes beyond the horizons of the dispute to consider the wider benefits, costs, or values at stake. In *Cassis de Dijon*, it is doubtful to think that either Rewe or the German Government considered the dispute as anything other than one about the marketing of alcoholic drinks. The wider implications for the structure of the overall single market project or the regulation of market externalities were background considerations at best. This leads to government by stealth. Judgments with broad implications are given without much prior consideration to these implications. It also leads to displacement of conflict. This lack of consideration generates new conflicts or leads to pre-

25 In *Cassis de Dijon*, the law does not only contain conflict. It also sets out a series of positive goods, the realisation of a single market which protects both the consumer and public health, to which parties commit themselves.

26 N. Walker, 'The Idea of Constitutional Pluralism', (2002) 65 *Modern Law Review* 317.

existing tensions re-emerging, with unpredictable consequences, in other *fora*. Finally, it can lead to parties miscalculating the costs of a conflict. The compulsion for battle in a particular dispute can lead to parties, particularly governments, challenging the authority of EU law, precisely because the wider consequences are seen as beyond the horizon of the dispute.

The second challenge is the plurality of knowledge. This is because transnational governance imposes an epistemic overload on law. Problems are difficult to resolve. This is not simply because of the technical complexity and specialisation of the information that may have to be used, but because of the multi-faceted nature of knowledge. Any corpus of knowledge will have a ‘technical’ dimension concerned with extending control over the ‘natural’ processes in question; a ‘practical’ dimension concerned with fostering mutual understanding by locating these against wider social processes; and an ‘emancipatory’ one concerned with identifying the undesirable consequences of any process. These elements interact in such a way that it is impossible to disentangle one from the other so that the identification and resolution of any problem involves, in each case, a unique blend of these three elements with the knowledge being assessed in terms of its plausibility and relevance to the problem rather than its universal veracity.²⁷ The situatedness and action-orientated nature of this process limits those who can participate in the formulation of problem-solving, as for it to emerge as knowledge, as justified true belief, all the participants must be sufficiently convinced by the end result that they believe it to be true. It also inevitably entails that they will ‘miss’ many forms of knowledge that other stakeholders consider to be important. These tensions come to the fore in a transnational governance regime that is dispersed across time and space, as these other stakeholders will often be dominant in other sites, where they can challenge the veracity and authority of the knowledge used to solve the problem and bolster the authority of law.

The final challenge is the redistributive one. The turn to governance has, in essence, been a flight from questions of contestation and redistribution: an attempt to purge politics of these unsavoury questions. If Joerges is astute enough to re-introduce the former, it is not clear where the latter fits in. For the narrowness of the parameters of each site of governance obscure both its capacity to dwell upon the broader redistributive implications of any of its decisions and its capacity to realise any redistributive strategy that will involve and incorporate other sites. Yet, if individual sites cannot effectively engage in redistribution, it is

²⁷ For the vast literature on this, see D. Yanow, ‘Seeing Organizational Learning: A Cultural View’ (2000) 7 *Organization* 247.

not clear that law can. For, as Joerges notes, the history of the welfare-state indicates that law is functionally poorly equipped to realise substantive goods. Yet, redistributive questions do not and should not go away: the question of how to accommodate them cannot therefore be left unaddressed.

The challenges of coherence of vision, pluralism of knowledge and redistribution may ultimately be undefeatable, but this does not mean that there should not be an attempt to address them through institutional design. It is at this point that Deliberative Supranationalism seems to send out contradictory messages.

DSN I suggests that the most effective way to deal with these issues is through a system of checks and balances. As no single site can simultaneously address these overall needs and satisfactorily resolve local challenges, a system of counter-action is put in place where subsequent sites can revisit other decisions in the light of their own needs. In *Cassis de Dijon*, the authorisation to market Cassis de Dijon would have been considered in the light of the French markets, first, with the needs of the single market a secondary consideration. The authorities could be mindful of the claims of other regulatory authorities but could not possibly be knowledgeable about them or anticipate how they might change. The German authorities have the possibility of putting their needs first, when the application to market Cassis de Dijon is made. They have both a greater local knowledge and, inter-temporally, their decision is closer to the event of marketing. It makes sense, therefore, that they should have the right to trump the French decision. They cannot do it in an autarkic manner. Instead, they must, first, recognise that the French decision is something which should have legal authority in Germany unless it fails to take account of German needs as the Germans see them. They, then, have the right to say that it has failed to do this, but the duty of co-ordination, which occurs as result of Article 28 EC, obliges them to provide good reasons why this is the case. They are given wide parameters within which to do this. They must merely show that it failed to respect a public interest recognised in Germany and that the German authorities were mindful of their responsibilities to other economic operators in regulating this public interest.

To be sure, questions can be raised with this model. Is sufficient account taken of redistributive questions in the case law? Is the Court sometimes too restrictive in its interpretation of the proportionality principle? Is there enough room for macro-systemic visioning? It has, however, great merits. It is, above all, a dynamic model. Every decision is authoritative, but no decision is determinative. It can be revisited in the light of changes as

they occur. It is also a local model. The priority of the local over the transnational has been spelt out by Balibar:

‘(local determinations) refer to the specific historical and geographical roots of the conflict, which are also, dialectically, the premises of its solution, and because they allow us to assign responsibilities and make concrete forces accountable for their actions, whereas the primacy of the “global” nourishes passivity by suggesting that everything is determined at the global level, that is nowhere.’²⁸

DSN I reaffirms this, but also suggests that supranationalism is, above all, a form of accountability. Local actors may have priority for their actions, but their actions do not merely affect themselves. They must be open to the interests of others and account to others for their actions.

DSN II adopts an entirely different approach to the tensions of transnational governance. It is the approach of synthetic unity. An assembly place is created at the apex of any regime for the different interests to frame the problems and values of the regime. This does not have to take place in a central setting, but it must create a European frame (*e.g.*, Open Method of Co-ordination (OMC)) - a standard that claims to have taken all the different interests into account and is therefore the best practice. The lack of territorial unity is then provided for by allowing different actors leeway as to how they apply and comply with these frames – be this through the room provided by the Framework Directives or the mandate in the OMC to tailor European standards according to local standards. In all instances, the golden thread running through these different sites of governance is a European line of reason which is assumed to be sufficiently flexible and open to incorporate all concerns. The premises of such an approach are the opposite to those in DSN I. A golden line of reason can only be found if it is assumed there is neither incommensurability nor incompatibility between the interests, beliefs and values of different stakeholders. If it is neither possible to iron out the differences nor evaluate the weight of the respective values and interests at stake, then it is simply not possible to have a single view on what is the best practice. In addition, there is limited trust in the capacities, responsibilities or will of local actors to resolve many disputes. Comparative advantage is attributed to the transnational level with its broader horizons.

Whilst it is true that one level of decision-making should not be fetishised at the expense of the other, - the global can be as rich, wise and plural as the local, and vice versa, -

28 E. Balibar, *supra* n. 22 at 229.

the basis for these assumptions is left surprisingly unclear. More disturbingly, the deep level of incompatibility between DSN I and DSN II and their opposing approaches to the *problématiques* of problem-solving are left unexplored. It may be that the diversity of transnational governance is such that a dual system is needed, in which a checks and balances approach applies in some areas and a synthetic unity approach applies in others. It is too simplistic to assume, however, that what has taken place in EU governance is some clever allocation along these lines.

V. Conclusion

Deliberative supranationalism remains an unfinished but exciting and evolving project. As its basis lies a tension, for it is simply not possible to argue that important new institutional arrangements are emerging, which curb territorial authority, without considering whether the very idea of territorial authority is not being challenged by these as well. These arrangements create their own configurations of power and dynamics of governance, which, as they become more central generally, lead to territoriality losing its hegemony over legal and political authority. In keeping with the scepticism of Joerges about public power, the 'discovery' of these new arrangements requires that we also consider both the origins and the working of their power, and what is problematical about it. If supranationalism emerged from the love-hate embrace between territoriality and its discontents, the implicit message of Joerges is that the central relationship should be between governance and its discontents. This essay suggests there are three vectors along which discontent at governance may be challenged: its banalisation of political virtue, its dishonesty about the consequences of rule by expertise, and its élitist absence of concern with any form of redistribution.

The Riddle of *Unitas in Diversitas*: from Conflict of Laws to Administrative Constitutionalism?

RAINER NICKEL*

Since the 1990's European law (and policy) has been entangled in a discussion about its foundations, its institutions and procedures, and its normative fundamentals, leaving the EU in a state of a permanent legitimacy crisis. Institutional reforms in the course of the Amsterdam (1997) and Nice (1999) Treaties have somehow enhanced democratic control over the EU decision-making processes, *e.g.*, by widening the scope of the co-decision procedure of Article 251 TEC. Amsterdam and Nice, however, also brought more competences for the EU, namely, in two core areas of national sovereignty, justice and home affairs. The uneasiness with this development finally led to the 2001 Laeken Declaration where the heads of state called for an open-minded examination of possible reforms, and installed a European Convention, with the well-known result of a proposal for a European Constitution. Many hope that the present ratification process of the 2004 Treaty on the Constitution of Europe¹ will result in a stabilization of the EU – a formal constitutionalisation as an *Ersatz* or substitute for the somehow lost fervour of European integrationism.

In his plea for a supranational conflict of laws, Christian Joerges argues for a different kind of constitutionalisation: A possible answer to the question of how to enhance the legitimacy of the EU, or more precise: of the EU governance arrangements, should not concentrate on the technical surface, not even if this surface is polished by adding the word constitution, or not. Instead, he reminds us, we should look at the underlying structures of European legal integration and their ability to produce law that “deserves recognition”. This leads us away from a unifying constitutional symbolism and towards a “new species of conflict of laws” where proceduralization and methodology replace top-down interventions by a centralized supranational government. The recent results of the French and Dutch

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1 The highly symbolic character of the word ‘constitution’ is underlined by the fact that the official cover of the printed version contains the words ‘Draft Treaty establishing a’ in a small 12-point-type, whereas the words ‘Constitution of Europe’ is printed in a 48-point-type. If seen from a distance the eye notices only the ‘Constitution of Europe’ headline, the ‘Draft Treaty’ disappears ...

referenda on the European Constitution seem to point into this direction: a constitution-making process in the way of a top-down approach, as it was perceived by many, rather fuels worries about the legitimacy of the EU than puts an end to them.

Christian Joerges' text is too rich to be explored exhaustively in a short comment. I will therefore concentrate on four aspects of his conflict-of-laws approach that I found particularly interesting, albeit from my restricted perspective, and without claiming to do justice to his seminal paper.

I. Methodology or normative programme?

The first aspect is related to the character of his conflict-of-laws-approach: is it constitutional theory or methodology we are confronted with here? The introduction remains undecided in this respect: "European law should be understood as a new species of conflict of laws" – this points towards a methodology that demands that European judges respect the political preferences of the forum state by exercising *comitas* (p. 5). However, the next step – that European law should "proceduralize Europe's legal responses to the integrationalist agenda" (p. 5) – demands institution building, or at least some kind of materialization of procedures and *fora* in the framework of European law. Here it seems that Christian Joerges' concept of a Supranational Conflict of Laws is a normative concept which we can use to measure the legitimacy of the existing institutions and procedures of law-making in the EU. In yet another turn, Joerges underlines that a special kind of "conflict-of-laws" methodology is needed, a methodology which incorporates the critique of legal interventionism of the 1980's with its scepticism about top-down regulation. In the end, the synthesis between conflict of laws and legal theory which Joerges proposes "should lead to a 'law of law production' in the integration process, thus ensuring its law-mediated legitimacy" (p. 5). This is unquestionably a formula full of riddles.²

In order to obtain access to this riddle I would like to suggest that the integration of the private international law concept of conflict of laws into a theoretical approach to European law has to be understood as a metaphor. In the course of his article, Joerges

2 The formula of the law of law-production, *Recht-Fertigungsrecht*, originates in Rudolf Wiethölter's procedural approach to law. A similar Wiethölter formula is *Rechts-Verfassungsrecht*, another play on words: *Verfassung* can mean constitution but also state of body or mind, and its verbal form *verfassen* means to constitute but also to write down something. Both expressions are related to the concept of a proceduralisation of the category of law: Rudolf Wiethölter, 'Proceduralisation of the Category of Law', in Christian Joerges and David M. Trubek, *Critical Legal Thought: An American-German Debate* (Baden-Baden: Nomos, 1989).

undertakes a seemingly small, but, in its consequences, important shift. In many parts of the text and in its title he speaks of ‘*conflict of laws*’ as a new methodological tool for the understanding and interpretation of European law. In central parts, however, this becomes something else, namely, ‘*conflicts law*’. This is not merely a shift in nuances, but a central point that separates his approach from the orthodox conflict of laws methodology: Traditional conflict of laws theory and practice deal with the determination of the applicable law in cases with a connection to foreign legal orders. Its doctrines in the framework of private international law underline a complete indifference towards the contents of the potentially applicable law. In this regard, the conflict of laws doctrines stand for a formal principle that has links neither to ideas of material justice nor to ideas of procedural justice.

In stark contrast to this formal approach, Joerges pleads on several occasions in his article for a process-based approach towards European law. This procedural approach has two facets: on the one hand, Joerges stresses the need to include societal actors into the processes of law-determination. He claims that, instead of an old-fashioned top-down, command-and-control style of regulation and decision making, a context-related design is needed. Within this framework, the regulator should take the needs and demands of the “concerned actors themselves” seriously, thus avoiding the unwanted consequences of a strict top-bottom regime. On the other hand, he pleads for what he calls a “deliberative supranationalism”, a theoretical concept whose elements can only be understood in the light of the special structure of European rule-making. The EU committee system, or comitology, is seen here as the prime and outstanding example of an attempt to find an answer to the riddle of *unitas in diversitas*: The unique structure and character of the EU committees foster a decision-making process that is oriented towards mutual learning and recognition.³

The bottom line of the article is, then, a dual concept, a composition of two elements, or rather, two sides of a coin: EU law is conflicts law and the EU institutions should function as conflicts institutions applying a conflicts methodology; and a (rather roughly circumscribed) procedural framework should be created that safeguards deliberative processes within the institutional framework of EU institutions.

While the first point demands, especially from the judiciary, a kind of self-restraint in the spirit of comity, the latter point seems to be the most important element of *conflicts law*.

³ See the ground-breaking article of Christian Joerges and Jürgen Neyer, ‘From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology’, 3 *European Law Journal* (1997), 219-242.

The article suggests that a process of constitutionalisation that does not have much in common with the actual constitution-making process in the EU is necessary. Comitology is the blueprint for supranational rule-making because it is not intrusive – as a centralized EU government would be – but allows for a concept of supranational law that is “fundamentally democratic” (p. 16). What is meant here is that comitology enables for and demands the mutual consideration of extra-territorial effects⁴ within the regulatory process (p. 16). An example may illustrate this mechanism: As long as there is no respective EU regulation, Member States are free to build atomic power plants along their exterior borders (so that, in the event of an accident, fortunate winds may blow the nuclear cloud to the neighbouring country). Politics and power, instead of law, decide whether this kind of externalisation of nuclear fallout risk is possible or not. In a comitology setting, the respective Member States would have to justify such a practice *vis-à-vis* the other Member States.

The characterisation of comitology as a tool for enhancing democracy⁵ is a strong and highly contested assumption.⁶ This leads me to the second point:

II. Democracy and supranational governance

Supranational governance in its present form and democracy are widely seen as being at odds.⁷ It is, nevertheless, remarkable that the article does not even consider the EU parliament as the only future guarantor of democratic legitimacy in the EU – and this is rightly so.

The discussion about democratic rule above or beyond nation-state level is often dominated by a number of misleading clichés. One of the most important stereotypes concerns the law-making process *within the nation state itself*. Democratic rule is portrayed as parliamentary rule, but a closer look at contemporary rule-making processes reveals a different picture. Governments and non-state actors play a significant role in the pre-formation of legal rules. Governments, in particular, represent highly aggregated entities with

4 Joanne Scott has made a similar point in the context of the WTO. She claims that ‘judicial review’ in the setting of the WTO may be conceived as ‘re-inforcing rather than negating democracy, by enhancing accountability, and in particular the external accountability of states’. Joanne Scott, *European Regulation of GMO's: Thinking about Judicial Review in the WTO*, *Jean Monnet Working Paper 04/04* (New York: NYU 2004, www.jeanmonnetprogram.org).

5 This should not be confused with the question whether the concept of deliberative supranationalism and its practical application in the framework of comitology can be characterized as democratic governance. CJ clearly rejects such a view (see p. 25-26 with references).

6 See the discussions of a number of objections against comitology on p. 24-26 with numerous references.

7 See Agustin José Menendez, ‘No Legitimacy Without Politics: Comments on Jens Steffek’, in Ch. Joerges/I-J Sand/G Teubner, *Transnational Governance and Constitutionalism* (Oxford and Portland/Oregon: Hart Publishing, 2004), 103-114.

an enormous potential of resources, manpower, knowledge assessment, and experience. They – and not the parliaments - are the primary source for legislative proposals. “Guvernative structures”, as v. Bogdandy calls them,⁸ widely dominate the law-making process, and not parliamentarians.

Secondly, parliaments do not act in a vacuum (*lufleerem Raum*), but within a societal sphere that is influenced and partially even dominated by aggregated interests and conflicting positions. A patchwork of unions, employer associations, political parties, NGO’s, religious groups and many other actors do not merely complement the law-generating political process, but they basically constitute this process by participating in public debates about, amongst others, market regulation and social regulation. Here lies the core of what is widely identified as the democratic problem of supranational and international regulation/governance: at European level, the lack of a fully-fledged parliamentarianism is accompanied by a lack of a strong European civil society, European political parties, and a European socio-political sphere where conflict about social regulation can be played out in the open. In other words, it seems that the social *humus* necessary for a democratic process worthy of this name does not exist at European level. Deliberative democracy ends at the national borders.⁹

Christian Joerges takes up this challenge in a very specific way: he defends his concept of supranational conflict of laws as a viable alternative to a European State or European parliamentarianism. In a central passage of the article, he stresses the role of law as a tool for conflict resolution:

“[C]onflicts between the policy objectives pursued by legislatures are by no means restricted to international constellations; rather, these conflicts are a constitutive feature of the law of democratic societies – law has to endure pluralism and ongoing contestation. In terms of conflict resolution, therefore, the law should encourage the concerned actors themselves to take up the search for problem-solving and interest-mediation. It should ensure that their activities respect principles of fairness, enhance their deliberative quality, and then eventually acknowledge such societal norm generation. It is in this way that law can respond to collisions and contestations, and it can thus be characterized as conflicts law”. (p. 11-12)

8 A. v. Bogdandy, *Gubernative Rechtssetzung* (Tübingen: Mohr, 2000); see, also, R. Dehousse, ‘Misfits: EU Law and the Transformation of European Governance’, in: Ch. Joerges/R. Dehousse (eds.), *Good Governance in Europe’s Integrated Market* (Oxford/New York: Oxford University Press, 2002), 207.

9 Here, I refer to the notion of deliberative democracy as unfolded by J. Habermas in his book *Between Facts and Norms* (Cambridge/Mass.: MIT Press, 1996) and in his later work, *The Inclusion of the Other* (Cambridge/Mass, MIT Press, 1998), with an additional reference to G. Frankenberg’s concept of republicanism, see G. Frankenberg, *Die Verfassung der Republik* (Frankfurt am Main: Suhrkamp, 1997), and for the theory of civil society, see U. Rödel/G. Frankenberg/H. Dubiel, *Die demokratische Frage* (Frankfurt am Main: Suhrkamp, 1989). Frankenberg, Rödel and Dubiel correctly stress the idea that social integration is the result of societal conflicts; as a consequence, there is a need for elaborated frameworks in which conflicts are staged. This issue cannot be broadened here.

If taken in a strong sense and as a *general* description of the role of law in democratic societies, this statement seems rather counter-intuitive. Although it is true that legislators should leave as much room as possible for societal self-organization (*e.g.*, in the field of labour law and labour relations), and that, in principle, parliaments should respect the rationalities that guide the different social spheres, they are not bound to the role of a notary whose task it is to codify compromises between conflicting interests. In the end, the legislators are the ones who were legitimised by general elections to interfere and to decide, and not the “concerned actors”, as the Joerges describes them.

If we do not want to give up the primacy of political legitimacy, then self-regulation or co-regulation by societal actors should be models for specific areas, but they should not become the norm itself for the whole process of law production. A more cautious reading of the concept of “conflicts law” is, by the way, certainly compatible with this conclusion. It appears more suitable, therefore, to reserve the picture of deliberative and societal norm generation - as a general model for norm-generating processes - for a different level of rule-making on which less democratic legitimacy can be found.

In the supranational arena of the EU, there is no comparable authority at hand that could qualify as an equivalent to the elected national parliament – not even the EU parliament, for well-known reasons. If, therefore, authority cannot solve the problems of diversity (neither the authority of the ECJ, nor the authority of the Commission or Council), then the details of the procedures that lead to binding decisions and Europe-wide regulations have to be the focus of attention. Why? Because what is produced here is law – even if it is not yet formally called law¹⁰ - and not merely social knowledge or non-binding policy recommendations. The above-quoted passage with its call for a ‘conflicts law’ underlines that we are deeply in need of a theoretical concept and practical proposals for this kind of ‘conflicts law’.

10 The binding rules of the EU are still not called law but regulations or directives. One of the most interesting details of the new Draft Constitutional Treaty of the EU is that it replaces the old nomenclature: regulations become European laws, and directives become European framework laws. See Article I-33 of the Draft Treaty. It seems, thus, as if rules and regulations deserve to be called laws only after a constitutionalisation process has taken place: Article I-6, ‘Union law’, defines the legal rank of EU laws: The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States. See the Treaty Establishing a Constitution for Europe (OJ C 310/1 of 16.12.2004).

III. Conflict of laws and the substantial nature of European law

The desire to preserve and to produce as much democratic legitimacy as possible represents the essence of ‘conflicts law’. But why call it ‘conflict of laws’? Joerges’ article argues in favour of Brainerd Currie’s approach to private international law and embraces his claim that the “choice between the competing interests of co-ordinate states is a political function of a high order, which ought not, in a democracy, to be committed to the judiciary:...the court is not equipped to perform such a function; and the Constitution specifically confers that function upon Congress”.¹¹ This quotation describes the European dilemma in a nutshell: the absence of a European ‘Congress’ forces the European legislator, as Joerges puts it, “to resort to alternative legal strategies and institutional devices” (p. 9).

However, the persuasive power of the conflict of laws metaphor seems rather limited. European legislation is, to a high degree, much more than just a choice between ‘competing interests’ or competing legal orders. It produces hard law in many fields and many forms, with directives overriding national constitutional law (as was the case with Directive 76/207/EC in the *Kreil* case) and directives containing very precise prescriptions for the national legislator (as is the case with Directives 2000/43/EC and 2000/78/EC concerning anti-discrimination legislation). Conflict of laws somehow loses its characteristics if it is not about choice of law, but about *unitas in diversitas*; and if applied to the EU, the existing EU legal framework is somehow played down and presented as less precise and “material” than it really is.

IV. From ‘conflicts law’ to administrative constitutionalism?

The law guiding the norm-production of European law, and this is the core principle of ‘conflicts law’/‘conflict of laws’, has to meet a number of preconditions in order to deserve recognition. In the concluding passages of his article CJ outlines this concept in the context of comitology:

“What is at issue for a conflict-of-laws perspective is not the establishment of a European constitutional state within which governance arrangements could be supervised in the same way as within national democracies; our queries concern the normative legitimacy of a conflict-of-laws approach to transnational governance. Only from such a perspective does it make sense to explore in detail the legal structuring of the discovery procedures through

¹¹ Brainerd Currie, ‘The Constitution and the Choice of Law: Government Interests and the Judicial Function’, (1959), in idem, *Selected Essays on the Conflict of Laws* (Durham, NC, Duke University Press, 1963), 188-282, at 272 [quote taken from Ch. Joerges, text to footnote 13].

which we expect comitology to arrive at responses to complex conflict constellations: to consider the composition of and interaction between committees, the openness of their agenda, the access of concerned societal actors, the pluralism of expertise, judicial protection, safeguard procedures, a supervision of the whole process by national and European parliamentary bodies and, last but not least, exit options in cases where conflicts cannot be resolved.”

In this passage, Christian Joerges circumscribes what could also be called a blueprint for legitimate law-making in the more-than-a-regime, less-than-a-federation entity called the EU. Transparency, participation, accountability, and standing are some of the elements that are already in the centre of lively discussions, in and around the Commission's White Paper¹² and beyond. Legal reforms, especially in the field of transparency, have already brought significant progress; access to EU documents, for example, is nowadays much easier than ten or five years before.¹³ The principle of participation has even found its way into the Draft Constitutional Treaty, as one of the two major elements of the ‘Democratic Life of the Union’, albeit in a rather optimistic form of ‘participatory democracy’¹⁴.

If viewed together, instead of ‘conflicts law’, the above mentioned fundamental preconditions for legitimate law-making may also be called *administrative constitutionalism* – not out of the vain ambition to find merely a public law description for a private law concept, but because the main concern of the concept lies in a clearer specification of the guiding norms for legislative-administrative rule-making: perhaps as a European Legal-Administrative Procedures Act in the making? The catalogue of preconditions set up so far is certainly not complete and needs further specification – but Christian Joerges has fortunately left some room for others to take up this challenge.

¹² COM (2001) 428, July 2001.

¹³ Especially Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents represents a major step towards greater transparency of the EU institutions.

¹⁴ See Article I-47 of the Treaty Establishing a Constitution for Europe, OJ C310/1 of 16. 12. 2004, at 34.

“No Legitimacy Beyond Democracy!” - and its Consequences

A Few Recommendations for Rethinking European Law in Terms of Conflict of Laws

FLORIAN RÖDL*

Introductory Overview

With this comment, I wish to support Christian Joerges’ plea to conceptualise European law and its supremacy as a supranational law of conflict of laws. But my support has a particular, and maybe ambivalent, shape. This is because it puts Joerges’ understanding of the claim for legitimacy, from which his whole enterprise starts, into question, and, therefore, the significance of his response. In contrast with (my understanding of) his position, I recommend that we differentiate between a claim for supranational juridification (I.1.), and a claim for democratic legitimacy of juridification (I.2.). Thereby, I can maintain the link of legitimacy with formal democracy strictly and exclusively (I.3.). This will necessitate an idea of a European democratic sovereign (II.1.). Yet, the restriction of legitimacy to formal democracy does not deprive the concept of democracy of critical impact. It does not prevent us from comparing the democratic quality of different types of legitimate juridification processes (II.2.). This conceptual re-framing of Joerges’ account allows us to avoid some, otherwise justified, criticism. I will argue that, if we ever acknowledge that external effects, which national democracies burden on their fellows in multiple ways, need juridification, then the comparative yardstick for the democratic quality of EU law is not the democratic quality prevailing in the Member States, but the processes of law-production in international law. On the other hand, my conceptual recommendations have effects for the form of justification for a European law as law of conflict of laws (III.). There, legitimacy has to leave

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the field and must be replaced not only by other normative aspects as democratic quality, but also by efficiency, implementability or practicability.

I. Juridification and Democratic Legitimacy

1. The EU represents not a Source but a Solution for a Legitimacy-Problem

A common way to raise the problem of the democratic legitimacy of the EU, its “democratic deficit”, is enshrined in a popular slogan which reads as follows: “If the European Union applied for membership to itself, affiliation would be denied!” The underlying rationale of approaching the legitimacy question is this: before the European Union was created, the Member States were not facing (in as far as they were democracies at that time) any specific problem of legitimacy, thanks to their democratic constitutions. After having conferred some of their competences to the Union, the problem has arisen as to whether the exercise of the conferred competences underlies an equivalent democratic control as it did before. This rationale establishes the standards of Member States’ democracies as the decisive yardstick for the democratic legitimacy for the European Union. As the Union obviously fails to display equivalent standards - some of them constitutional (*e.g.*, position of the parliament), some of them factual (*e.g.*, no cohesive European Parties, no European public sphere) - its legitimacy is cast into doubt.

Joerges’ starting point is diametrically opposed to this common approach.¹ For him, the account of the common approach starts too late. It takes the European Union with its competences, which have been conferred to it by the Member States, as a given. But, as Joerges says, the establishing of the European Union should instead be observed as a solution for an preceding problem of legitimacy. It is the legitimacy problem of each Member State (and of any nation state). This legitimacy problem of the Member State is rooted in the external effects that each state cannot avoid producing - Joerges calls them “extra-territorial effects”. The law of a given state with its entitlements and obligations has effects on other states and their populations, due to the multiple inter-dependences that each and every state has with the rest of the world. The legitimacy problem arises if the external effects are not

¹ For the following, compare his Sections III.1 and III.3.a.

representing boons, but burdens for the other national societies, as they often do. In order to observe this as a problem of legitimacy, Joerges takes up the venerable formula of “No taxation without representation!”² The underlying and generalised rationale of this formula is, I think, the basic principle for the legitimacy of law which Kant had once put as follows:

“Die gesetzgebende Gewalt kann nur dem vereinigten Wille des Volkes zukommen. Denn, da von ihr alles Recht ausgehen soll, so muss sie durch ihr Gesetz schlechterdings niemand unrecht tun können. Nun ist es, wenn jemand etwas gegen einen anderen verfügt, immer möglich, dass er ihm dadurch unrecht tue, nie aber in dem, was er über sich selbst beschließt (denn *volenti non fit iniuria*).”³

With this, Kant had established the idea of legitimacy of law not as depending on its substance, its content or its underlying purpose, but as a matter of democratic procedure.⁴ Joerges claims, in other words, that the negative external effects of national societies and their laws are a violation of this principle, as they affect people who were not granted equal participation in its creation. Therefore, national law and national democracies both lack legitimacy, in so far as they burden their fellows. In consequence, the prevalent legitimacy question which is at stake regarding the European Union is not whether the production of European Union law displays democratic standards which are comparable to those of the Member States, but whether the European Union as a supranational polity is able to solve the legitimacy problem which all Member States have always faced.

Thus, it is Joerges’ basic assumption that the European Union does, indeed, relieve the legitimacy problem of the external effects of the modern nation state.⁵ It does so by imposing supranational constraints for the legislative autonomy of the Member States. These constraints take the form of establishing particular requirements for the law of the Member State. Member States, so he says, have to take the concerns of their fellow states and their

2 This formula goes back to James Otis from Massachusetts at the Stamp Act Congress held in New York City 1765. Otis urged for actual representation of the American colonies in the British Parliament in London. But it is worth telling that for most of his American fellows this formula meant that the Americans wanted their own assemblies to impose taxes on them. Essentially, it served as a slogan for separation rather than for democracy. The problem of legitimacy of separation is a turnaround of to the problem of the legitimacy of a supranational polity.

3 Immanuel Kant, *Metaphysik der Sitten*, § 46, p. B 196

4 I draw from Ingeborg Maus, *Zur Aufklärung der Demokratietheorie*, (Frankfurt/M., 1992).

5 It must be observed as an alleviation and not as a solution. External effects of European states affect other societies all over the globe in a negative way as well.

populations into consideration when designing their laws.⁶ In conclusion, Joerges holds national legislation legitimate in the face of its external effects, in so far as these effects are set under external legal review guided by principles which secure respect of the interest of other' states. This is how European Union law relieves the legitimacy problem of the Member States, as this is how national law regains legitimacy in face of its external effects.

I subscribe to Joerges' assumption that the EU does, indeed, relieve the legitimacy problem which all Member States have always had to face. The deviating point I want to make concerns the understanding of how it does so. But to put my argument clearly, I have to take a short detour.

2. Another approach: The EU represents juridification of a "natural state"

Though remaining on the same ground, *i.e.*, in diametrical opposition to the common approach to Europe's "democratic deficit", we do not need to start with the supposed democratic legitimacy of the nation state straight away. We could even be more modest: we could concentrate on the foregoing problem of whether, without the Union, the external effects of the nation states are constrained by any law at all - be it democratic or not.

The appropriate candidate is obviously international law. But we know that international law is fragmented by form, and rudimentary by substance. There is customary law, treaty law and institutions such as the United Nations. Even taking all of them together, only marginal fields of all the potential external effects of a nation state are covered. For the rest, any state can do whatever it likes and whatever its conditions allow it to do, regardless of the external consequences and needs of other states and their peoples. In this respect, interstate relations are still in, what Kant called, a "natural state". In a "natural state", the subject is committed to do or legislate whatever seems right to it, and no objective law decides on the resulting conflicts.⁷ Thus, a "natural state" is described as a state of "potential permanent violence" and to my understanding, "violence" not only refers to manifest military aggression, but also, for example, to socio-economic harm which is mediated by the world market. And if we are about to follow Kant further, it is a claim of practical reason to leave

⁶ For a better understanding, I restrict the vocabulary of my account to the situation envisaged by Joerges' DSN I.

⁷ Immanuel Kant, *Metaphysics of Morals*, § 44, p. B 193 f.

the “natural state” and to enter into a “state of law” - irrespective of its democratic legitimacy (this is reserved for the history to come⁸). Consequently, in the face of their multiple mutual external effects, nation states find themselves in a “natural state” and are bound to leave it.

It seems worth mentioning that this line of reasoning is reflected in a third doctrine in conflict of laws, which Joerges’ account has not taken on board.⁹ I refer to a camp besides the orthodox view, represented by Gerhard Kegel¹⁰ (or John G. Collier¹¹ or Pierre Mayer¹²), and its politicising opponent, Brainerd Currie¹³: the so-called internationalists¹⁴. Despite their deep divide over the role of public policy in private law, both, Kegel and Currie, share the view that a state is allowed to do whatever it likes in conflict of laws. The “internationalists”, in contrast, assume that conflict of laws has to be conceived as an intrinsic part of international law.¹⁵ Accordingly, many conflicts-scholars, but also courts, started to look for conflict-rules in international customary law. The Restatement (Third) of Foreign Relations Law of the United States¹⁶, with Andreas Lowenfeld as an influential reporter, has pushed the internationalist approach to its ultimate consequence. It states a legal obligation by international law¹⁷ to allocate the spatial applicability of the law of the different states (also called “prescriptive jurisdiction” of the state) according to a universal principle of “reasonableness”, and to balance any conflict of regulatory interest between states from a neutral perspective.¹⁸ This may sound vague, but a defence of the Restatement is not of

8 Immanuel Kant, *Metaphysics of Morals*, General Annotation A, p. B 208-210.

9 Compare his Section I.

10 Gerhard Kegel / Klaus Schurig, *Internationales Privatrecht*, 9th edition, (Munich, 2004).

11 John G. Collier, *Conflict of Laws*, 3rd edition, (Cambridge, 2001).

12 Pierre Mayer/ Vincent Heuzé, *Droit International Privé*, 7th edition, (Paris, 2001).

13 Brainerd Currie, *Selected Essays on Conflict of Laws*, Durham 1963.

14 The main scholars in Germany are Ernst Zitelmann (*Internationales Privatrecht*, 2 Vol., Munich / Leipzig 1987/ 1912), Hans Wiebringhaus (*Das Gesetz der funktionellen Verdoppelung*, 2nd edition, (Saarbrücken 1955), Albert Bleckmann (*Die völkerrechtlichen Grundlagen des internationalen Kollisionsrechts*, Köln *et al.* 1992).

15 Wiebringhaus and Bleckmann draw from the French scholar Goerges Scelle and his idea of a *dédoublement fonctionnel* of the state in regulation on substantially international matters.

16 American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States*, 1987

17 Andreas Lowenfeld, *International Litigation and the Quest for Reasonableness*, (Oxford, 1996), p. 19.

18 Para. 403 Sec. 1 of the Restatement states: Even when one of the bases for jurisdiction under § 402 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of jurisdiction is unreasonable. And Sec. II reads: Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate: (a) ... (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted; ... (g) the extent to which another state may

interest here. What I wanted to note is the parallel with our problem of a “natural state” concerning the state’s external effects. Though the “internationalists” have put it in different terms, we can rephrase the underlying rationale in more familiar terms: with its national conflict-rules, a state determines the spatial applicability of the law of all other states, and by that, it may deprive a foreign state’s law from its validity. The legal and factual consequences of that decision of a particular state reach well beyond the states borders. Therefore, one can hardly imagine a more straightforward external effect of a state’s law than national decisions in conflict of laws. Consequently, internationalists look in international law for restrictions to the exercise of state sovereignty in setting conflict-rules. Herewith, they try to establish a supranational “state of law” regarding the field of conflict of laws.

Having noted the “natural state” with regard to the mutual external effects of states and its reflection in the internationalist conflict of laws-doctrine, we can turn back to the EU. What the EU does, is exactly this: it eventually establishes in many areas a “state of law” both for and among the Member States. Most areas of European law were not covered by international treaty law or by customary law before the foundation of the European Communities. So, the European Union must, first and foremost, be praised for its establishing a state of law for what had been a “natural state” before. Certainly, the latter has - since World War II - no longer been characterized by military violence, but is still characterized by the unruly external effects of each European nation state, many of which are mediated by the market. Moreover, in contrast to international treaty law (and in line with Kant’s requirement that states should enter a state which is similar to a constitution¹⁹), the EU represents not only a treaty with substantive rules, but also a “constitution”, in the sense that it institutes legislative, executive and judicial functions. We can state, in conclusion, that even if we ignored the problem of democratic legitimacy, it could be demonstrated that the European Union is not a source, but serves as (part of) a solution of a foregoing and more fundamental problem, *i.e.*, the persisting “natural state” between the states, and that it fulfills thereby a claim of practical reason.

have an interest in regulating the activity; and (h) the likelihood of conflict with regulation by another state.
19 Immanuel Kant, *Towards Perpetual Peace*, p. BA 30.

3. No Legitimacy beyond Democracy

At this stage, it is easy to tie together the two problems rooted in the external effects of the state that have been treated separately in the two paragraphs above, the first problem being a lack of democratic legitimacy, the second being a lack of juridification. At first sight, they may only seem to be different shades of the same problem, and in a sense, they are, as, in general, we all are interested in democratically legitimised law only. But there is a logical priority of the problem of supranational juridification, as in our context the problem of democratic legitimacy is raised for nothing else than law.

However, it seems to me, that Joerges does not differentiate the problem of juridification from that of its democratic legitimacy. He lets them collapse into one. We saw that, for Joerges, the EU relieves the Member States of the problem of democratic legitimacy for their domestic law by setting their regulations under supranational legal control. How ever this legal control may then be proceduralised (*e.g.*, fundamental freedoms which can be invoked before national courts), the problem of lacking democratic legitimacy is solved, in Joerges account, by a substantive constraint. In other words, Joerges raises the problem of legitimacy and answers it with a claim for supranational juridification - an answer which is not appropriate for a lack of democratic legitimacy, but is for the precedent finding of a “natural state”.

Moreover and in consequence, even if we assume that supranational juridification is, nonetheless a valid answer for the nation state’s legitimacy problem, this entails a conceptual rupture inside the concept of legitimacy. If certain substantive constraints are able to serve as a functional equivalent of inclusion in the democratic procedure for the claim for legitimacy, we end up with an overarching concept of legitimacy which can be achieved either by democratic participation or by compliance with substantive requirements. If this reconstruction were adequate, Joerges would have eventually dissolved the exclusive conceptual connection between legitimacy and democratic procedure. I consider this a hazardous manoeuvre. Its consequences tend to undermine the grasping of the problem at the outset. If legitimacy can be conferred not only by procedure but also by compliance with substantive content, there is no logical reason why this content must be enshrined into supranational law. Could not it equally well be the nation state’s own (constitutional) law,

i.e., stating a principle of international fairness, which secures the required respect for other states' and their populations' interests? I think that our intuitions would not tend to consider this as an equivalent to supranational constraints. The intuition is related to the worry about how Joerges' conceptual change, which declares compliance with substantive constraints as a source of legitimacy, can be justified at all. It is a difficult task, and I cannot see how it can be fulfilled, as the Kantian turn to procedure as a basis of legitimacy (not of justice) instead of compliance with substantive constraints had compelling reasons: As to substantive constraints, the decisive question is who is to decide legitimately on the content of such substantive principles - if not the sovereign!²⁰

II. Democratic Legitimacy and Democratic Quality of EU Law

1. The quest for a supranational democratic sovereign

Who is to decide, if not *the* sovereign, I said. But, who is the sovereign in our context? It is important to point out that it cannot be the national sovereign. As we stated, together with Joerges, the democratic legitimacy that the national sovereign has to provide is not enough. Hence, it turns out that the fundamental status of the concept of national sovereignty has inherently been shattered by raising a problem of democratic legitimacy for the nation state with reference to those affected but not included in the national sovereign. From this viewpoint, it appears unavoidable that the democratic sovereign which would be needed to achieve democratic legitimacy for supranational constraints cannot be the national sovereign. It must be a sovereign which is conceptually constituted not by the nation (culture, language or whatever some like to suggest²¹) but by the criteria of affectedness by law and its factual effects. Certainly, "affectedness" is itself a matter of possibly contested judgment (not of "perspective"). However, I do not see any defensible argument with which the "affected" could be restricted to the population of a particular state with regard to its own legislation. In conclusion, what I wish to suggest to Joerges is that either we accept this consequence, or we have to accept that, from the outset, our problem cannot even be raised.

20 Immanuel Kant, *Metaphysics of Morals*, General Annotation A, p. B 207.

21 Cf. Josef Isensee, in: *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, edited by J. Isensee / P. Kirchhof, Vol. 2: *Der Verfassungsstaat*, 3rd edition, Heidelberg 2004, § 15 Staat und Verfassung, para. 123. ff.

Although it may look similarly at first sight, I want to stress that my reasoning is opposed to an statist position which emphasizes that the EU has done no harm to national sovereignty, as the Member States are still the “Master of the Treaties”, and that it shall never do - as the *Bundesverfassungsgericht* argued in its Maastricht-Judgment.²² On the contrary. To start with the problem of the democratic legitimacy of nation states, as Joerges does and I follow suit, implies that national sovereignty has to be “harmed” because the democratic process which the nation state provides does not cover the claim for legitimacy of its external effects. And I want to argue, moreover, that the nation state is bound by this claim of legitimacy to submit its legislation to supranational constraints which must be set by a corresponding supranational sovereign where all (or as many as possible) who are affected have an equal say.²³

2. The European sovereign and the claim for democratisation

Is there, hence, a European sovereign which provides for democratic legitimacy for the European constraints of the Member State’s autonomy? I do not pretend to be in line with the doctrine of European and domestic constitutional law when I suggest that, if we want to see the external effects of the Member State’s autonomy under democratically legitimised supranational control, we have to interpret the European Treaties and its secondary legislation as being a representation of the will of a European sovereign. It is for another day and maybe for another writer to demonstrate it.²⁴ Just one peculiarity of such an attempt should be mentioned: it had to interpret the conclusion of the Treaties by the Member States not as a consensus by the national sovereigns which is binding for a particular Member State because of its own will²⁵, but as an act of all Europeans establishing a European constitution. Accordingly, the concluding governments and ratifying parliaments do represent only collective and autonomous units, in which the European sovereign is, for reasons of historical contingency, divided.²⁶

22 *Bundesverfassungsgericht*, in: BVerfGE 89, 155 (sub C.I.2.).

23 It is true that my line of reasoning points towards a global democratic constitution.

24 A tentative attempt is made by Stefan Oeter, *Föderalismus*, in A. v. Bogdandy, *Europäisches Verfassungsrecht*, Berlin 2002, p. 59 – 119, invoking a concept of shared sovereignty with the European Parliament as representing the European sovereign (p. 88 f.).

25 The prevalent Hegelian heritage in the doctrine of international, compare his *Philosophy of Law*, § 333.

26 I voluntarily admit to what will have become a suspicion in the mind of the reader anyway: The other side of

I have argued that, in the face of the deficit of democratic legitimacy for the Member State's, we have to claim for democratically legitimised supranational constraints, and I suggest the reconstruction of democratic legitimacy for the European constraints of national autonomy in the conclusion of the Treaties and the secondary legislation based on them, representing a European sovereign. Accordingly, the democratic legitimacy of the European Union is no longer any cause for worry. But with this, I am far from intending quietism about any claim for more democracy in Europe. On the contrary. As we know from the permanent struggles for democracy inside the Member States after reaching formal democratic legitimacy, *e.g.*, establishing a constitution with at least representative legislation, there is still room to increase the "democratic quality" of law production, guided by a regulative idea of radical democracy.²⁷

However, any claim for democratisation of the European Union has to take our starting point - the lack of supranational juridification of the multiple external effects of nation states - into account. This draws our attention from the democratic standards of the nation state as the decisive yardstick for the Union's democratic progress to the democratic standards of international law production. Though this deserved extended scrutiny, it should be obvious without further explanation that, in terms of democracy, the standards of law production in the European Union are considerably higher than in the international community. Again, this is no plea for quietism. The democratic quality of the European Union must be enhanced, and I can subscribe to many claims for democratisation with regard to the European Union. The regulative idea of radical democracy assures that a claim for democratisation will always be justified - and the list for democratic reform of the Union (which has also been poorly observed by the European Constitutional Convention) is long enough.

the coin is that I must (and want to) interpret the supranational federalism of the European Union in terms of a Kelsenian monist conception of national and international law (compare his *Reine Rechtslehre*, 1st edition, Leipzig and Vienna, Section 50), according to which it is not the constitution that grounds the state's sovereignty, but that it is international law which confers it. That it is conferred from above implies, to my understanding, that it is restrainable, which makes me recommend replacing the concept idea of (absolute) sovereignty with the concept of (restrainable) autonomy.

27 Together with Jürgen Bast, Bettina Friedrich *et al.*, we have developed the idea of radical democracy as a regulative idea in: 'Kritische Rechtswissenschaft und Kritische Justiz', in: *Kritische Justiz* 31 (1999), p. 313 ff.

III. The Plea for European Law as Conflict of Laws Restated

I have drawn a picture in which a European sovereign sets constraints for the Member States' regulatory autonomy. At this point, a European law as law of conflict of laws may come naturally as the corresponding form of law. But despite its natural correspondence, this form of law is no necessity. In my picture, the constraints for national autonomy needn't be set by conflict of laws-like principles with which the national legislator has to comply, but can well be set by uniform substantive rules, or substantive frameworks. Which type is actually chosen is - observed from sideways on - a matter of discretion.

As far as I understand Joerges' theory, for him, in contrast, it is not a matter of discretion, but a question of legitimacy. The European Union should not produce many substantive rules as it lacks the legitimacy which is indispensable for that. A pre-requisite of major substantive legislation would indeed be - in my terms and according to my understanding of his position - a level of democratic quality of law-production similar to that of a nation state. But it cannot achieve a similar level of legitimacy and democratic quality, and this is why the EU should refrain from producing (too many) substantive rules and should instead content itself with a type of conflict-legislation.

However, in my account, there is no room for a normative-democratic priority for conflict of laws as a paradigm of European law. It is a matter of discretion. But leaving our sideways-on-perspective, we can find lots of reasons why the European Union often performs better if it does produce the kind of conflict-rules and conflict-principles which Joerges envisages. One of these reasons is that the public awareness of national legislation is doubtless higher than that of European legislation, that political parties are still acting in a national framework, and that the national media are still struggling even to understand the basic constitutional structures of the Union. As long as this is the case, it enhances the democratic quality of the legislation process if Europe does not set the substantive rules but sticks to non-discrimination principles, veritable conflict rules, and some substantive minimal, or framework, rules, leaving as much autonomy as possible to the Member States. Moreover, non-democratic arguments can support a conflict of law-approach: the complexity and difficulty of the regulatory tasks, the dangers of the unintended consequences inside the comprehensive legal orders, the Member States' path dependence preventing uniform

solutions, *etc.* But as we are not dealing with democratic legitimacy, but with democratic quality and other aspects, these kinds of arguments can be balanced with other reasons that point to substantive regulation, for example, an intrinsic necessity of uniform law (as in anti-trust law), the intention to avoid destructive competition (as in environmental or social and labour law), *etc.*

A similar line of reasoning - I have to restrict myself to this small remark and the explanation has to be reserved for another occasion - applies to the idea of reflexive law, proceduralisation, *etc.*, shifted to the European level.²⁸ Establishing these mechanisms, in particular, when conflict of laws solutions are inadequate, as, for example, with risk-regulation for goods, is not a matter of a superior normativity - either to avoid “life-world-intrusion” or to draw an affirmative conclusion out of insights from systems theory - but a matter of balancing several criteria: different aspects of democratic quality, efficiency, practicability, implementability, *etc.*

In conclusion, I just would like to state clearly: I do not want to present my account as a general answer to the question of the appropriate shape of European law. I merely wanted to point to the appropriate form of how answers for specific areas of law ought to be given.

28 See Joerges' Section II and II.4.

Private International Law Analogies

ROBERT WAI*

I. Private International Law Analogies

Sir Hersch Lauterpacht's first great work identifies the significant role that private law analogies play in the development of public international law.¹ By this, he meant not simply the direct and uncontroversial use of private law principles in areas such as loan agreements involving a state party, but rather the use of private law analogy at the very core of public international law.² For Lauterpacht, the private laws that are common to nations are an important part of "the general principles of law recognized by civilized nations", the source of public international law identified in Article 38 of the Statute of the Permanent Court of International Justice.³ These common principles of private law are the instantiation of principles for co-ordinated life that can fill gaps in the development of public international law, especially in its formative periods. It may be that private law sources and analogies could also assist in the current efforts to develop principles governing the relations among different levels of tribunals, and among different international tribunals, such as the specialized tribunals for trade, human rights, and health and safety.⁴

Christian Joerges demonstrates how such a turn to private law can provide insights into the cross-border, regulatory co-ordination concerns of European law and transnational governance. Specifically, Joerges looks to private international law for what he considers to be an overlooked, yet superior approach to the conflict among regulatory laws, not just of private law but also of public law, in Europe and beyond. In this task, Joerges engages in a complex and unique transatlantic borrowing: he emphasizes two characteristics of private international law influenced by a reading of Brainerd Currie's work on US conflict of laws. First, he sees in Currie's work a clear recognition that private law potentially has public

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1 Hersch Lauterpacht, *Private Law Sources and Analogies of International Law* (London: Longmans, Green & Co., 1927).

2 Lauterpacht, page 3-5.

3 Article 38(1)(c) of the Statute of the International Court of Justice.

4 See, for example, International Law Commission Study Group on the Fragmentation of International Law (A/CN.4/L.628) adopted August 2002 (2741. and 2742.); special issue of the *New York University Journal of International Law and Politics*, Volume 31 (1999).

policy purposes and therefore involves public interests.⁵ This means that resolution of conflict of laws problems often has a political function of attempting to resolve conflict of interests among states; for Joerges, this situation describes many of the contemporary challenges in European and transnational governance. Second, he sees in Currie's response to such conflicts the basis for an appropriate response of contemporary courts facing problems of conflicts among jurisdictions. Aware of the greater democratic legitimacy and greater expertise of legislatures, Currie advocates deference on the part of US courts when dealing with "true conflicts", *i.e.*, in cases where a public policy concern of the forum jurisdiction can be identified. The combination of a broad sense of forum interest and a decision rule that applies forum law in cases of true conflicts has the potential to be very parochial. Joerges has more hope for the approach. He notes that Currie later moved to a more moderate and restrained interpretation of forum interests in order to avoid conflicts. He also elaborates an understanding of that restrained approach that combines Currie's recognition that there are real public policy stakes in conflict of laws, with the more traditional willingness of private international law to tolerate foreign law.

Following this approach, Joerges sees the conflict of laws approach as involving a certain deference, which he identifies as *comity*, to the legislative interests of both jurisdictions. In particular, the conflict of laws approach looks away from the substance of the underlying laws and the task of choosing the better rule, but instead takes a more procedural approach. In this, he sees similarities to developments in "post-interventionist" law more generally, with the switch from government to governance, and attention to various kinds of reflexive regulation and proceduralization.

II. Private Law and Co-ordination Problems among Parallel Units

Part of the appeal of private law for Lauterpacht and of conflict of laws for Joerges seems to be that private law centrally deals with an analogical challenge of co-ordinating the interests of two parallel units. In the case of private law, it is disputes between private parties. In the case of private international law, it is disputes between private parties but with the further complication of elements of the dispute that are connected to more than one legal jurisdiction. Even if it is a municipal court that is faced with adjudication of such a dispute, the approach

⁵ In this respect, Currie's work completes the insights of US legal realism in the area of conflict of laws; for earlier work, see Walter Wheeler Cook, 'The Logical and Legal Bases of the Conflict of Laws', 33 *Yale L.J.* 457 (1924); E. G. Lorenzen, 'Territoriality, Public Policy and the Conflict of Laws', 33 *Yale L.J.* 736 (1924); David Cavers, 'A Critique of the Choice of Law Problem', 47 *Harv.L.Rev.* 173 (1933).

has focused mostly on finding an appropriate balance among the interests of the various parties and jurisdictions.

This emphasis in private law helps counter a tendency towards hubristic “supremacy” reasoning on the part of “higher-level” institutions, whether federal or supranational. For Lauterpacht, this corresponds to the challenge of an international tribunal dealing with disputes between two sovereign states over territorial claims or treaty enforcement and interpretation. For Joerges, this more modest private law approach contrasts with any conception of European level supremacy. He clearly believes that caution for European level institutions is appropriate, especially for courts that are limited in their democratic legitimacy and functional expertise. Even for a higher-level institution such as the European Court of Justice, the aim is to think of the challenge as a co-ordination problem between two parallel units. The situation of the European Court of Justice, for example, would be similar to that of federal courts in countries such as the United States that regularly must deal with delicate problems of federalism.⁶

For Joerges, some oversight is clearly needed in an inter-dependent Europe and an inter-dependent world. Increasing economic and social inter-dependence among jurisdictions means that governmental measures in one state almost inevitably have external effects in trading partners, a process exemplified by the expansive role of the federal trade and commerce clause of the US constitution. A similar dynamic is present in the WTO and explains the increasing focus on *de facto* discrimination and trade effects caused by divergent national regulations. Some of the most controversial decisions of the WTO, such as *Beef Hormones*⁷ and *Shrimp Turtles*,⁸ are of this character. This external effect is only weakly protected in traditional sovereign structures, and Joerges believes the European law and institutions, for all their faults, legitimately advance concern for the effects of national regulations on out-of-jurisdiction interests.

⁶ These areas of constitutional restriction include areas of private international law concern. In this respect, it is interesting to note how the US Supreme Court has tried to balance constitutional limitations, such as due process requirements of the Fourteenth Amendment to the US Constitution, with a certain deference towards state jurisdictional autonomy. For a good example of this balance, see the ‘minimum contacts’ requirements articulated in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

⁷ *EC – Measures Concerning Meat and Meat Products (Hormones)*, Report of the Appellate Body, WT/DS26/AB/R, WT/DS48/AB/R, 6 January 1998.

⁸ *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, WT/DS58/AB/R, 12 October 1998.

But Joerges also does not want too much intervention by the courts. A believer in the insights of post-interventionist law about the legislature, he also fears the limits in legitimacy and in expertise of courts. Instead, what he pushes for is for courts such as the European Court of Justice, and presumably international tribunals such as the WTO Dispute Settlement Body, not to regulate directly in substance and in detail what a particular state must do in order to comply with international treaty obligations. Instead, such courts should act as “instigators” for transnational processes of governance to kick in. This could be the initiation of procedures inside a Member State to find a less trade restrictive alternative form of regulation (as in *Cassis de Dijon*), or direct negotiation between Member States on resolution of a dispute, but it also could be, for example, the transnational process of governance that he sees around surrounding comitology in Europe.

III. Comity

Joerges cites the use of comity in Currie as describing the deference of the courts towards their own legislatures with respect to conflicts of policy. This is one sense in which comity is used, but it is important to exercise caution in transferring the concept of comity to other fields, including from private to public law, and from the United States to Europe.

Even in the US context, comity is used in a variety of not necessarily consistent ways.⁹ Indeed, the sense of comity that Joerges identifies in Currie – of deference of forum courts to the forum legislature – is not the most common use of comity in US conflict of laws. Instead, comity has more often been identified with some level of consideration, not out of legal obligation but out of a kind of diplomatic politesse for the laws and concerns of other countries. This is the sense in which it is invoked for example in the key US Supreme Court case, *Hilton v. Guyot*.¹⁰ It is also, and not coincidentally, the sense in which Joseph Story imported the principle of comity, from Huber's work, into US conflict of laws theory.¹¹ In this way, comity is vehicle in US conflict of laws to exercise some of the cosmopolitan concern for foreign jurisdictions that, in European private international law, seems more directly addressed through a view of the field as apolitical and concerned mainly with private rights. In the US context, in other words, this provides a helpful bulwark against excessive forum parochialism, the hazard of Currie's use of comity by courts towards their own legislatures. In

⁹ See Joel Paul, ‘Comity in International Law’, 32 *Harv. Int'l L.J.* 1 (1991).

¹⁰ *Hilton v. Guyot*, 59 U.S.113 (1895).

¹¹ Joseph Story, *Commentaries on the Conflict of Laws* (Boston: Little & Brown, 1841).

the contemporary order, and especially given the insights about the defects of legislative and administrative process taken from post-interventionist law, it seems particularly important that courts do not simply defer to their own legislatures in matters of cross-jurisdictional conflicts. In this task, a use of this other US concept, of comity with respect to the policies and processes of other states, may be a helpful import to understand the role of European and other international institutions in trying to adjudicate disputes between different states. This mechanism also provides a means of not falsifying true conflicts by ignoring or limiting the concerns of one state or the other.¹²

Beyond even these two senses of comity – of deference of forum court to forum legislature, and of concern for the interests and processes of foreign jurisdictions – what Joerges is pushing for at European and international tribunals is something like a deference to the complicated array of procedures – both municipal and cross-border processes, but also non-state based processes – for reaching accommodation that exist in any more mature international system. This is helpful. At the EU level, it means giving attention to sometimes overlooked processes, such as comitology. At the international level, for example, it means leaving some room for states to figure out how exactly they should comply with the requirements of the WTO regime. In the case of *Beef Hormones*, for example, there should be greater deference to state choices so long as they adhere to procedural requirements such as justification based on scientific evidence, use of representative procedure, and reference to multi-lateral standards. And at both EU and international levels, it means attending to emergent forms of self-regulation developed in private or mixed public-private processes of functional systems.

IV. Courts and Litigation in Transnational Governance

These uses of comity are all sensible encouragement to courts not to assert supremacy too quickly and substitute a specific resolution to a regulatory dispute among jurisdictions, but instead to attend to the range of other procedures that are at work in reaching accommodation among the interests of different jurisdictions. But there is a danger that this kind of caution can push courts to an almost routine deference to other procedures. This seems a dangerous position given the current state of international society. Sometimes what is needed from courts is not simple deference whether to another foreign state's interest, to a legislative

¹² See, for example, Joseph Singer, 'Real Conflicts', 69 *Boston Univ. L.Rev.* 1 (1989)

branch, or to other transnational processes. Instead, courts must be seen as an increasingly central and normal actor in the complex processes of transnational governance. There may be reasons why a court needs to recognize that sometimes what is needed is precisely a more active role of oversight by a court.¹³

There is a more general turn in transnational relations to the role of litigation and courts. The adversarial legalism that Kagan identifies as a distinctive “American” way of law and politics, is increasingly a feature of transnational law and politics. For Kagan, this means policy-making and dispute resolution is characterized by (a) contestation in the form of law (legal rights, duties, procedures, enforcement, penalties, litigation, and/or judicial review); combined with (b) litigant activism (contestation dominated by disputing parties or interests, often acting through lawyers).¹⁴ Many others have noted the spread of the turn to courts as an active tool in international relations.¹⁵

This suggests a less metaphorical reason for attention to the conflict of laws. The field of private international law plays an important role in the construction of one of the plural regimes that constitute the modern terrain of transnational governance: transnational private litigation and transnational private transactions.¹⁶ Such private law claims, made in municipal courts but for disputes with cross-border elements, do respond to some of the regulatory gaps of our contemporary transnational system of governance.¹⁷ In litigation such as the claims in New York courts made on behalf of victims of the 1984 Bhopal chemical accident, private law claims were pursued as an alternative form of compensation and regulation where other forms of international and municipal regulation were blocked or ineffective.¹⁸ Beyond compensation and regulation, private law claims may also perform a communicative function

13 Craig Scott and I have tried to argue for a more activist conception of the role of private law courts in a process of *transnational comity* with respect to transnational corporate liability and human rights concerns; Craig Scott & Robert Wai, ‘Transnational Governance of Corporate Conduct through the Migration of Human Rights Norms: The Potential Contribution of Transnational Private Litigation’, in Christian Joerges, Inger-Johanne Sand & Gunther Teubner (eds.), *Transnational Governance and Constitutionalism* 287 (Oxford & Portland: Hart, 2004) at 309.

14 Robert A. Kagan, *Adversarial Legalism: The American Way of Law* (Cambridge, Mass.: Harvard University Press, 2001).

15 See, for example, Anne-Marie Slaughter & David Boscoe, ‘Plaintiff’s Diplomacy’, 79 *Foreign Affairs* 102 (2000).

16 Harold Koh, ‘Transnational Public Law Litigation’, 100 *Yale L.J.* 2347 (1991).

17 See Robert Wai, ‘Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization’, 40 *Colum. J. Transnat’l L.* 209 (2002).

18 *In Re Union Carbide Corp. Gas Plant Disaster at Bhopal, India* in Dec., 1984, 634 F. Supp. 842 (S.D.N.Y. 1986), *aff’d*, 809 F.2d 195 (2d Cir. 1987). More generally, see Upendra Baxi (ed.), *Inconvenient Forum and Convenient Catastrophe: The Bhopal Case* (Bombay: N.M. Tripathi, 1986); Jamie Cassels, *The Uncertain Promise of Law: Lessons from Bhopal* (Toronto, University of Toronto Press, 1993).

in contemporary transnational politics: drawing public attention to specific examples of wrong-doing, highlighting more general gaps in the domain of global governance, and a transmitting policy values from one social domain, such as environmental concerns, to other domains, such as systems of corporate actors.¹⁹

It would be interesting to know how Joerges views the role in transnational governance of such private law regimes, in which conflict of laws principles are directly rather than just metaphorically relevant. Such private litigation is currently less important in the Continental European context. But given its significance for a number of jurisdictions of global economic significance, and given the particular regulatory concerns that such litigation addresses, it may be important even for Europeans to fit private litigation into their vision of transnational governance. This is particular so for scholars interested in the operation of forms of reflexive regulation. In this way, transnational private litigation could be as important a process of transnational governance as the comitology system that Joerges has analyzed with such originality in the European context. In any event, to recognize and analyse these emergent and complex forms of transnational governance properly, it seems clear that Joerges is correct to push us to creatively combine concepts from public and private law.

¹⁹ I discuss this ideational function of transnational private law at more length in Robert Wai, 'Transnational Private Law and Private Ordering in a Contested Global Society', *Harvard Int'l L.J.* (forthcoming, 2005).