

Semantics of European Law*

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I The Language of European Law

Hugh Collins has put forward the idea of private law being a society's language that is entangled in the grown structure of the nation state.¹ This idea implies strong scepticism about the prospects for an 'ever closer union' predominantly based on a unified system of law. According to *Collins*, the emergence of European law predominantly causes the disintegration of what could formerly be regarded as a Member State's legal culture. He describes legal culture as embodying a sphere of social interaction, where sanctioning power is institutionalised and rule making follows from a centralised system of autonomy and control. This sphere is undergoing structural and institutional changes, resulting from the fragmentation of social productivity and cultural identity. As a consequence, the civil law based separation between private and public law has lost ground and may be replaced by both functionalist and contextualist models of law that possess a high degree of adaptability to the contingent demands of an ordering scheme beyond the model of 'state' and 'society'.

If we now look at more than forty years of European Community law, we must first clarify our perspective, or, the historically and culturally based bias from which the analysis of this body of law is to take place. To decipher the language of European law we will need a better understanding of our own. The task, then, might be to account for the semantic contents² of the categories that we apply to new and disturbing phenomena in our social reality.

II Culture, Tradition and System

It is precisely this constellation that is so welcoming for the two volumes edited by *Gessner, Hölland* and *Varga*, and by *Micklitz* and *Weatherill*. The first volume brings together some of the most canonical readings in sociology of law, legal theory and legal history that have been produced in Europe, while the second presents an excellent overview of issues and documents in the context of European Economic law. *Vranken's* monograph is a rich and detailed study of the different modes of the Europeanisation process of private law.

* A review essay on V. Gessner, A. Hölland, C. Varga (eds), *European Legal Cultures*, (Aldershot 1996); H.-W. Micklitz, S. Weatherill (eds) *European Economic Law* (Aldershot 1997); M. Vranken, *Fundamentals of European Civil Law* (The Federation Press 1997).

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¹ Collins, 'European Private Law and the Cultural Identity of Member States', (1995) 3 ERPL 353.

² Cf. Margalit, 'Gedenken, Vergessen, Vergeben', in G. Smith and A. Margalit (eds), *Amnestie oder die Politik der Erinnerung* (Suhrkamp 1997), 192–205, at 200.

The Dartmouth editors describe their project as a textbook series in European Law, which will collect the relevant material in the area of Labour, Environmental, Agrarian and Economic law. The first in the series for the 'European law student' is the volume on 'Legal Cultures'. If there is something that holds these collected texts together, it is that they partake of what the American comparatist *John H. Merryman* has depicted as the 'legal tradition'.³ But, while *Merryman* pointed to the three traditions that were responsible for the specific development of the civil law, the common law and the socialist law system, the perspective today has shifted, as we now have to focus on the intertwinings of different clusters of legal production and communication within and across national borders. If the terms *transnational*, *international* or *global law* make any sense, it is because they allow us to question the categories used so far and to enter into a process of discovery and exploration of a legal language that mirrors the movements of 'convergence (and divergence)' between the various systems of socio-legal production.⁴

The texts collected in the *Gessner/Höland/Varga* volume provide rich background material for the understanding of the contemporary process of law inside and outside of Europe. We find a total of six general chapters (Parts I–VI), the readings in which are dedicated to what might be called the European *experience* of the law. The editors first provide us with texts by *J. Szücs*, *P. Sack*, *I. Satay*, *G. Eörsi*, plus *F. Wieacker*, *M. Weber* and *C.O. Lenz*. Preceding these texts under the heading, 'Common Traditions', is an extensive list of background and source reading. The editors first mark the *points de fuite* of the volume by collecting texts on classical and medieval European law, on the divide between civil and common law. Secondly, they provide a survey of comparatist techniques and methods to account for the differences in legal culture in Europe, and also give an account of 'authoritarian law'; and here, the editors differentiate among fascist, Nazi and socialist regimes.

A Culture

*Wieacker*⁵ traces the Christian background of European law from both a dogmatic and an institutional perspective. We look back to the days when a lawyer was trained in Bologna and then returned to his home country to be part of the first renaissance in Europe: the intellectual rediscovery of Roman law and its sophistication through the Pandects. The birth of the Italian Republic, with its centre in a city and with functional economic and financial ties, was paralleled by a European wide process of professionalisation in the legal, economic and administrative fields. Be it by virtue of the collapse of religious unity or the decline in metaphysics, law, in an age of positivism, was able to exert an ever greater pressure upon political power and its claim to legitimation. Thus, the emancipative quality of modern law offered itself to the demands of a self-interested and supposedly value-free system of economic transfer and exchange. *Weber's* famous observation of the parallelism between formalism and anti-formalism did, in fact, lie at the heart of a growing commercial

³ 'The legal tradition relates the legal system to the culture of which it is a partial expression. It puts the legal system in to cultural perspective', cf, *J.H. Merryman, The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* (Stanford University Press 1969), 2.

⁴ Cf, Teubner, 'Breaking Frames: The Global Interplay of Legal and Social Systems', (1997) 45 *Am. J. Comp. L.* 149

⁵ 'Foundations of European Legal Culture', in: *Gessner, Höland, Varga, op cit*, pp. 48–62.

world relying on long-term commitment and adjustment. 'Good faith' is used as one of the dogmatic vehicles in the complex practice that is as much in need of enforceable formal rules as it has long since become the realm of trust, confidence, reputation and risk.⁶ Formulas such as 'fair dealing' or the 'usages of trade' have always haunted jurists who have tried to rationalise the rules they rely on.

The rise of what *Weber* calls 'the modern class problem', led to the need for a *social law*. The critique of a legal formalism that had come to be represented by a *mélange* of formal rules and business oriented legal ethics, was to become a relentless attack upon practically every area and every specific rule in law. The concept of a social law—however vague in its technical contours—led to the implosion of formally closed bodies of law as well, and in the long run, also undermined the politically relevant difference between public and private law. The war on formalism that the American legal realists waged around the turn of the century had its origins in this finely construed legal architecture based on distinction and functionality. The German and French attack on the judge as a decision-producing slot-machine, just prior to the turn of the century, was only one element in a radical critique of competences and legitimation. The anti-formalist turn to 'free law' had still to prove its immunity against its own instrumentalisation once the political climate and system had changed.

B Tradition

While the attempt to identify the specifics of European legal *culture* leads us to an array of examples of the law's intricate heritage of conflict and ideology, the corollary legal learning process must also account for these traditions which still resonate. The task of seeking out the European legal tradition does not become easier once we equate the boundaries of the EC with those of the Roman Empire, or we determine that the French Napoleonic *code civile* was the root-cause of the codification now in place in many Member States.⁷ That the Anglo-Saxon legal sphere is to be fundamentally distinguished from continental Europe seemingly needs no further elaboration. *Lenz* rightly points to the contingencies responsible for the development of a singular legal tradition, for example, the particular reception of Roman law in 13th century England. Here, courts had already been institutionally centralised and consolidated to the degree that England was able to maintain and build its own legal tradition. He also notes, however, as the two principal sources of legal development, the Enlightenment and the French Revolution on the one hand, and Roman law on the other. England, then, would also gradually move towards codification and increasingly limit the judge's adjudicatory freedom; a development partly resulting from its 1973 entry into the European Community. Pointing to the further similarities among the Member States, *Lenz* draws attention to the importance of fundamental rights; enumerated in each European constitution, with the exception of Great Britain and France. While the lack of such rights in the UK can be explained with regard to

⁶ Cf, for a new account, Brownsword, 'Contract Law, Co-operation, and Good Faith: The Movement from Static to Dynamic Market Individualism', in: Deakin/Michie (eds), *Contracts, Co-operation, and Competition*, (OUP 1997), 255–284.

⁷ *Lenz*, 'Common Bases and Fundamental Values of European Community Law', in Gessner, Höland, Varga, *op cit*, 78; for a similar observation concerning the legal process in the Arabic world, cf, Bälz, 'Europäisches Privatrecht jenseits von Europa?', (1999) 3 *Zeitschrift für Europäisches Privatrecht* 3.

the role played by the Magna Carta of 1215, the French constitution's failure to list a rights catalogue is particularly striking; yet, is better understood, when we recall that both the declaratory 'Declaration of the Rights of Man' of 1789 and the Preamble of the 1946 constitution are still in force, raising the constitutional presumption of individual rights.

At this point, the book's overarching concern is already apparent: while we must acknowledge the relative youthfulness of, say, the current Greek, Portuguese and Spanish constitutions in force, we are nonetheless invited to reflect upon the various historical factors which influenced the birth of these texts. Here, the experience with authoritarian regimes proves crucial in understanding the role of these infant constitutional texts in the Member States themselves, while this influence may also have a wider impact upon the Community as a whole. The notion of fundamental rights, itself the primary conceptual basis for a constitutional document, is telling for the institutionalisation of political power. The concept of the constitution encompasses the organisation of the political system, the process of generating political will and the execution of legislative acts, just as much as the role of the judiciary. This provides great potential for conflict, especially with regard to the pressing question of the EU's democratic deficit. The EU has developed enormously since it was qualified by Walter Hallstein as a 'legal community': the Maastricht and Amsterdam Treaties, in fact, reflect a far higher degree of political and communitarian consolidation than earlier descriptions of the European market might have suggested. The agenda might be, at this point, to search for a balance between harmonisation and subsidiarity: it is one thing to declare the 'personal rights of liberty of the individual' as being the focal point of Europe's legal culture, it is yet another to resolve the question of the system's legitimating basis.

To underscore the lingering heritage of a lack of rule of law, the editors have chosen to include a whole chapter on the experiences with totalitarianism. Preceded by an introductory text on the decay of formal law under the influence of Nazi law and Nazi lawyers, we find material by *L. Wintgens, I. Ward, I. Müller, V. Gessner* and *K. Platt* which is centred around the history of the law under National Socialist rule. The introduction begins by tackling the question of what the state and its law look like in the absence of the rule of law, and then aims to produce a working definition of 'totalitarianism' and to analyse the manner in which law functions under totalitarian rule. It points to the *initial* invisibility of legal change in contrast with vast upheaval in the political system and denounces *the Führer-Prinzip* and racism lying at the core of the Nazi ideology. We are treated to a brief discussion of the so-called 'Radbruch Thesis', the Hart-Fuller debate on legal positivism and the contemporary discussion of the role of the judiciary under Nazi rule (brought on by the collapse of the East German state and its legal system). The following texts, then, spell out the sophisticated paradox that *Ernst Fraenkel* called the rational core within an irrational shell and, the 'Dual State' and that *Hannah Arendt* chose to depict as the Nazi state's 'shapelessness'. The simple fact that, during its 14 years of existence, the Nazi regime did not feel it necessary to abolish the Weimar Constitution is crucial to understand the interplay between actors and text. This aspect is also closely tied to the question of retroactive justice and the continuing struggle to find renewed justice in the form of rehabilitation, compensation and commemoration. Following the texts dealing with the Nazi experience, we read excerpts by *F.-C. Schroeder, H. Berman, V. Savickij* and *J. Kubiak* on the inner developments within Russian law and the Stalinist impact on the legal systems in Russia and the eastern bloc states.

C System

Method-oriented material is brought together under the title 'The European Legal Mind', while a survey of comparatist approaches to Europe's legal systems finds room under the heading 'The Patchwork of Legal cultures in Europe'. So, we find texts by *M. Kaser, F. Kern, M. Villey, J.L. Goutal, G. Bergholtz, M. Forster, A.L. Goodhart, H. Silving, G. Eörsi, M. Cappelletti, A.E. Ehrenzweig, R. Zimmermann, G.E. de Groot, K. Zweigert* and *F. Werro*, that allow us to take a look at the different roots of methodology and doctrine at work in European legal systems. The explorations into the logic of deduction within a closed set of systematic references and judge-made law-and-policy make these texts an elucidating lecture. Yet, as much as the differences in the reasoning and the length of judgments made by a French and by an English judge may seem crucial⁸, one cannot simply dismiss the effects that the changing role of the judiciary will have on both. The presupposed conflict between rule and precedent, changes in appearance with the tides of juridification and deregulation. Where courts assume evermore responsibility for the socio-legal discourses, they partly co-initiate; Hercules does not stand alone within a long chain of historical precedent, but is placed within a publicly and privately on-going debate about the merits of the decisions he renders.

What, then, can be described as a European *system* of law? The editors take us into what they call themselves an 'extensive chapter' on the 'colourful' and 'motley' 'patchwork quilt' of European law. They claim only to highlight the sheer complexity that confronts the comparatist who attempts to collect elements of a social theory of law by entering the *école de vérité* and bringing together material and information on the sources and the functioning of the law in a given society.

When *Richard Abel* reviewed Max Rheinstein's 1972 book on 'Marriage Stability, Divorce and the Law', he called for 'books about law' in contrast to 'lawbooks', which was what he found Rheinstein's work to be an example of.⁹ What the editors indeed do promote—drawing on recent work in the sociology of law—is the analysis of the actual processes of the implementation of law in different cultural contexts. In a longer excerpt from a review article by *I. Markovits*, we find the observation that there can be no real assessment of the actual meaning of doctrine if its socio-legal context is not taken into account; and especially so, where a legal doctrine is examined in complete separation from the procedural environment in which it is invoked or challenged. Comparative law would be better recasting itself as an experimental process of 'spying out' details of the 'law in action', and of overcoming the myriad of stubbornly retained legal differentiations in order to reach beyond classical categories separating different 'families', or 'spheres', of law. As a consequence, our focus has to become one on the intricate patterns of the *evolution* of law. Indeed, this perspective would enable the comparatist to sneak beneath the habitual boundaries between legal national orders and identify modes of legal production in relationship to the socio-economic regime they are accompanying.¹⁰ The focus would necessarily have to shift from the macro to the micro level of comparison and include the complex cluster of both norms and actors, of institutions

⁸ Cf, Goutal, 'Characteristics in Judicial Style in France, Britain and the USA', in Gessner, Höland, Varga, *op cit*, 116, 121.

⁹ Cf, Introduction, in Gessner, Höland, Varga, *op cit*, 245, 247 note 9.

¹⁰ Cf, for this approach, Teubner, 'Eigenwillige Produktionsregime: Zur Ko-evolution von Wirtschaft und Recht in den varieties of capitalism', in (1999) *Soziale Systeme* (forthcoming).

and their use and production of law, of the transitory processes in the different areas of the social realm and the numerous ways in which systemic settings react to 'irritations' from the 'foreign' settings they come into contact with.

A substantial part of the remainder of the book thus provides us with material on the developments in the field of administrative law. And, while *New Private Law*—to borrow a phrase from a recent research project at the University of Denver—might be a more appropriate label for the emerging law which is situated beyond the confines of the classical public-private law divide, the path to a democratically based 'law of infrastructure' that governs co-operation between public and private actors, the delegation of public services to private performance or the development of new decision procedures (e.g., mediation) will be paved by the agile body of administrative law. The exact outcome of such administrative legal agility, however, will fully depend upon a complex interplay between the cultures, traditions and systems in which administrative law is embedded and its long heritage. The volume presents plenty of rich material tracing the structural conditions that situate public and private law between the expectations and experiences of the past and the promises and hopes of the future.

D The Community as Playing Field: The Single Market as a Cultural Challenge

We cannot part from this intriguing volume without drawing attention to another of its merits: the various explorations into the modes of the functioning of different socio-legal institutions, as well as their embeddedness within distinct cultural settings, all stress the necessity for a constant search for the very fine distinctions between the factual and motivational factors which govern within the different systemic contexts. Building on research into different regimes of industrial relations, authors such as *J. Flood* and *K. Dyson* underline the fact that we must be sensitive to the motivational background at work in organisational settings. The internationalisation that has its impact on theory and practice in the Member States, unfolds itself on various levels of culturally moulded social behaviour. As *Neil Fligstein* recently observed, we will only be able to understand fully the true influence of globalisation on the different national welfare states when we take into account the very specific reasons for the existence of highly differentiated settings of industry and commerce on the one hand, and the history of the welfare regime on the other.¹¹

The editors then proceed to a presentation of work concerned with the transition process in Eastern Europe and its implications on the project of European Integration. What *A. Cohen* and *J. Arato*, once described as the release of a 'Civil Society' is today coming under closer scrutiny, especially as regards the foundation upon which the rule of law is being built. *C. Varga*, *C. Offe*, *H. Schwartz* and *B. Pokol* start off by questioning the chances for the creation of enforceable legal rules, making specific reference to the pre-constitutional background. The often-raised question of whether to base the constitution on *rights* or on *principles* will not be resolved but, in the process, the relevant issues will at least be debated. As the primary aspect of the task is the process of coming to terms with the past, the rights/principles dualism might, indeed, offer little assistance. Instead, a conflict and process-oriented approach to the challenge of *learning from the past* might be a more promising option.

¹¹ Cf. Neil Fligstein, *Is Globalisation the Cause of the Crises of Welfare States?* (EUI Working Paper SPS 98/5).

Finally, the closing question of an immensely rich textbook is no longer one of whether we ought to speak of a European culture or, instead, work with an understanding of a *number* of European cultures but, rather, whether we are now able to depict 'how much of Europe' might now be found in national legal cultures'. Here, in our efforts to outline the future tasks in the construction of Europe, we might return to *Joseph Weiler's* observation that there is, in spite of so much European Law, so little of a European Public. As the introduction to the book's last chapter ('European Integration') underlines, the multitude of official languages remains in stark contrast to the actual level of democratic deliberation: but, we might also ask, is this the appropriate research agenda if we look at the multi-level Europe the collected texts have laid out before us? Ought not the challenge, instead, be one of undermining current thinking within national boundaries and the seemingly logical conclusion that there should be a European public opinion? Ought we not to accept a radically opened perspective on a process of societal communication that is taking place in highly decentralised sectors and within differentiated systems of social interaction? We would then no longer attempt to copy the nation state at European level but, instead, and with a discerning eye to the historical highs and lows of democratic life, engage in a radically democratic discourse beyond the confines of the separation of powers and the state-society divide.

III The Ongoing Transformation—European Law in search of its identity

In the second volume reviewed here, *Hans Micklitz* and *Stephen Weatherill* have collected a great number of texts, cases and directives in the field of European Economic Law. The texts' sources are always indicated and, at the end of each chapter, a list of further reading material may be found. The book is divided into 12 chapters and the briefest glance at these reveals the width of the ground covered and raises the inevitable question as to what, after all, makes up European *Economic Law*? In the beginning of their volume, the editors bring together essays by *Joerges*, *Weiler*, *Streit* and *Mussler* and note the great tension which marks the creation of the European Market from its outset. The exercise of reaching beyond the borders of the nation state towards a sphere of free exchange of persons, goods, capital (and services), necessarily raises a question of how to capture this opening within traditional paradigms of legal imagination.

Weiler, in his landmark piece from the Yale Law Journal, denounces the specific *ideology* accompanying the idea of European integration: and, lest we be mistaken, this is itself ideology since designating integration as the goal of creating the EC in fact neutralises its very political nature. The EC, seen as being somewhat above and acting beyond political cleavages, escapes a traditional discourse about political ordering by developing an institutional auto-dynamic that consequently grows immune to the old school analysis. This process is the more crucial in that it negates the shift from a political (and democratic) order based within national borders via a transnational interlude towards an as yet unknown polity.

This first of twelve 'chapters' concludes with a comment from the very centre of Germany's economic school of *ordo-liberalism*, which is devoted to the belief in a free market and the corresponding promotion of the market participant to a market citizen as bearer of constitutional rights.¹² While seemingly surpassing a strong separation

¹² Cf, for a critique, A.Lyon-Caen, 'Consommateurs ou citoyens?', *Le Monde* du 18 avril 1996, at 12.

between a political state and an un-political *bürgerliche Gesellschaft*, the focus on a sovereign market citizen eventually leads to the continuing existence of the very separation it claims to abolish.¹³ 'Autonomous economic decisions of private actors'¹⁴ become the focus for the creation of an institutional framework beyond the nation state's paternalism in the name of the *social*. Pointing to the 'ambiguities' that were promoted by the Commission's 1985 White Paper, the SEA and Article 100a, *Streit* and *Mussler* stress an important aspect of the underlying constitutional dimension: but, by virtue of their focus on corporatist distortions of competition, what escapes them is the fact that ambiguity in any case is always at national level, with the legitimacy of market regulation being put into question by lobbying and informalism among strong economic actors, interest groups and state agencies. Where German ordo-liberals demand a 'European Economic Constitution', its very specific character might tend to exclude a much richer approach to constitutional politics that would mobilise a polity's capability of self-government in democratically decentralised procedures. The eminent role of *direct effect* and *supremacy* for the protection of individual rights cannot hide the fact that they are derived from market freedoms. This is still true, even when we concede that the Court's jurisprudence is related to the indirect effect of unimplemented directives (*Paola Faccini Dori v. Recreb*).

A Inside and Outside the European Market: Effects of Industrial Policy

With the intervention into the market between and among the Member States, the EC has lost its innocence. Whether it be summarised as 'negative' or 'positive integration', the effort to regulate market behaviour has, with regard to its competitive position in a global market, an impact on competitive structures both inside the EC and, at the same time and increasingly so, outside the EC. This double-bind leads us back to the political nature of the EC itself. Who is the actor in charge? Who is executing 'European' decisions? Which 'state' are we speaking of when referring to the state's industrial policy as regards the regulation of the market? How can we deal with the possible clash between (national) state and (European) market? *Micklitz* and *Weatherill* present an outline of the issue in their second chapter, discussing the scope of the Community's industrial policy, with emphasis laid upon the conditions and effects of structural adjustment, the role of merger control scrutiny in defining the relevant market, and the necessity of rigid control of the financial support given by public authorities.

Chapters 3, 4 and 5 tackle the questions which arise as a result of the interplay between competition and industrial policy.¹⁵ Under the heading 'Internal Market and State Aid', the editors go back to the Court's judgments in *Italian Republic v EC Commission* (1974) and *France v EC Commission* (1970) which focused on the on the scope of the Treaty's regulation of state aid in Articles 92–94 and prepared the ground for the decision in *Philip Morris Holland BV v EC Commission* (1980). The final part of the book dedicated to industrial policy is Chapter 5 with texts by *Norbert Reich* and *Marc van der Woude* and cases dealing with state intervention into the market under

¹³ Cf. Wiethölter, 'Wirtschaftsrecht', in A. Görlitz (ed), *Handlexikon zur Rechtswissenschaft* (Wissenschaftliche Buchgesellschaft 1972), at 537 and 538.

¹⁴ Streit and Mussler, in: Micklitz/Weatherill, *op cit*, 32.

¹⁵ See C.-D.Ehlermann, 'The Contribution of EC Competition Policy to the Single Market', in *op cit*, 139 *et seq.*, 140: 'The Single Market Programme is a gigantic programme of deregulation'.

Article 90. *Reich's* 'reflections' clearly denounce the Court's (and the Treaty's) economic bias when it comes to discussing the mode of integration in the EC. What can be observed from the quoted case law is, in fact, the Court's process of gradual shifting from upholding a standard of limited discretion in the area of public services procurement to its narrow interpretation when attempting to challenge interference with market integration with more vigour. The state's discretion is rolled back in favour of supporting the privatisation of public services and the delegation of corresponding tasks to private parties. *Reich* is critical of this jurisprudence on the basis of the work done at the ZERP in Bremen and points to the disturbed balance between the Community's interest in market integration and what he calls the citizens' interest in social integration. The cases quoted by the editors are helpful in understanding the Court's hostile attitude towards state monopolies that exist in public services and towards the state's support for private actors employing practices that are causing distortions in the competitive system.

*B European Economic Law Cannot be Confined to a Narrow Area*¹⁶

Free Exchange of goods necessarily encompasses various marketing techniques. As a form of 'commercial free speech' has developed, a corresponding need has arisen for the determining of a legal regime for 'Euro-branding' and the Europe-wide search for the investment required for product development and innovation. The editors include a piece by *R. Schmidt* and *E. Pioch* in which the authors dwell on the crucial question of whether the 'European Consumer', or addressee of the Single Market actually exists. Schmidt and Pioch argue that the unitary approach to identifying consumers must be replaced by 'pluralist micro-marketing strategies which rely on sophisticated market mechanisms.'

The legal notion of the *consumer* receives further elaboration, and so beguiles the editors that they use it as a springboard for a discussion of the Treaty's relationship to another body of European Law: the Convention on Human Rights. Though, as *Elisabeth Spalin* suggests in her comment on *Drogan*, this relationship is triangular, *i.e.*, between the EC and the Member States, the Treaty and the Convention and the Member States and Human Rights. *Spalin's* intriguing observation relates to the ECJ's attempt to declare information given to Irish citizens about abortion clinics outside Ireland as being beyond the reach of Community law. It is to the editor's credit that they place this issue in their chapter on Commercial Free Speech and title it with these promising words: Beyond the Economy . . .

C Self-Supporting European Law?

Chapter 11 turns the community back onto itself and unfolds the issue of the Europeanisation of remedies. It was a long way down the road from *Van Gend en Loos* to *Francovich* and the notion of enforcement constitutes the issue par excellence upon which to found a discussion of the relationship between the Community and its members. We also read the cases *George Heylens* (1987), *Factortame* (1990), *Zuckerfabrik* (1991), *EC Commission v Italy* (1989), as well as *BEUC* (1994) and enter into the miraculous and scary world of 'effectiveness', Article 189 and 'what happens to Member States that fail to comply with its provisions'. The editors seek to provide

¹⁶ Micklitz/Weatherill, in, *op cit*, at 186.

relief to the anxiety-ridden reader and point to the alleged carefulness with which the Court goes about defining European criteria of remedies. They do not fail, however, to mention the sequels to this line of cases, namely *Factortame* and *Brasseries du Pecheur*. Aptly, the editors speak of the Member States having to 'digest' the decisions' implications. The reader, by now only partially conscious, dwells on two pieces by R. Caranta and F. Schockweiler which provide only dubious relief for the digestion before going on to the last chapter.

D The Nature of Rights in European Economic Law

This being the title for Chapter 12, we are about to grasp fully the meaning of the material presented so far: the conversion of 'EC law into a system of individual rights' (517p). The tension between 'Human Rights and Economic Rights' is again stressed, but the word which sums up this well designed volume, which is rich and intricate and brings together both a wide variety of aspects of European law and complements its analysis with the relevant case and document material, is 'optimism'. A hope, in fact, that the Community and its citizens, guided by Article 8, are on a positive path. The concluding focus, then, on the development of a wider pattern of social rights under the Community regime allows for a richer conceptualisation of European 'integration'.

IV European Governance

The debate about the categorisation of the European Union—an organisation *sui generis* or a mere copy of the model of the (possibly federalist) nation state?—inevitably leads to a multi-levelled research agenda. The Union's own history has been one of experimenting with different degrees of convergence between a grand ideal (the market) and the emerging necessity of its political constitutionalisation (the Union *viz. the state*). The steps taken in 1957, 1986, 1992, 1996 and those that still lie ahead mark what, at best, could be called a *learning process*: and one that is taking place under great political and economic pressure. Where are the *loci* for an alternative form of democratic legitimation for the integrative process?¹⁷ O. Gerstenberg reminds us of the 'imaginative work' that is necessary for an institutional creation.¹⁸ Drawing on J. Cohen and Ch. Sabel's model of radical deliberative democracy, Gerstenberg argues that democracy would benefit from the heterogeneity of participants and moral outlooks.¹⁹ His description of private law as an instrument of 'social dialogue' is designed to fill in the gap that will remain following the privatisation of public services. Society still, it would seem, is still in need of discursive structures in order to generate legitimation for decentralised political decisions.²⁰

¹⁷ Cf, for example, Joerges/Neyer, 'From Intergovernmental Bargaining to Deliberative Political Process: The Constitutionalisation of Comitology', (1997) 3:3 *ELJ* 273, 294

¹⁸ Gerstenberg, 'Law's Polyarchy: A Comment on Cohen and Sabel', (1997), 3:4 *ELJ* 343 with reference to R. Schmalz-Bruns, *Reflexive Demokratie*, (Nomos 1996) and Everson, 'The Legacy of the Market Citizen' in J. Shaw and G. More, (eds) *New Legal Dynamics of the European Union*, (Clarendon Press 1995), 73, at 87.

¹⁹ Gerstenberg, *ibid.*

²⁰ Gerstenberg, 'Private Ordering, Public Interventionism and Social Pluralism', in *COST A7* (Brussels 1998).

A The Future of Private Law

Within German scholarship on economic and private law, it seems to be an established practice to interpret German private law texts from the perspective of the existing European Directive law.²¹ The last example of this being the interpretation of the national law on sureties (*Bürgschaften*)²² in the light of the Council's Directive 85/577/EC, one may aptly speak of a dialogue between the national jurisdiction and the ECJ. Whether the same holds true in the opposite direction, is, however, far from evident.²³ The questions raised by the ECJ's *Dietzinger* decision as to the dogmatic sources from which the Court draws its line of argument only underline the necessity of a dialogue among the respective legal orders about the historical, cultural and theoretical foundation of their bodies of law.²⁴ It is here that an ordo-liberal observation comes to bear: 'Europeanisation of private law will be the cornerstone for the use and usefulness of the concept of 'indirect effect'.²⁵ Does this indicate, one might ask, the renaissance of *private law as a society's language* (H. Collins) on a European level?

There is little to support such enthusiasm. In fact, any European (or global) private law is bound to carry the same burden which already rests on national private law. Under the impact of privatisation, of state intervention and regulation, private law appears to have been left with the role of safeguarding societal guidance or governance. If its normative component is to guarantee political and social cohesion, contract law should envelop what was formerly known as public law. The challenge is twofold: with the shift from Fordistic production to flexible specialisation²⁶ and the resulting attack on the economic model of full-employment, the functioning of the market can no longer satisfy the state's demand for full employment.²⁷ The second concerns the 'person' that is at work on the neo-liberal theory of private contract: it remains a fixpoint for rationalising and maximising interests but does not encompass any traits of reciprocal social interaction. The idea of private (law) ordering, at this point, thus remains in the shadow of a crude economic functionalism, that has little to offer to any aspirations for political governance under new circumstances.

B Hidden Agendas

Martin Vranken depicts the hidden agendas and the undercurrents in the contemporary process of the Europeanisation of (private) law. What *H. Merryman* observed to be the persisting qualification of the civil law as fundamental law²⁸—

²¹ Cf, Pfeiffer, 'Die Bürgschaft unter dem Einfluß des deutschen und europäischen Verbraucherrechts', (1998) 19 *Zeitschrift für Wirtschaftsrecht* 1129, at 1130; H.-W. Micklitz, (1998) *EuZW* 253; for a synthesis of European Economic law and its influence on German law, cf, already W. Kilian, *Europäisches Wirtschaftsrecht* (C.H. Beck 1996).

²² Cf, Bundesgerichtshof, in (1998) 19 *Zeitschrift für Wirtschaftsrecht* 949—*Baukrän*.

²³ Cf, Pfeiffer, n 90, at 1130.

²⁴ Cf, H.J. Sonnenberger, 'Der Ruf unserer Zeit nach einer europäischen Ordnung des Zivilrechts', (1998) *Juristenzeitung* 982–991

²⁵ Streit and Mussler, 'The Economic Constitution of the European Community: From Rome to Maastricht', in: Micklitz/Weatherill (eds), *op cit*, at 47.

²⁶ Cf, Ch. Sabel, M. Piore, *The Second Industrial Divide* (Basic Books 1984); M. Best, *The New Competition* (Harvard UP 1990).

²⁷ Cf, J. Habermas, *Die postnationale Konstellation und die Zukunft der Demokratie*, in: *Die postnationale Konstellation* (Suhrkamp 1998), at 138 *et seq.*

²⁸ Cf, Merryman, *op cit*, at 7.

notwithstanding the experience of drastic public law interventions—*Vranken* traces from the history and continuing procedures of codification and the search for a—civil law based—*ius commune*, deeply within the detailed studies of contract, tort, labour and commercial law as well as the law of procedure. He avoids crude comparisons between legal families but uncovers common concerns such as the attempts to limit the freedom of contract, persistent both in civil law and common law. A discovery of similar value is that of the emergence of twofold tort law in Article 1382, 1384 Code Civil that reaches beyond the traditional boundaries of liability and replaces them with a policy-oriented scheme of risk allocation. Statute-based German law is experiencing a comparable development (*Verursacher- und Gefährdungshaftung, Verkehrssicherungspflichten, Status- und Befundsicherung*). The doctrine of so-called *Wegfall der Geschäftsgrundlage*, that *Vranken* rightly depicts as a striking example of the modern evolution of German civil law, in fact serves as an agile instrument in capturing cases situated in between all other applicable rules.

Vranken, in short, traces the process of the Europeanisation of the law of the Member States and shows how, apart from family or inheritance law, most core areas are affected by the Community and demonstrates that what we have before us are fragments of a uniform law in the process of becoming. But, *Vranken's* study is much too meticulous to proclaim the birth of a Uniform Community Law: we are called upon to retain our sense of a multitude of cultural settings that, albeit vaguely construed, the principle of subsidiarity principle estops us from harmonising. In conclusion, he considers the potential of the European citizen, but remains cautious and proposes a dynamic and incremental understanding of the notion; applying the same logic to the concept of integration itself.

C The Heritage of 'State' and 'Society'

Jürgen Habermas has underlined the fallacies which arise from social theorists' use of the category of society (*Gesellschaft*); fallacies derived from its protagonists conceptualisation of a dual normative and material realm of civil emancipation and their disregard for the fact that it was the state that originally led to the appearance of 'society' as such.²⁹ This society constitutes the playing field of social interaction, of differentiation and organisation, of intertwining loops of hierarchy and heterarchy. But here, where social injustice and human despair are but viewed as challenges to human activity, they have been stripped of their intriguingly disturbing nature of causing pain and demanding consolation as well as political action. In *Habermas's* critique, the notion of 'society' serves only as virtual background for the projection of *phenomena* that stir the imagination but do not themselves provoke civil action. The reason for the emergence of *society as a virtual space*, lies in the fact that the state (*Staat*) was forgotten as the other, complementary category from which 'society' was eventually derived. In this act of forgetting we have buried what might have continued to irritate, to disturb and to further the quest for an understanding of collectivism and individualism, of emancipation and silencing, of hierarchy and social pluralism. Instead, society—as a term coined under the influence of nation states, territorial political organisations and culturally more or less levelled social and political communities—is now undergoing its seemingly final grand alteration: *globalisation* tears down boundaries, innovates standards, disembodies and multiplies notions of identity.

²⁹ Cf. J.Habermas, *op cit* n 111, at 91/92.

This international dynamic was always a part of the category of society. Its reality has become one of chance, of opportunity, of restlessness and sheer fatalism. Nothing can ultimately not be altered, all is a result of human doing: so, 'up and let's go and meet the challenge'. A strange optimism that can barely hide its inner affinity with a fundamental opportunism. Seen against this background, the question of the emergence of an international law, of a global law, of global actors, global institutions and a global order, has become one of *timing*, and is no longer one in need and even apt of normative justification. And this opening takes place after theory itself had already lost its normative and idealist strongholds, when structural analysis seemed only to suggest clusters of power and of institutional corruption.³⁰

The shift in perspective from 'state' to 'society' to 'globalism' and the act of forgetting which has accompanied each turn, must be taken into account when airing ideas of a European law, a European state, or indeed, a European society. A possible reaction to this could be to *remember* the determining historical factors and, specifically, the long history of our categories of 'state', 'society', 'freedom', 'democracy' and 'emancipation'.³¹ Semantic remembrance, then, would take place in the form of reflecting upon the concepts employed in the theorising about the ordering of our society. In remembering the usages and experiences that helped to build the categories we continue to employ, we might be able to re-assess of the plurivalent nature of our very language. In learning to understand the historicity of categories such as 'state' and 'society', we remember the hopes and enthusiasms, the frustrations and despairs that remain enmeshed in these categories. This will be all the more necessary, the more we begin to describe political entities, not with reference to their institutional form, but rather with regard to the task they are called upon to perform.³² The debate about public ordering vis-à-vis private ordering must be responsive to a highly fragmented social sphere, to decentralised discourses and processes of questioning legitimacy, and to the deciphering of the 'past' and the 'future' in the categories which we deploy in our efforts to understand the shift from national to international to global.

³⁰ Cf. J.Habermas, *Faktizität und Geltung* (Suhrkamp 1992).

³¹ Cf. in particular, Y.H.Yerushalmi-Zakhor, *Jewish History and Jewish Memory* (Washington UP 1982); *ibidem*, *Ein Feld in Anatot. Versuche über Jüdische Geschichte* (Wagenbach 1993); J. Assmann, *Das kulturelle Gedächtnis* (Beck 1999); P. Zumbansen, *Staat, Gesellschaft, Vertrag, Lernerfahrungen* (forthcoming).

³² *Ibid*, Zumbansen, 296 *et seq.*