

Who would be the Author of a Common European Private Law? *

CHRISTIAN JOERGES
Bremen/Florence

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I. Europeanisation as a Contest of Legal Disciplines

The title of my introduction is inspired by the greatest German thinker of all times, Immanuel Kant. In his “Streit der Fakultäten” (Contest of Faculties, 1798),¹ the man from Königsberg

* This text builds upon Zur Legitimität der Europäisierung des Privatrechts. Überlegungen zu einem Recht-Fertigungs-Recht für das Mehrebenensystem der EU, in Ch. Joerges/G. Teubner (Hrsg.), Rechtsverfassungsrecht. Recht-Fertigung zwischen Privatrechtsdogmatik und Gesellschaftstheorie, Baden-Baden: Nomos 2003 (= On the Legitimacy of Europeanising Private Law: Considerations on a Justice-making Law for the EU Multi-level System, Electronic Journal of Comparative Law, 7:3 (September 2003), <http://www.ejcl.org/ejcl/73/art73-3.html>; EUI WP 2003/3 <http://www.iue.it/PUB/law03-3.pdf>). In its further elaboration it will place special emphasis on the embeddedness of contract law in regulated environments and the potentially disintegrative effects of detailed selective harmonization, thereby drawing on my oral presentation on “Tenancy Law and the Open Method of Co-ordination” at the Tenancy workshop.

¹ I. Kant, The Contest of Faculties, in Hans Reiss, ed., Kant: Political Writings, 2d ed. (Cambridge: Cambridge University Press, 1991) (Der Streit der Fakultäten [1798], Kant, Werkausgabe der

pleaded for a new hierarchy at our Universities. Philosophy rather than theology, let alone law, is the queen of all our *Geisteswissenschaften*. We are of course not engaged here in non-legal, interdisciplinary discourses. We are only witnessing an intra-legal contest: Three disciplines are trying to provide guidance to the Europeanisation process in the realm of private law: European law, comparative law and private international law. They are all contesting not only each other, but also, and more intensively, fighting within their own domains. My claim: none of the can win the contest. I see instead the disciplines trying to free themselves from their state embeddedness, at war with themselves one could say, in search of a new paradigm.

1.1 European Law

My claim must sound somewhat strange in relation to the discipline with which I begin, namely, European Law. Isn't the European construction exactly the negation, the *Überwindung*, of the nation state? Yes, fortunately enough. But we may be replace be replacing the nation state by a European superstate. Let us consider European law in general? You may not be so familiar with the way it has established itself. That happened back in 1963 when the ECJ told us:

The EEC Treaty... "is more than an agreement which merely creates mutual obligations between contracting states". ... The ... "Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields..."

A great story, no doubt. "Legal Supranationalism" is at the core of this understanding: Community law, even secondary law, trumps national law, even constitutional law.

How does all this relate to private law? The Community entered the private law arena back in the 70s and 80s through a somewhat disdained backdoor, namely, consumer protection. The private law epistemic community responded with benign neglect for as long as possible. But the growth of the Community proved to be irresistible. Once this was realised, attitudes changed profoundly. The most pronounced response is was and is the plea for nothing less than a European codification of private law.

An alliance of institutional actors and academic entrepreneurs:

Wissenschaftlichen Buchgesellschaft [ed. by W. Weischedel], Wissenschaftliche Buchgesellschaft, Darmstadt; Wissenschaftliche Buchgesellschaft 1971, vol. 9, 277 ff.

- The European Parliament in resolutions of 1989 and 1994,² which did not have an immediate impact, but did help to keep the idea alive. By now, the EP has become more cautious, or at least more patient.
- The Commission is more sibylline. In its Action Plan we are discussing here, it presents options: Europeanisation could be left to market mechanisms?³ Europe could follow the American Restatement technique?⁴ It could “consolidate” what it has accomplished. It could, instead, embark upon wide-ranging legislative activities. The Commission carefully avoids revealing its own preferences. What, one may wonder, are they up to?
- Many prominent academic actors, in particular Professor Christian von Bar from Osnabrück,⁵ never had any doubt about what the final outcome was to be: a European code. Is this a state-building objective as I have indicated? The “EEC Study Group on a Civil Code” emphasises that its contribution should be neutral, non political, an academic research project. It is not political legislation, but scholarly deliberation, which should guide the process. “Sweet melodies”?⁶ Quite well-known and old melodies, at any rate. My fellow country-men and their allies follow the example set by Bernhard Windscheid, the mastermind in constructing the German Civil Code. The kind of legitimacy they invoke is exactly the same.

Does this project have any chance? Is it normatively sound? I will explain my scepticism more fully in the second part of this lecture. But let us first glance at the two other contenders: comparative law and private international law.

² EC OJ 1989 C 158, 400 and OJ 1994 C 205, 518.

³ Paras. 49-51.

⁴ Paras. 52.56.

⁵ Cf. e.g. Ch von Bar, From Principles to Codification: Prospects for European Private Law, *Columbia Journal of European Law* 9 (2002), 379-388. For a detailed reconstruction of the origins of these ideas in Holland and Northern Germany, cf. K. Riedl, *Europäisierung des Privatrechts: Die „Recht-Fertigung“ wissenschaftlicher Vereinheitlichungsprojekte*, Ph.D. Thesis EUI Florence 2003, ch. VII.9, 297 ff.; for a thoughtful critique cf. Ch. Schmid, *Legitimacy Conditions of a European Civil Code*, *Maastricht Journal of European and Comparative Law* 8 (2001), 277-298; for a polemic cf. for a polemic Y. Lequette, *Quelques remarques à propos du projet de code civil européen de Monsieur von Bar*, *Recueil Dalloz Sirey*, n° 28, 25/07/2002, 2202-2214.

⁶ Reinhard Zimmermann, *Heard melodies are sweet, those unheard are sweeter...*, in: *Archiv für die zivilistische Praxis* 193 (1993), 122-169.

1.2 Comparative Law

Comparative law first. There are so many good reasons for believing that the process of European integration might bring about a *renaissance* of this discipline. Comparative law is booming. The Common Core project in Trento attracts, year after year, a growing numbers of comparatists; look at the *ius commune* lectures and casebook series; Ole Lando's Lando and the von Bar group; the *acquis* group; the competition of European Universities for Commission money to fund comparative research activities.

All this is accompanied by rich theoretical debates. It is not my ambition here to review, let alone evaluate, what is going on in so many minds and quarters. Let me, however, point to a somewhat paradoxical dimensions of the present state of the comparative art: Let me cite two opponents:

- Reinhard Zimmermann is one of them. He trusts in the continued vigour of what may be/become a common European legal heritage, which comprises the (non-American) common law. This looks like a transnational and pre-nation state position. Is it really? Legal history, as Zimmermann understands it, is a natural ally of the non-legislative codification movements.⁷ A very strange loop again: a national non-state tradition presents itself as a model for Europe.
- At the opposite end of the spectrum is Pierre Legrand and his provocative and thought provoking non-convergence thesis. His opposition against functionalist schools of thought and codification initiatives is based upon the epistemological assertion that common law and civil law cannot communicate. Legrand's is a powerful *critique* of rule-oriented, rule-restricted ideas about law and comparative research. But does not Legrand, by locating himself in a tradition of law-as-culture, by his quest to take the "deep structures of legal rationality" into account,⁸ confirm, at least implicitly, outdated views about the autonomy of national societies?

Functionalism, as represented by Hein Kötz and the heirs of Schlesinger in the common core project are agnostics. They just look and compare. Hein Kötz, however, has never denied his scepticism as to codification ideas. But again I see at work what the political scientist Michael

⁷ R. Zimmermann, Roman Law and European Legal Unity, in: A.S. Hartkamp, M.W. Hesselink, E. Hondius, C. Joustra and E. du Perron (eds.), *Towards a European Civil Code*, 2nd edn., Nijmegen/Den Haag: Kluwer 1998, 21 ff., and id., *Savignys Vermächtnis*, in: P. Caropni and G. Dilcher (eds.), *Norm und Tradition. Welche Geschichtlichkeit für die Rechtsgeschichte?*, Köln/Weimar/Wien: Böhlau 1998, 281 ff..

⁸ P. Legrand, European Legal Systems are not Converging, *International and Comparative Law Quarterly*, 45 (1996), 52 ff., at 60-61.

Zürn has labeled “methodological nationalism”,⁹ a conceptual mindset which is out of touch with the realities of postnational constellations we live in.

1.3 Private International Law Private international law is in a similar situation. This thesis may again come as a little surprise. Is it not the vocation of private international law to organise constructive responses to legal diversity? And why shouldn't European primary law and secondary legislation provide a framework for the supervising and furthering of the contributions of these disciplines to the project of European integration?

The tensions between private international law and European law are most fascinating indeed. The tensions have a history of their own. Since European law established itself as a *sui generis* discipline between national public law and international law, and the integration process did not touch it for such a long time, the masters of the new discipline did not pay any attention to it. The decisions in which the ECJ adjudicated private international law constellations and set aside its rules and principles without mentioning this discipline are legion. Academic discoveries and encounters were bound to follow. Private international law scholars started to recommend their discipline as the softer alternative to a harmonisation of substantive law. By now, we are witnessing, particularly in Germany, the steady growth of a sophisticated debate, which will go on for some time to come. It is a promising debate. But PIL will have to learn: the European Union is a non-hierarchical polity. The type of conflicts it has to resolve are not those for which private international law scholars suggest their choice-of-law methodologies. These conflicts arise from the interaction between legal systems, from the different in intensity and speed of the denationalisation of both different social sectors and societal sub-systems.

1.4 Interim Conclusion

To repeat: All of our three contenders flourish and develop, all are alive and – partly – well. However, where they flourish, they are breaking their inherited frames: they contribute to the building up of a law which captures the interaction of legal systems, the building of transnational networks and other governance arrangements, and the search for a law that ensures the legitimacy

⁹ M. Zürn, Politik in der postnationalen Konstellation, in: Chr. Landfried (ed.), Politik in der entgrenzten Welt, Köln 2001, 181-204.

of governance in post-national constellations. What I will try to do in the next section is to develop this perspective inductively with the help of three examples.

II. The Practice of Europeanisation

- The first example is from the field of product liability law. Here, the ECJ seems to suggest that European legislation should pre-empt national case law – this frightening perspective, I call “vertical supranationalism”.
- The second example deals with the privatisation of public services. The legal battle is between European state aid law, a section of the Treaty chapter on competition policy, and regulatory arrangements at national level. For this type of constellation, I will use the term “diagonal conflict” and the term “proceduralisation” to characterise the adequate response to this type of choice-of-law issue.
- The third example is from company law. Europe is on the way to Delaware, many commentators have, happily or critically, observed. I will instead talk about the transformation of economic freedoms into political rights of European citizens.

II.1 Product Liability Law

Back in 1985 the European Community adopted Directive on PL. That was widely understood as a further step in the development of consumer protection, the flagship of progressive Europeanisation, and a playground of a transnational epistemic Community of consumer law advocates.

The Product Liability Directive was considered to be a marginal piece of legislation. European law, however, has much in common with a sleeping dog. At some unforeseen moment, it wakes up – and bites. This has happened quite dramatically in three judgements handed down by the ECJ on 25 April 2002.¹⁰ They all concern that so far dormant Directive.

The ECJ argued to everybody’s surprise that this legislative aimed at “complete harmonisation”. This is a technical term out of the supremacy doctrine, which I mentioned in the introduction. Where the Community legislature has occupied a field, the Member States are bound to follow.

¹⁰ Case C-52/00, *Commission v. France*; Case C-183/00, *María Victoria González Sánchez v. Medicina Asturiana SA*; Case C-154/00, *Commission v. Hellenic Republic*; see, also, Case C-203/99, *Henning Veedfald v. Århus Amtskommun* - (2000) ECR I-3569.

Among the three decisions on the French, the Greek and the Spanish implementation of the directive, the one on Spanish law¹¹ is particularly frightening.

A bit of facts: The plaintiff had been infected by the Hepatitis C virus in a clinic, because of a blood transfusion. She brought an action based on Law No. 22/94 that transposed the Directive, and, in addition, on the general liability provisions of Spanish civil law, and, finally, on General Law No 26 of 19 July 1984 for the Protection of Consumers and Users.

It takes a private international law mind trained in the exercises of characterisation to appreciate what the ECJ did. The product liability directive has a specific theoretical basis. What does its supremacy imply? Which actions under Spanish law are pre-empted? Certainly not actions based on negligence? Maybe actions based on objective standards of defectiveness of a product? The ECJ told us:

“The system of rules put in place by the Directive, ... does not preclude the application of other systems of contractual or non-contractual liability based on other grounds, such as fault or a warranty in respect of latent defects.”¹²

The Spanish court will have to decipher what that may mean. Regardless of what they find out, the ECJ's opaque statements may have irritating effects elsewhere. The Court's move will be interpreted at least by interested parties as a move towards more uniform competitive conditions in the internal market. Under the *acte claire* doctrine there are good chances to insist that the ECJ should clarify further to which degree national tort law is affected.

II.2 Diagonal Conflicts: Rationalising the Provision of Public Services

The EU's competences are restricted to the fields enumerated in the Treaty. This is one of the core principles of the European construct. Real world constellations, however, do not follow the lines drawn by the drafters of the treaties. It is typical in the EU that the European level is competent, sometimes even exclusively, to regulate one aspect of a problem, whereas Member States remain competent to regulate another one. The term “diagonal” is to distinguish such constellations from “vertical” conflict resolutions where Community law trumps national law on the one hand, and from “horizontal” conflicts which arise from differences among the legal systems of Member States and belong to the domain of private international law.

¹¹ Case C-183/00, judgment of 25.04.2002 – María Victoria González Sánchez v. Medicina Asturiana SA.

Examples are legion. I restrict myself to a very recent one, which take us into the world of public law. This is in itself revealing, because it illustrates the inherent links of Europeanisation to privatisation, *i.e.*, Europeanisation induced transformation of national regulatory traditions and preferences into a pan-European economic “constitution”. I am talking about the ECJ’s *Altmark Trans* judgment of 24 July 03.¹³

This judgment was awaited with great attention all over Europe because it concerned the broader constitutional dimensions of European state aid control and privatisation policies. *Altmark Trans* is a conflict about the reorganisation of public transport. Public transport is but one example of the huge field of public interest services, organised differently all over Europe in line with different national traditions and political priorities as *services publiques* in France, as *Daseinsvorsorge* in Germany. There is more at stake than a conflict over the competences at different levels of government. The conflict concerns the political contents of European interventions and notions of social justice: should Europe reorganise its public services, and privatise them? Should it defend its welfare state traditions and ideals of distributional justice? The conflict is, of course, more complex. The inefficiency of many public services is in nobody’s interest. Nor are the provisions of so many well-paid managerial positions to elderly gentlemen who retired from political arenas. Nor is the foreclosure of access to these markets to non-local suppliers? There are many more reasons to welcome outside intervention and to examine the distributional justice arguments brought forward by the defenders of the *status quo* carefully. And there are also good reasons to examine critically what happened where privatisation programs were, as was especially the case in the UK, carried through.

Altmark Trans GmbH and *Nahverkehrsgesellschaft* both sought to organise public transport in the Landkreis of Stendal in Sachsen Anhalt, one of the New East German Länder. *Altmark Trans* had been licensed, and got the license renewed by the Regierungspräsidium, whereas the bid of *Nahverkehrsgesellschaft* was rejected. I have to neglect the complex specifics of European traffic policy (art. 77), secondary legislation (Reg. 1191/69 as amended by Regulation 1893/91) and the German Personenbeförderungsgesetz as amended in 1995).

¹² Case 183/00, para. 31.

¹³ Case C-280/00, *Altmark Trans GmbH v. Regierungspräsidium Magdeburg and Nahverkehrsgesellschaft Altmark GmbH*, nyr.

What I find so interesting and encouraging about this judgment is that the ECJ sought to mitigate between European and regional concerns by substantiating the conditions under which the financial support of local transport enterprises will not be characterised as a state aid:¹⁴

- The recipient must be required to discharge clearly defined public service obligations;
- The parameters of the calculated compensation must be established in advance in an objective and transparent manner;
- The compensation must not exceed costs plus a reasonable profit;
- Decisions are to be taken either after a public procurement procedure or the level of compensation is to be determined on the basis of an analysis of the costs of typical undertaking, well run and adequately provided with adequate means of transport.

That is an exercise in conflict avoidance through proceduralisation. I will explain my enthusiasm further in a minute. But first a well-known case and my favourite example.

II.3 From Economic Freedoms to Political Rights: Does the Centros Judgment send Europe on the Road to Delaware?

The judgement in *Centros* concerns the core of the European legal acquis, namely, the freedoms of market citizens, which apply directly and ought, therefore, to take primacy over national law. Moreover, the decision counts as a prolongation and strengthening of a perception that has deeply penetrated the legal consciousness and awareness of economic law: it is held to serve the so-called negative integration, because the directly valid freedoms support review of the content of national law by the ECJ, exposing the law to regulatory competition. The justification would deserve a more detailed argument than space allows here.¹⁵ I have also to refrain from any discussion of the two follow-ups, *Überseering*¹⁶ and *Inspire Art*.¹⁷

¹⁴ Paras. 89-93, 95.

¹⁵ The following owes much to Barbara Trefil's LL.M. thesis on "Centros und die Niederlassungsfreiheit von Gesellschaften in Europa", EUI Working Paper Law 2003/9, <http://www.iue.it/PUB/law03-9.pdf>.

¹⁶ Case C-208/00, *Überseering BV v. Nordic Construction Company Baumanagement GmbH (NCC)*, judgment of 05.11.02.

¹⁷ Case C-167/01, *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd*, judgment of 30.09.03.

As so often occurs, the facts of this seminal case were trivial: a Danish married couple, Marianne and Tony Bryde, wished to import wine into Denmark but not pay the fee of the DK 200,000 (28,000 Euro) that Denmark requires for the registration of companies. They founded, in May 1992, a private limited company in England, the now legendary Centros Ltd., and set up a subsidiary in Copenhagen – for none of these steps did they require more than the minimum capital investment.

Unsurprisingly, the Danish authorities refused registration; the Brydes went to court; seven years later, on 9 March 1999 they got an answer from the ECJ which read:

“It is contrary to Articles 52 and 58 of the Treaty for a Member State to refuse to register a branch of a company formed in accordance with the law of another Member State in which it has its registered office but in which it conducts no business where the branch is intended to enable the company in question to carry on its entire business in the state in which that branch is to be created, while avoiding the need to form a company there, thus evading application of the rules governing the formation of companies which, in that state, are more restrictive as regards the paying up of a minimum share capital.”¹⁸

At least one hundred commentators have tried to understand. European law, says the criticism of the ECJ, has no business interfering with a purely internal Danish matter. The Brydes, who were pursuing no business interests in England, ought to have bowed to their home sovereign. This is one strain of critique. The majority of the commentators praise the ECJ for opening up Europe’s company laws to a process of regulatory competition.

I disagree with both camps. With the first, because there is nothing in itself abusive in a citizen of a Member State founding a company in accordance with another Member State’s provisions which are more favourable for him.

Neither do I see the ECJ sending Europe on the road to *Delaware*? For Denmark remains entitled to impose regulatory requirements on both its own – and on foreign – citizens, but has to adduce “compelling grounds of public interest”. European law does not push Danish law aside, but places it under pressure of justification. It was this pressure that Denmark could not stand up to: that law was completely unable to achieve the protection of creditors, which, according to the Danish government’s presentation, was the object of the Danish regulation. The ECJ acted as a constitutional court. It assumed the right to test Danish law according to whether it respected

¹⁸ Sentence 1 of the tenor of the judgment ECJ [1999] I- 1947.

rights guaranteed at European level. However, the limits imposed on Denmark are limited. Denmark is entitled to protect its creditors and act against fraud – but in accordance with the provisos that are familiar to the readers of the case law on Article 28 [ex 30].¹⁹ Denmark very soon, in May 2000, adopted a new regulation according to which companies wishing to do business in Denmark and having their main administrative centre there, must either deposit a caution amounting to DK 110,000 with the Danish bank authorities in the form of cash, government bonds or bank guarantees (which in the event of insolvency serve exclusively to meet tax demands), or else it must be clear that minimum assets of at least DK 125,000 are available.²⁰

The Brydes may go to court again. A sad perspective. But here is the bright side: Danish citizen can bring her sovereign to court with the argument that the latter has no good reasons for denying him the use of the regulatory alternatives offered by another Member State.

III. Conclusions: The Search for Legitimation in the Europeanisation Process

It is time to put the abstract deliberations of the first part and the analyses of the second part into perspective. What I am now trying to present is a synthesis. I will proceed in three steps:

- the first is analytical. I will now sketch out the understanding of Europe as a multi-level system of governance
- In a second step I will re-conceptualise this analytical model in legal categories.
- In a third step, I will substantiate this perspective with the help of the three examples discussed in Section II. Here, contours of the new discipline emerging out of the contest of the three contenders should become visible.

III.1 The European Polity as a “Multi-level System of Governance sui generis”

“Less than a federation, more than a regime”; this characterisation of the European polity by William Wallace dates from 1983 and is still adequate.²¹ This is because it is so vague. The term *en vogue* to day sounds more informative: integration research has kept on explaining, for some

¹⁹ Paras. 37-39.

²⁰ Cf. B. Trefil (note 13 *supra*), at 31 ff., with references to www.retsinfo.dk and a survey of the debate on the questionability in European law of the new regulations.

years now, that the EU is to be understood as a “multi-level system of governance.” So are federations and other systems of governance. What is specific, “*sui generis*” about the European system? This question is at the core of a very rich debate.²² The specification that I am relying on stresses the non-hierarchical network character of the system – and argues: Since the powers and also, to some degree, the resources for political action, are located at various and relatively autonomous levels in the EU, then coping with functionally interwoven problem-constellations will depend on communication between those actors who are genuinely competent in their various domains. This is what (some) political scientists can accept.²³ But how then, the lawyer has to ask, may law organise or support such a process – if it is to prevent that Europe pits in on trial?²⁴

III.2 Deliberative Supranationalism

It is a small step from such theorising to an interpretation of legal provisions as precepts for a communication-oriented, “deliberative” political style which can be easily explained in a broader context: in our “post-national constellations”, which are typified by economic interpenetration and interdependency, the extra-territorial effects of the decisions and omissions of democratic polities are simply unavoidable; but the burdens imposed unilaterally on one’s neighbour cannot be sufficiently legitimated by “democratic” processes which are internal to the state. It may sound like a paradox, but it has become an irrefutable insight: nation states cannot act democratically. “Deliberative” supranationalism is an alternative to orthodox notions of supranationalism which have underlined the autonomy of European law and its supremacy over national law.

²¹ Less than a Federation. More than a Regime: The Community as a Political System, in H. Wallace/W. Wallace (eds.), *Policy-Making in the European Community*, Oxford: Oxford University Press, 403-436.

²² For a particularly instructive summary cf. F.W. Scharpf, *Notes toward a Theory of Multilevel Governing in Europe*, *Scandinavian Political Studies* 24 (2001), 1 ff.

²³ As, of course, J. Neyer, *Discourse and Order in the EU: A Deliberative Approach to Multi-Level Governance*, *Journal of Common Market Studies* 41 (2003), 687 ff.

²⁴ This is again a rephrase: R. Wiethölter, *Ist unserem Recht der Prozeß zu machen?*, in A. Honneth et al., *Zwischenbetrachtungen im Prozeß der Aufklärung*, Frankfurt a.M.: Suhrkamp 1989, 794-812.

III.2.1 Deliberative Supranationalism I: A European Conflicts Law for False and Avoidable Conflicts

The normative core message of Deliberative Supranationalism is that Europe, through its supranational rules and principles, should give voice to “foreign” concerns and insist that Member States mutually “recognise” their laws (that they “apply” foreign law) and refrain from insisting on their *lex fori* and domestic interests. This is the principle. The discipline imposed on a Member State’s political autonomy is limited. The principle and its limitations can be discovered and studied best in the jurisprudence of the ECJ. We have just dealt with one single example. But there are so many more documenting how a mediation between differences in regulatory policies and the diverse interests of the concerned jurisdictions can be accomplished.²⁵ These examples, I argue, represent a truly *European* law of conflict of laws. It is “deliberative” in that it does not content itself with appealing to the supremacy of European law; it is “European” because it seeks to identify principles and rules which make differing laws in the EU compatible.

III.2.2 Deliberative Supranationalism II: “Diagonal” (and “True”) Conflicts

What can be achieved through such exercises in moderate and restrained interpretation is a resolution of frictions among national jurisdictions. But such conflict resolution is not always so easy and cannot proceed from case to case. The pattern we have observed in the *Altmark* case is of more general importance. Once one begins to pay attention to the “regulatory” activities of the Community, one realises that the entire institutional framework of European markets is affected by Community legislation. Private lawyers tend to pay little attention to this dissociation as long as regulatory activities occur outside their own premises. What they can no longer convincingly deny, however, is that it is “Europe”, and no longer national legislation or the Member States, which determines the extent of the “private” realm and the mode of its regulation. Whereas the “traditional core areas” of private law may have retained their familiar grammar, the institutional frameworks of the private economy and the concomitant regulatory activities have been “Europeanised”; a fact which has radically altered the overall legal (and normative) environment in which private law operates. Even where private law appears to have preserved its “national” characteristics, the Europeanisation process has replaced its former institutional environment. It is this discrepancy between the apparent survival of private law institutions and the erosion and

²⁵ Cf. Ch. Joerges, The Impact of European Integration on Private Law: Reductionist Perceptions, True Conflicts and a New Constitutional Perspective, *European Law Journal* 3 (1997), 378 ff.

renewal of their social function, which is widely neglected by many commentators who content themselves with observing the “core areas” of private law.

“Diagonal conflicts” can be “true conflicts” in the sense that the American conflicts scholar Brainerd Currie has given to this term decades ago.²⁶ What is specific about these conflicts is that they involve two levels of governance. This has two implications: one is that the conflict constellations can vary from jurisdiction to jurisdiction. And the second is that the regulatory prerogatives of the European level have led to the establishment of complex transnational governments arrangements involving European *and* national, governmental and non-governmental actors. How does this relate to private law? Is it law at all? These questions concern the most provoking and thought-provoking dimension of Currie’s *oeuvre*. Let me cite:

“[The] choice between the competing interests of 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”.²⁷

To rephrase: the resolution of conflicts in the inter-state and international arena imply policy choices, which courts must not handle. This insight has been refuted by private international law scholars again and again. Its implication is that the choice-of-law process is to be understood as an act of transnational governance. This is a restatement of our question. But what is the solution?

The solution is a proceduralisation of law which fosters deliberative problem-solving, a law that would “constitutionalise” transnational governance arrangements so that they deserve this recognition.²⁸

²⁶ See for a brief explanation. B. Currie, Notes on Methods and Objectives in the Conflict of Law, in: idem, Selected Essays on the Conflict of Laws, Durham, NC: Duke University Press, at 177 et seq., 183-84 and the summary of his position in his Comment on Babcock v. Jackson, (1963) 63 Columbia Law Rev. 1233 et seq., and 1242 et seq. On Currie’s impact cf. H. Muir Watt, Choice of Law in Integrated and Interconnected Markets: A Matter of Political Economy, Columbia Journal of European Law 9 (2003), 383 – 409.

²⁷ B. Currie, The Constitution and the Choice of Law: Governmental Interests and the Judicial Function, in idem, Selected Essays, 188 ff., at 272.

²⁸ Cf. Ch. Joerges, “Deliberative Supranationalism” - Two Defences, (2002) 8 European Law Journal 8 (2002), 133 ff.

III.3 Juridifying the Europeanisation Process

Rather than elaborating these abstract suggestions further, I would like to conclude by underlining that we have already observed how they operate and what they mean.

- Consider again the ECJ's recent product liability cases. They can be interpreted as a move back into orthodox supranationalism. Such a move would be a disaster, however. Product liability law is an element in a complex web of product safety law and regulation which, in Europe, is intimately related to semi-private Europeanised standardisation activities. It needs doctrinal blindness to encourage the ECJ to enter and expect it to control this arena.
- Let us consider, again, windmill energy and the privatisation of public services (*Daseinsvorsorge*). Legal traditions, social expectations, political preferences, and administrative know-how all differ widely between Sicily and Mecklenburg, between Scotland and Greece. Europe can initiate further changes, and foster social learning. This is its mandate; the imposition of uniform regimes is a nightmare.
- Consider again the *Centros* case. This is, in my interpretation, a wonderful example for the transformation of *Marktbürger* (H.P. Ipsen) into a European citizen, for the transformation of economic freedoms into rights of political importance, empowering the *Untertan* (subject) of a Member State to bring his or her sovereign to court and force national governments to give good reasons for their governance practices.

In all of these interpretations and suggestions, Europeanisation is conceptualised as a process, juridified by principles and procedures which organise the interactions between political actors and courts at different levels of governance, as a *Recht-Fertigungs-Recht* (Rudolf Wiethölter²⁹), as a law of lawmaking (Frank I. Michelman³⁰). And what about a codification of Europe's private law? This is an idea for books about European private law, not for the law in Europe. Europe will remain heterarchical and plural; it will legitimate anybody to do away, either top-down or bottom-up, with its rich legal cultures; it will have to live with its complex mixture of "primary law" which grants basic freedoms and rights; transnational governance arrangements which organise regulatory activities; legislative and judicial interventions which irritate. This

²⁹ Recht-Fertigungen eines Gesellschafts-Rechts, in: Ch. Joerges/G. Teubner (eds.), *Rechtsverfassungsrecht. Recht-Fertigung zwischen Privatrechtsdogmatik und Gesellschaftstheorie*, Baden-Baden: Nomos 2003, 13-21; [Just-ifications of a Law of Society, forthcoming in: Oren Perez and Gunther Teubner (eds.), *On Paradoxes and Self-reference in Law* (2003)].

³⁰ Brennan and Democracy, Princeton, NJ: Princeton University Press 1999, 34 ff., 48.

mixture *is* the “state of the (European) Union”. It is by no means a comfortable situation. It may even be one, which exceeds our learning capabilities and creativity.