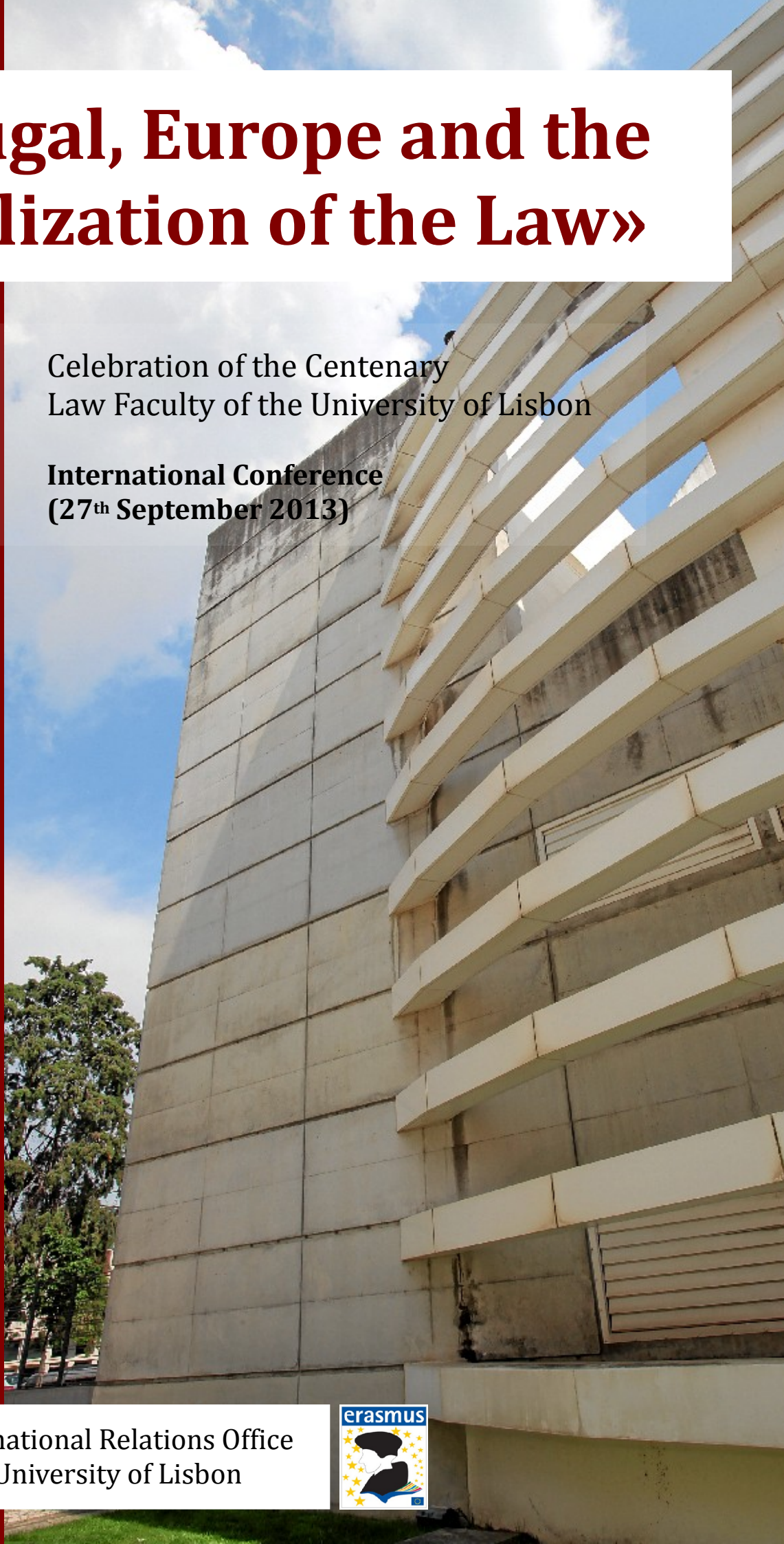
«Portugal, Europe and the Globalization of the Law»



FACULDADE DE DIREITO
Universidade de Lisboa

Celebration of the Centenary
Law Faculty of the University of Lisbon

International Conference
(27th September 2013)

Vasco Pereira da Silva
Bernd Oppermann
Patrick Hugg
Luís Lima Pinheiro
Rainer Arnold
Balaguer Callejón
Fausto de Quadros
Luís Pereira Coutinho
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Erasmus and International Relations Office
Law Faculty of the University of Lisbon

erasmus

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Opening session

Closing session

FACULDADE DE DIREITO
Universidade de Lisboa

GABINETE ERASMUS
ERASMUS OFFICE

Celebration of the Centenary
Law Faculty of the University of Lisbon

27th. September 2013

International Conference
«Portugal, Europe and the Globalization of the Law»

- 9h 30m – Opening Session
Prof. Dr. António Feijó - Vice-Rector of the University of Lisbon
Prof. Dr. Eduardo Vera-Cruz Pinto - Dean of the Law Faculty
Prof. Dr. Martim de Albuquerque - President of the Organizing Committee of the Centenary
Prof. Dr. Vasco Pereira da Silva – President of the Erasmus and International Relations Office

- 10h - «Portugal, Europe and the Globalization from the perspective of Law and Economics»
Prof. Dr. Rainer Prokisch (Univ. Maastricht)
Prof. Dr. Pasquale Pistone (Univ. Salerno)
Prof. Dr. Ana Paula Dourado (Univ. Lisbon)
Chairman

- 11h 45m – «Portugal, Europe and the Globalization from the perspective of Private Law»
Prof. Dr. Bernd Oppermann (Univ. Hannover)
Prof. Dr. Patrick Hugg (Loyolla Univ. – New Orleans)
Prof. Dr. Luís Lima Pinheiro (Univ. Lisbon)
Chairman

- 15h – « Portugal, Europe and the Globalization from the perspective of Public Law»
Prof. Dr. Rainer Arnold (Univ. Regensburg)
Prof. Dr. Balaguer Calléjon (Univ. Granada)
Prof. Dr. Fausto de Quadros (Univ. of Lisbon)
Chairman

- 16h 45m – «Portugal, Europe and the Globalization from the perspective of Law History»
Prof. Dr. Janez Krancj (Univ. Ljubljama)
Prof. Dr. Caroula Kervegan (Univ.Cergy-Pontoise)
Prof. Dr. Pedro Barbas Homem (Univ. Lisbon)
Chairman

- 18h 30m – Closing Session
Prof. Dr. Pedro Romano Martinez -President of the Scientific Council
Profª. Dra. Maria João Estorninho -President of the Pedagogical Council
Prof. Dr. Vasco Pereira da Silva – President of the Erasmus and International Relations Office
Reports of the Sessions

Chapter III

Portugal, Europe and the Globalization from the perspective of Law and Economics ►

Chapter IV

Portugal, Europe and the Globalization from the perspective of Law History ►

« Introduction- Adressment to the participants »

Vasco Pereira da Silva (University of Lisbon)

Celebration of the Centenary

Law Faculty of the University of Lisbon

Opening Session

ADRESSMENT TO THE PARTICIPANTS

Ladies and Gentlemen,

Dear Guests

We are in the Opening Session of our International Congress celebrating the Centenary of the Law Faculty of the University of Lisbon. This is a kind of special "birthday party" of a "living Faculty" that, on one hand, is already old, because it celebrates one century, but on the other end is at the same time "fresh new", because it begins now its second century.

As President of the Erasmus and International Relations Office of the Law Faculty of the University of Lisbon and organizer of the event, I am expected to act like the "owner of the house". I believe that the duties of a (good) owner of the house are as such:

1) To say hello and welcome to all the guests and thank them for the visit;
2) To organize a "guided tour" through the house, showing to the guests our "four rooms" (the four thematic sessions), and our two "living rooms" (the opening and the closing session);
3) To wish that all the guests enjoy the party and feel like coming back again soon.

I am trying to do my best in order to fulfill all my duties, in this order:

1) Hello and Welcome

First of all I´d like to thank to:

- The Vice-Rector of the University of Lisbon, Prof. Dr. António Feijó, representing the Rector, that institutionally means the participation of our University at this event;

- The Secretary of State for Regional Development, Dr. Pedro Lomba, that earlier of entering the Government was working as Assistant at the Law Faculty, and because of that has been and always will be one of us. It goes without saying that he is always very welcomed at his "home" Faculty;

- The Dean, Prof. Eduardo Vera-Cruz, that is at present responsible to "carry on the flag" of our institution;

- The colleagues, coming from different countries of the EU and from the United States, to participate in this International Conference, most of them chosen for being longtime friends of the Faculty (coming frequently to teach in our intensive courses);

- The Portuguese colleagues taking part in the event;

- The civil and academic authorities;

- And last, but not least, I would like also to thank my staff, the Erasmus and International Relations office, namely my colleagues of the board of Direction, and the Erasmus Secretary, as well as the Students Association, without them it would be impossible to organize such an initiative.

2) "Guided Tour" through the house

As said before, the "house" comprehends "four rooms" and "two living rooms", that is to say, four themes and an opening and a closing session. The general theme for the "design" and the "decoration" of the house, meaning the theme of the Meeting, is «Portugal, Europe and the Globalization of the Law». No need to stress the importance and the actuality of the theme. In short: the world globalization implies the globalization of the Law; the European Union is a way of dealing regionally with the globalization; and Portugal has a historical tradition in this matter, being one of "creators" of the globalized world, with the Discoveries (even if nowadays the situation of the country is not so bright as it has been before).

The theme is considered under an "ecumenical perspective", being analyzed according to the different perspectives of the four groups of disciplines of the Law

Faculty (Private Law, Public Law, Law and Economics, and Law History). It explains our four sessions, that we hope may also become the four chapters of the commemorative book: «Portugal, Europe and the Globalization from the perspective of Law and Economics» (9h 30m), «Portugal, Europe and the Globalization from the perspective of Private Law» (11h 45m), « Portugal, Europe and the Globalization from the perspective of Public Law» (15h), «Portugal, Europe and the Globalization from the perspective of Law History» (16h 45m).

After, there will be a Closing Session, with the presentation of the reports of the sessions, trying to elaborate the "state of the art" of the themes discussed and some (provisional) conclusions, in a kind of "synthesis essay" of our Meeting.

3) Let us Party

So, now, after welcoming all the guests and visiting the house, my task is almost accomplished. The party is on, take a deep breath and have fun. It is now time to sing all together:

"Happy birthday to you… Law Faculty"

Thank you very much for your attention.

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Chapter I

Portugal, Europe, and the Globalization from the perspective of private law

Bernd Oppermann (University of Hannover)
«Portugal, Europe, and the Globalization from the perspective of private law» ►

Patrick R. Hugg (University of Saint Louis)
«Portugal, Europe, and Globalization from the Perspective of Private Law
– A Transatlantic View» ►

Luís de Lima Pinheiro (University of Lisbon)
«Portugal, Europe and Globalization in the Private Law Perspective» ►

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«Portugal, Europe, and the Globalization from the perspective of private law»

Bernd Oppermann (University of Hannover)

1. Unification of the European private legal order by EU model law? - Reflections about the Common European Sales Law (CESL) [1].

It is an honor being invited to participate at a colloquium for an anniversary of our European partner faculty. For such purpose it would not be suitable talking about trivial everyday matters of a long-term academic partnership. Even more, since the fall of German idealism, it might be intellectually less challenging bringing news from the legal community back home. However, there are again some scholars tending to reflect about the recent time to be fascinating for Europe because a transition is conceived from national to post-national legal order, even parallelized to the transition from the industrial to the postindustrial information society.[2] From a European point of view it appears particularly interesting for my given theme to reflect about the idea of a European contract law, or to be a bit more realistic on a lower level, the optional European Sales Law (CESL), which is only a proposal so far, limited to cross-border business, and, even worse, limited to consumer-related and SME-related contracts. Such tiny segment of contract law nevertheless covers quite an important part of the internet business.

As developed at this very location a year ago, the EU proposal is opposed by moderate to harsh critique of scholars as well as – amazingly - of associations representing groups of market participants which are subject of the anticipated legal protection, as there are consumer organizations and SMEs. Meanwhile, a remarkable quantity of articles, commentaries and monographs are devoted to the CESL proposal. In my opinion, the most valuable are the reflections utilizing an economic view on the matter. Although, since today's first session was devoted to economic analysis already, I do not want to start boring the audience. Instead, I will introduce a quite traditional view on harmonization and unification as it is provided by CESL.

2. Natural law and Roman law in Portugal

One of these common cultural goods could be the private legal order of the EU Member States respectively, to be envisaged as a product of its genealogy and present cultural environment. Consciously spoken, I should be aware that it could be misleading what looks alike. Such a wise acknowledgement might be the reason that more anxious legal scholars tend to deny almost anything arising from different legal systems to be

[1] Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, 11. 10. 2011, COM (2011) 635 (final)
[2] *Grundmann, S.,* Costs and benefits of an optional European sales law (CESL), Common Market Law Review 50, 225 (2013).

alike.[3] Such a position might guarantee the utmost precision on a specific legal problem, at the same time, although, it does not appear to be very helpful for the subject matter discussed at the recent conference. Due to its development over the centuries, the German view on codification appears very much directed towards its own identity in order to achieve or to resist national unity. The founding of a national state in 1871 did not leave the law and the legal science untouched.[4] On the contrary, codification in Portugal appears much more directed to the realms outside of Europe, to the various colonies, protectorates or just friendly nations. Take the relationship to Brazil to demonstrate an early tendency towards a global perspective or "*legal geostrategy*"[5] for the problems Portuguese law had to resolve. For these and for other reasons, legal scholars seem to deny nowadays – different to the concept of the scholars *Coing* or *Calasso* – the fascinating idea of a common history of European law or even private law.[6] Influenced by *Max Weber*[7], *Franz Wieacker* has developed a general idea of European private law culture on a more abstract level.[8] Significantly appears the concept of rationality, the approach to settle conflicts by rational rules which tend towards a judification of public life. In this view, the European cultural tradition leads consequently to legalization of any social relationships,[9] where personalism, legalism and intellectualism are significant concepts. By interaction of these ideal concepts, an occidental or European legal culture might be reconstructable.[10]

For a genuine Portuguese tradition of legal thinking, it has been referred to the *Lei da Boa Razão para os direitos das nações polidas e civilizadas* – adopted during the reform governance of *Marquês de Pombal* – which regarded Roman law as a subsidiary source of law, that may be applied in case it was in conformity with *boa razão,* which practically indicates the natural law.[11] Maybe even more significantly, he quoted an enactment on succession (*direito sucessório*) from Sept. 9, 1769, where the ideas of the Enlightenment played an important role (*reforma iluminista*). The ideas of enlightenment and especially the notion of *boa razão* continued to take a crucial role in the work of *Teles* [12] who participated in a committee for the compilation of the Portuguese Civil code.[13] Although *Teles* relied at the same time on the long-established

[3] Regard the opposing positions of legal historians in this publication. For the strongly different positions in respect of a comparative approach towards CESL cf. Fn. 34, 35.
[4] *Ogorek, R.,* Richterkönig oder Subsumtionsautomat? Zur Justiztheorie im 19. Jhdt., Frankfurt a.M. 1986.
[5] This interesting term came up during the discussion of our Lisbon conference.
[6] *Duve, Th.,* Von der Europäischen Rechtsgeschichte zu einer Rechtsgeschichte Europas in globalhistorischer Perspektive, Rechtsgeschichte 20 (2012), S. 18
[7] For the history of reception, cf. *Dilcher, G.,* Franz Wieacker als „Germanist". Mit einigen Bemerkungen zu seiner Beziehung zu Marx, Nietzsche und Max Weber, in: *Behrends, O. / Schumann, E. [Ed.],* Franz Wieacker. Historiker des modernen Privatrechts, Göttingen 2010, S. 223, 244, 249.
[8] *Wieacker, F.,* Europäische Rechtsgeschichte, 2nd. Ed. Göttingen 1996, Translation: History of private law in Europe with particular reference to Germany, translated to English by *Weir, T.,* 1997 [cit. via German version of 1996].
[9] *Wieacker* (FN. 8), 45 -70 (European legal science).
[10] *Wieacker* (FN. 8), 204 – 215 (*usus modernus*)
[11] See *Hamza, G.,* Privatrechtsentwicklung in den Ländern der Iberischen Halbinsel, 89 – 94, http://www.ajk.elte.hu/file/annales_2009_04_Hamza.pdf, on the role of rationalism in Portuguese history of law.
[12] *Correia Teles, J. H.,* "*Theoria da interpretação das leis*", 1815.
[13] In the view of *Hamza* (Fn. 11), 92, in *Teles'* influential work ("*Digesto portuguez, ou tractado dos direitos ou obrigações civis, accommodado as leis e costumes de nação portugueza para servir de subsidio ao Novo Codigo Civil*") from 1835.

Portuguese civil jurisprudence based on the Roman law traditions,[14] a tendency of further movement for private law codification may be noticed. *Seabra*[15] was entrusted with the private law codification in 1850. His draft resulted finally in the Portuguese *Código civil* from 1867.[16] As referred, *Seabra* took into account these provisions of the Prussian *Allgemeines Landrecht* related to civil law, the French *code civil* and the Austrian *Allgemeines Bürgerliches Gesetzbuch*. Art. 16 of the C*ódigo civil* regards *direito natural* as a subsidiary source of law (*direito subsidiário*). One may raise the hypothesis that the old and the new Portuguese Civil code, which was adopted in 1966, again have been influenced by the German sources, for instance by the German doctrine of legal transactions (*Rechtsgeschäftslehre*).[17] As mentioned, although, such similarities are not creating necessarily the same product. Interestingly enough appears the fact that the first civil law codification from 1868 and the second from 1966 are still effective in different former Portuguese colonies.[18] In this sense they became globalized law.

3. Natural law, Roman law and Pandectism in Germany

In a comparative view, one might draw lines of trade on sea and land and argue that the development of legal thinking, law and philosophy would reflect economic needs of the rising citoyen. Utilizing a slightly different approach, however, the analysis of lines from the reception of natural law concepts and of the ideas of enlightenment in the academic discussion was for some German territories of the 17th and 18th century culminating in interesting regional enactments, as in Saxonia, Wurttemberg and Prussia. The details are, due to the territorial structures of German territories quite divers and complicated, insofar worth to mention could be the influence of French ideas in the turn of the 18th to the 19th century, later of the Napoleon occupation, and in the 19th century the adapted code civil order of these territories located on the left side of the Rhine river.

For German private law development and codification, especially the contribution of *Wieacker* appears quite interesting in respect of legal method and jurisprudence when it comes to deal with the age of the law of reason, the Historical School, and

[14] Ref. *Coelho da Rocha, M. A*., *Instituições de direito civil portuguez,* Univ. Coimbra 1857.
[15] A follower of Natural Law tradition (*Escola do direito natural*)
[16] *Seabra*, *A. L., Visconde de,* published in 1857 at Lisbon the first part of a Civil Code while the final version of *código civil* was promulgated by the law of July 1st, 1867.
[17] The effect of the German pandectist legal science (*Pandektenwissenschaft*) and the Historical School of Law (*escola histórica*) can be observed in the structure of the *Código civil*.[17] There are, of course, significant differences in the details. The General Part (*Parte geral*) of the *Código civil* is more extensive than the *Allgemeiner Teil* of the German BGB. Contrarily, the Portugal code does not provide the definition of the legal transactions. The first provision dealing with legal transactions (Art 217) only provides that expression of will may be explicit or implicit
[18] *Hamza* (Fn. 11) ref. to the civil law of Indian provinces of Goa, Damão and Diu. The provisions of the amended Portuguese civil code of 1966 is applied in the former Portuguese colonies in Africa, even after their independence; in case these provisions are consistent with the constitutional order. Consequently, in Angola (*República de Angola*), Mozambique (*República de Moçambique*), Cape Verde (*República Cabo Verde*), São Tomé and Príncipe (*República Democrática de São Tomé e Príncipe*) and Guinea-Bissau (*República da Guiné-Bissau*) the significantly amended versions of the code were adopted as national civil codes.

Pandectism, the latter being influential until today.[19] For the details, parallels to the development with other European states might be drawn between the relationship of Roman law reception and the different concepts of natural law and rationalism. As briefly quoted before for Portugal, parallels could be synthesized in struggling arguments pro as *Thibaud* and later, in a much more reflected way even *Puchta*[20] had positioned themselves, or arguments contra codification as *Savigny* might be positioned[21]. From the German development of codification in the 19. Century, leading to a civil code as late as in 1900, a contradiction remains between products of Pandectism associated by a formal or even positivistic understanding of law and jurisprudence on the one hand, and on the other the "social" element in law focused on and developed in many post war states of Europe in the twentieth century, or at least in the second half thereof. For a few decades now, the EU is pushing forward this social aspect, utilizing the Anglo-American term of "fairness" to be implied into modern law. The possible motivation of achieving quite different side-effects of Europeanization and more EU competences might remain here none of our interests. In this sense, EU rules are introduced and implemented into national legal bodies.

In result, one may still conclude in a Scotch scholarly view that the intellectual foundations of a formalist legal science have crumbled; its prestigious system of constructs has been lost; a firm European methodology has not been developed instead, while the constitutional method of European law is not sufficiently precise and formal for private law purposes.[22]

4. Codification and self-identity

The matter of codification may be analysed also under a more contradictory mode of building political structures. In Germany of the 19th century, codification appeared to be an instrument of legitimizing the building of a nation, the so-called "second empire". Significantly, the development of a separate commercial law codification of 1866, just five years before the proclamation of national unity, may give a further and more delicate view on the phenomenon of codification.

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[19] *Wieacker* (Fn. 8), 249 – 347 (law of reason).

[20] Cf. *Mecke, C.-E.,* Begriff und System des Rechts bei Georg Friedrich Puchta, Göttingen 2009, 314 ff.

[21] *Wieacker* (Fn. 8), 390 – 392 (*Savigny* on codification). Amazingly, the association of the struggle for codification in facing CESL has been drawn by a US-American commentary, cf. *Ackermann, Th.,* Public Supply of Optional Standardized Consumer Contracts: A Rationale for the Common European Sales Law?, (2013) 50 Common Market Law Review, Issue 1/2, pp. 11, draft version at http://www.law.uchicago.edu/files/files/Ackermann%20paper.pdf.

[22] Cf. the commentary of *Cairns, J.W.,* Edin. L.R. 1997, 1(2), 275-278. So far, his comment is coherent with the *Wieacker* source quoted by the authors. The following word are a bit more of a personal view, where the Cairns states this implementation by secondary EU law to be not only symptomatic of the moral and intellectual debility of present legal culture and of the lesser role of private law in the social and administrative state we have today. In the neglect and deterioration of private law theory, the author demands a "failure to meet the three essential prerequisites of any productive legal science: an unequivocal commitment to law, a full appreciation of society as it really is, and a secure method in tune with current thinking."

Europeanization and globalisation, although used in economic context, must at first hand not necessarily be caused by economic origin. In Europe, the warfare between 1914 and 1945 has created a specific ratio that it might be better to Europeanize in common projects. Thus, the political construction of the European Economic Community was promoted. The political decision gave room for legal unification or at least harmonisation under the well-known principles of subsidiarity and proportionality. New "European" rights were announced, whether of more constitutional origin as non-discrimination and equality or of more private origin, as freedom of movement of goods and services as well as the other liberties of the European market. Private law rules, despite parallel developments and adjustments by governments or judge-rule, have so far remained predominantly in national competence. Until today, the EU and its Member States did a lot in order to unify or at least to harmonize private law rules. There are many good examples of unification in national rules on cross-border cases, as the Rome and Brussels regulations have substituted them for the sake of unification. For substantial law, European competition law has been unified to a high degree by Art. 101 ff. TFEU and by accompanying EU regulations. Consumer law and unfair competition law has been more softly harmonized by quite some EU directives forcing the EU Member States to adjust the rules to common standards of the internal market. The present tendency, circumscribed by Dir. 29/2005 on unfair competition, Dir. 83/2011 on consumer rights and the CESL proposal tends towards unification.

Focussing on the small segment of cross-border sales law, the CESL has already quite some established company:

- The principles of European Contract Law were prepared by the Commission on European Contract Law (= PECL) in 1999;

- The Principles, Definitions and Model Rules of European Private Law, or the Draft Common Frame of Reference (DCFR) was the result of another working in 2009;
- The Unidroit Principles of International and Commercial Contracts (PICC) in its 2010 version was a further scholarly project of transnational harmonization;
- Not to forget other products of *lex mercatoria*, like UN Sales Law or CISG which constitutes a more famous set of rules on commercial sales contracts. In contrary to the before named body of rules its application is part of the national law of states who ratified the international treaty. Although CISG is not compulsory, the parties need to opt out;
- The Rome and Brussels Regulations must be mentioned in respect of their character of unified European conflict rules of the sphere of international private law;
- Last but not least, as quoted above, there are the EU member states relying on their different tradition of national civil law order, giving established and enforceable sets of rules.

Indeed, one must admit that the majority of legal rules and legal sources in private law remain of national origin,[23] and – due to different legal tradition and different legal method or jurisprudence - tend to activate their centrifugal force. The centripetal powers of the Treaty on the Functioning of the EU as incorporated in Art. 67 ff., Art. 114 ff., Art. 267 and other tools of the European Courts are effective, nevertheless, the character of distinct cooperating states with a distinct private law systems prevails.

To put an end to my first and maybe somehow wild associations, seen from a formal, technical point of view, any enforceable European sales law codification or even a European civil code is far away from being realized. Probably, it never will. In contrary, regarded from a more conceptual point of view on the common structure of the mutual development of private law inside the EU, the differences are not that significant as my quotation of Portuguese and German codification process may have resembled. An interrelated, though different tradition in legal history opts more like for harmonisation as in the prior EU practice of soft directives instead for unification by straight regulations. The new mixed model of so-called full harmonisation as enjoyed through the last consumer rights directive[24] shares advantages and disadvantages of both sides. Something what appears similar in nature does not need to be forced into unity, even not in the same European Union. Soft harmonisation avoids the conflict with the historical and political differences and appears more neutral in its effect on third states outside the Union.

5. The Proposal on Common European Sales Law (CESL)

According to the first provision of the European Commission's proposal for a Common European Sales Law (CESL) [25], the purpose of such unifying efforts is to improve the establishment and functioning of the internal market by making available a uniform set of contract law rules. According to the explanatory memorandum, 'the overall objective of the proposal is to improve the establishment and the functioning of the internal market by facilitating the expansion of cross-border trade for business and cross-border purchases for consumers'. [26] Thus, the focus is on economic growth and efficiency by reducing transaction costs caused by differences of national laws within the same markets: 'Differences in contract law between Member States may hinder cross-border trade in the EU, by dissuading business and consumers from cross-border transactions. Businesses involved in the trade in goods that export into other EU

[23] In comparative context of CESL towards UP, PECL, PESL, DCFR and CISG, the role of the different actors, as there are state legislators, parties of a cross-border contract, courts, etc. must be taken into account, cf.: *Smits, J. M.,* The Common European Sales Law (CESL) beyond Party Choice, Maastricht Univ., Maastricht European Private Law Institute Working Paper 2012/11, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2039345; see further: *Smits* (Fn. 45).
[24] Dir. 83/2011, Art. 4.
[25] Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, 11. 10. 2011, COM (2011) 635 (final)
[26] Commission Staff Working Paper, Impact Assessment, Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law on a Common European Sales Law, Brussels, 11. 10. 2011, SEC (2011) 1165 final, pg. 4.

markets face unnecessary entry transaction costs close to 51 billion every year. The value of the trade foregone by those who are dissuaded due to differences in contract law amounts to some tens of billions of Euros.'[27] Indeed, a new CESL might probably bring the European Union some economic advantage by benefitting at least the main target groups as small vendors and consumers to sell or purchase their products and services demanded especially through the Internet, and to do so in more countries without incurring costs of legal advice, while the overall costs of introducing a CESL should remain comparatively low.[28] Art. 114 TFEU provides a reasonable legal basis for a CESL. Beyond the market, the EU acts within the limits of the competences explicitly attributed to it, and, in going further, should act within the scope of European Law, especially with respect to the principles of subsidiarity and proportionality (Art. 5 TEU).

The proposed CESL has a limited substantive, personal and territorial scope (Art. 3 – 7 CESL). It comes as an optional instrument, drafted on the line of its predecessors mentioned before. [29] In opposite to CISG, it is necessary to "opt in", which might be regarded less advantageous. CESL is focuses on cross-border business. Once more, it protects the consumer beside its applicability for SMEs. With quite some probability, it might remain an eternal proposal. Obviously, it might be a waste of time to talk about it.

Still, the CESL consists to a large extent of general contract law rules. This means that it could be valuable at least as a catalogue of principles. In recent years, on several occasions, the European Court of Justice has referred to 'general principles of civil law', with regard to the principles of the binding force of contract, discharge by performance, and good faith and unjustified enrichment.[30] If the proposal becomes formal European law, the Courts could decide to refer to its incorporated common European private law principles. Even more, the CESL could become a common European model for private sales law.

In order to give an example, pursuant to Article 2 CESL, 'each party has a duty to act in accordance with good faith and fair dealing'. It constitutes a general clause which has to be made technical by judge-made rules.[31] Good faith and fair dealing is indeed one of the three 'general principles' underlying the CESL. The other two are the principles of freedom of contract (Article 1) and co-operation (Article 3).

The common European set of general contract law rules will not only have the direct consequence of increasing confidence in cross-border shopping and in the Internal Market at large. It also expresses the fundamental idea that the Internal Market

[27] Ibid. 7.
[28] Cf. *Hesselink, M.W.,* The case for a common European sales law in an age of rising nationalism, ERCL 2012, 342, 354.
[29] See further the synopsis by *Jansen, N. /Zimmermann, R.,* A Genetic Comparison of Transnational Model Rules, Oxford Journal of Legal Studies, Vol. 31, No. 4 (2011), pp. 625 ff.
[30] *Hesselink* (Fn. 28), ERCL 2012, 342, 359, in ref. to ECJ, Case 277/05, Société thermale d'Eugénie-les-Bains v Ministère de l'Économie, des Finances et de l'Industrie [2007] ECR I-06415 ; Case 412/06, Annelore Hamilton v Volksbank Filder eG [2008] ECR I-02383 ; Case 489/07 Pia Messner v Firma Stefan Krüger [2009] ECR I-07315.
[31] *Hesselink,* ibd, 359 f., seems to take the wording "good faith" of the proposal literal in the sense of filling it with meaning, which appears not to be the technical approach of a civil law jurist.

is not a jungle where "might is right". In other words, the model of justice between the parties implements the idea of a social market economy (Article 3, Para 3 TEU). Therefore, some people even believe that in the sum, the CESL could serve as modest attempt at a European '*constitution civile'*.[32] Whether the CESL actually could become a common European frame of reference for civil justice is, of course, not a matter of expert opinion but of the European Parliament. European contract law could be "an expression of the European identity of citizens", while, in turn, a CESL could contribute to further shaping the identity of the EU. It is even deemed "to broaden its normative scope and deepen its moral underpinning, as a statement of common European principles of just conduct between private parties". [33]

Even more, the CESL appears too well constructed going far beyond the value of a catalogue. To a higher degree as the cross-border commercial sales law CISG, it appears thoroughly constructed taking into account ratio, causes and remedies of sales contracts. Even more, in the view of comparative law, it contains an average international solution how to build a sales law suitable from the view of many legal orders. For Europe, it is an excellently elaborated example by integrating the modern principles of good contracting, fair competition and consumer protection into the body of – nationally different - traditional principles on the law of obligations.

There had been strong opposition and more is to be expected. The counter-arguments include cultural, economic, social justice, and systematic approaches,[34] and usually they are presented as technical arguments. Let us revise the most obvious examples within the frame of time given.[35]

There is the cultural argument, on expanding Europeanization of private law through directives since the 70ies of the last century. The tendency of unification allegedly does not harmonize with the cultural dimension of the law. The concepts of legal culture and their ingredients as there is language, values, legal principles, legal institutions, preferences of the members of a specific nation, are, of course not precise and their use differs. Some are inspired by concepts of postmodernism, cultural

[32] For European Law, cf. *Williams, A.,* The ethos of Europe: values, law and justice in the EU, Cambridge 2010. For private law, cf. H. Collins, The European civil code: the way forward, Cambridge 2008.
[33] Cf. for such opinion in detail *Hesselink* (Fn. 28), 342, 359 ff.
[34] Cf. *Caruso, D.,* The missing view of the cathedral: the private law paradigm of European legal integration, 3 European Law Journal (1997) 27; *Cravetto, Ch./Pasa, B.,* Reflections on the Proposal for a Regulation on a Common European Sales Law, CDCT Working Paper 7-2012/European Legal Culture 6, http://www.eulegalculture.eu/files/; *Kornet, N.,* The Common European Sales Law and the CISG – Complicating or Simplifying the Legal Environment? Maastricht Univ., Maastricht European Private Law Institute Working Paper No. 2012/4, http://papers.ssrn.com/sol3/papers.cfm? abstract_id=2012310; *Harvey C./ Schillig M.,* Consequences of an Ineffective Agreement to Use the Common European Sales Law, ERCL 2013, 143; *Cornu, G.,* Un code civil n'est pas un instrument communautaire, Dalloz 2002, 351; *Lequette, Y.,* Le Code européen est de Retour, Revue des Contrats 2011, 1028 ; *Huet, J.,* Le scandale de l'harmonisation totale, Revue des Contrats 2011, 1070.
[35] For a more thorough analysis cf: *Hesselink, M.W.,* The European Commission's Action Plan: Towards a More Coherent European Contract Law' 10 European Review of Private Law (2004), 397; *Hesselink,* How to opt into the Common European Sales Law? Brief comments on the Commission's proposal for a regulation, 18 European Review of Private Law (2012), 195; *Hesselink,* The Case for a common European Sales Law in an Age of Rising Nationalism (Fn. 28), ERCL 2012, 342 ff.; *Jansen/Zimmermann* (Fn. 29), OJLS Vol. 31, No. 4 (2011), pp. 625 ff.

anthropology, social sciences, or even legal thinking of the 19th century.[36] Their common theme is a focus on national legal cultures and nation. In France, moreover, quite some scholars have been particularly outspoken about the relationship between legal culture and the nation.[37] As outlined above, the groups of the cultural argument might be suitable against unification but must not be directed *per se* against harmonization.

Another set of counter-arguments addressed against the Europeanization appears economic in nature.[38] The CESL seen as a model of better law touches the theories on horizontal and vertical competition of regulators.[39] Horizontal regulatory competition means that several sets of rules are available for choice and the rule setters enter into competition with the problematic approach of strengthen or weaken the standards and the costs of the regulation in question. Under its conditions such procedure may possibly work. Vertical regulatory competition stresses the relationship between centralized and decentralized set of rules and the precondition of choice, a rarely tested case. The latter would apply to CESL which deems to combine the benefits of centralized and decentralized regulation. Consequently, this approach is contested by the fact that in the maximum only 10% of all contracts are cross-border cases. The advantages of this combined regulatory power at EU level are frustrated due to the mere minimal number of such transaction. Nevertheless, on the level of the Member States, the same set of rules could indeed be realized more effective to a higher number of cases.

For the reason mentioned above, I must skip the economic part, though, and shall omit the one or other good economic argument.[40] – One pseudo-economic argument

[36] A good example is named by *Legrand's* "Against a European civilcode" (1997). More indirectly, other scholars also have described legal culture as national. *Teubner,* e.g., criticizes the unfair terms directive for its reference to the concept of good faith, he, nevertheless, does so primarily with reference to national cultures. Others argue that the 'average consumer' of European law in the before mentioned directive does in fact not exist because in Europe there are different 'national consumer cultures', *Teubner, G.,* Legal irritants: good faith in British law or how unifying law ends up in new Divergences, Modern Law Review (1998) 23. More recent: *Fischer-Lescano, A./ Teubner, G.,* Regime-Kollisionen: Zur Fragmentierung des globalen Rechts, Frankfurt 2006.

[37] *Cornu,* (Fn. 34), *Dalloz 2002*, 351; *Lequette,* (Fn. 34), Revue des Contrats 2011, 1028; *Huet* (Fn. 34), Revue des Contrats 2011, 1070.

[38] *Roger van den Bergh* has addressed the European Commission's 2001 idea of European contract law with the argument that individuals have specific preferences concerning to private law of the country in which they live and that national legislators are best placed to respond to those preferences. However, available statistics show that income differs immensely within countries. Why assume that bureaucrats in Brussels would be more able to find out what the preferences are of the Portuguese than Portuguese legislators and judges could do? In other words, if the public choice argument against the Europeanization of private law is based on the principal-agent problem and the distance between the law maker and the citizen, then why not first object against the size of certain Member States? Would it not be much more rational to decide in Europe that all Member States must have an efficient size? Some countries would then be lumped together while others could be split into two or more new countries in order for them to reap the benefits of efficient rule making. For these ideas, cf. *van den Bergh, R.*, Forced Harmonization of Contract law in Europe: Not to be continued, in *Grundmann, S. / Stuyck, J.* (eds), An Academic Green Paper on European Contract Law (The Hague: Kluwer Law International, 2002) 249 ff. See also *Ogus, A.,* Competition between National Legal Systems: A Contribution of Economic Analysis to Comparative Law, 48 International and Comparative Law Quarterly (1999), 405 ff.; *Faure, M.,* Economic Analysis of Tort law and the European Civil Code, in: *Hartkamp, A. L.* et al (eds), Towards a European Civil Code, 4th ed. Kluwer Law International 2011, 977 ff., 985.

[39] *Grundmann* (Fn. 2), 226.

[40] Two further groups of economic arguments are, first, that competition between legal systems is better than unification and, secondly, local preferences can be better turned into law by local legislators. However, even if both claims are empirically sound, the question remains why one has to choose national private law. Both claims rather

should be named, however. Envisaging the different groups of pros and cons on CESL, some scholars claim with good cause that a kind of private law nationalism is on the rise.[41] The general attitude towards European private law today seems to be distinctly more skeptical. It is in this climate of increasing nationalist resistance against the further Europeanization of private law, and of more general doubts about Europe as a result of the EU's handling of the economic crisis, that the European Commission is proposing a regulation on CESL. The resistance appears understandable from a political perspective, it remains a point of view, though, must not further be discussed here.

There are other noteworthy causes of strong opposition against CESL. One is acknowledging the complexity of legal sources whether in an economic context or in respect of practical legal understanding.[42] Obviously, arguments on complexity and efficiency are convincing on the surface because the European market should not be hindered by many different and competing sets of legal rules.[43] However, such a decision is enforced daily by opting in or out on a secondary market for legal rules. Therefore, it must not be of our concern.

Last but not least, there are arguments against the CESL derived from principles of EU law, namely the constitutional principle of subsidiarity and proportionality in the light of limited competence of Europe. Indeed, the notion of creating a new European private law should not primarily be the work of legal scholars, but of politicians and parliaments.[44] Another view would purportedly lead to a lack of democratic

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seem to support arguments for sub-national private law. Values and ideologies differ from country to country: French contract law is based on French values and ideologies while English contract law expresses the English ideology, cf. *Micklitz, H.-W.,* Social Justice and access Justice in private law, in: *Micklitz* (ed), The many concepts of social justice in European private law (Cheltenham: Edward Elgar, 2011), 3 ff., 6 ff. These and other supposedly technical arguments against European private law argue that private law should be a matter for the national legislator only. In other words, these arguments are based on the idea that in Europe systems of private law should coincide with national borders. In historical experience of the last centuries, such has been clearly not the case. For an economic analysis of the CESL options, cf. *Ganuza, J. J./ Gomez, F.,* Optional Law for Firms and Consumers: An Economic Analysis of Opting into the Common European Sales Law (2012), http://www.cemfi.es/ftp/wp/1207.pdf; *Mak, Ch.,* In Defense of CESL, draft paper, Univ. of Chicago 2012, http://www.law.uchicago.edu/files/files/Mak%20paper.pdf.

[41] *Hesselink,* The Case for a common European Sales Law in an Age of Rising Nationalism (Fn. 28), ERCL 2012, 342 ff.

[42] *Jansen/Zimmermann* did employ the term "*neue Unübersichtlichkeit*" in order to address the phenomenon, cf. *Jansen, N. /Zimmermann* (Fn. 35), OJLS, Vol. 31, No. 4 (2011), pp. 625 ff. Practitioners and professional associations are more decisive in their opinion, as it has been the German Association for machine and plant construction (VDMA). The association claims for business to business contracts that CISG was valid in 23 Member States of the EU and that that industry and trade as far as export oriented would have relied on. In their view of the industry it gives no advantage to provide a second legal body for cross-border commercial contracting, cf. http://www.bundestag.de/bundestag/ausschuesse17/a06/anhoerungen/archiv/16_Europaeisches_Kaufrecht/04_Stellungnahmen/Stellungnahme_Steinberger.pdf

[43] Furthermore, in professional cross-border trade, standard forms related to UN CISG law are of practical importance. Thus, another body of legal rules would not help here but it would confuse. In the view of VDMA, it would make more sense to increase the freedom of contract by limiting nation law on contract clause control. Also other professional association as the German "Bundesrechtsanwaltskammer" vote for literal integration of CISG instead of providing another set of legal rules, cf. VDMA, Ibid.

[44] Referring on some works like the joint "commentary" on CESL by *Schulze [ed.],* Common European Sales Law (CESL), Baden-Baden 2012, it appears somehow difficult how comment a mere proposal. Nevertheless, being after consumption in an enlightened position, the argument that enactment should be performed and explained by the institutions designated appears even more convincing.

legitimacy[45]. Present efforts to Europeanize private law will not constitute rules binding in the same constitutional way as at the national level since CESL is an optional contract code. There are other good examples of optional instruments in the field of uniform law are the Uniform Commercial Code (UCC), the Convention on the International Sale of Goods (CISG), or other well-drafted collections of rules in international business law. Their unconstitutional character does not negate quality and efficiency of these instruments. In consequence, it is questionable whether (European) private law always needs to be legitimized in a democratic way.[46] Private law as the result of a long process of trial and error, of spontaneous development towards the standards a community prefers, is fairly independent from state institutions. The arguments are well-known from the referred dispute on codification of private law during the first half of the 19th century.[47]

For the purposes of evaluating the value of CESL it suffices to acknowledge that the relationship between private law and democracy is not as straightforward as is sometimes assumed. Legitimacy of private law cannot only be established through the national democratic institutions, but also in other ways. The EU efforts for a European private law are given in the form of non-binding instruments. They need not to fulfill the same requirements as binding law. But also private law in the more traditional sense does not always have to be legitimized at the State level: the democratic functions of law can sometimes be provided by others outside the order of state powers. Instead, more fundamental problems of private law, as distributive matters of consumer protection, the protection of markets, the dimension of collective labor law, obviously should be controlled and decided by the parliaments.

6. Outlook

As stated more thoroughly one year ago at this honorable institution, I will continue praising the CESL proposal, whether it remains a proposal forever or not. In a distinct perspective of the development of legal cultures of Europe it may better to remain a proposal since unification of private law has been very much disputed even on the European continent. Harmonization would do it well enough for the sake of the European market.

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[45] *Smits, J.M.,* European Private Law and Democracy: a Misunderstood Relationship, in: *Faure, M./ Stephen, F. (eds.),* Essays in the Law and Economics of Regulation in Honour of Anthony Ogus, Antwerp-Oxford 2008, 49.

[46] Looked at in this way, private law is much more independent. Such an understanding of private law is more in line with how it has developed over the ages, providing this area of the law with its own rationality independent from any public aim. If private law is understood as kind of living organism than as a product of explicit design, it becomes clear why democratic input in this area of law may only have a limited impact. For a reference, cf. *Ackermann,* Public Supply of Optional Standardized Consumer Contracts … (2013) (Fn. 21), 50 CMLR 11 ff. See also from a very different perspective, *Wieacker* (Fn. 8), 390 - 399.

[47] "Kodifizierungsstreit", cf. *Wieacker,* ibid., refers to the academic conflict about codification between *Thibaut* and *Savigny*, where the term "organic development" of the law has played an important role on the side of *Savigny*. It is even not clear who succeeded. While the surface of the history of codification seems to point on the side of *Thibaud* by codifying a German civil code which went into force in 1900, some scholars believe that the way so-called pandect legal science and its idealist dogmatism has been incorporated and gives more ground to the organic-historical contribution of *Savigny* and *Puchta*.

Seen from a comparative approach instead,[48] the CESL proposal has a much more positive impact. One should imagine teaching students from another continent the law of obligations actually being valid on the common European market. This is a task like squaring the circle. Since other parts of the world do not exactly or not at all join the European notion of social market law, the situation appears similar as developed before. The troubles will multiply by getting on the point, taking into account 28 distinct systems of private legal order. Here, the proposal of the CESL unfolds its true practical and academic value because it integrates elements of modern European private law I was referring to as the "social element" into a rather technical notion of a model sales law. In a comparative view, as some critique claim, it might be the 29th system of consumer sales law in EU Europe. However, challenged by competition, it might be one of the best.

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[48] Cf. *Hesselink,* The Case for a common European Sales Law in an Age of Rising Nationalism (Fn. 28), ERCL 2012, 342 ff.; *Grundmann,* Costs and benefits … (2013) (Fn. 2), CMLR 50, 225 ff.; *Ackermann,* Public Supply of Optional Standardized Consumer Contracts … (2013) (Fn. 21), 50 CMLR 11 ff. More skeptical the *credo* of *Smits,* The Common European Sales Law (CESL) beyond Party Choice (Fn. 23).

«Portugal, Europe, and Globalization from the Perspective of Private Law – A Transatlantic View»

Patrick R. Hugg (University of Saint Louis)

I. Introduction

What a delight to be invited to the Celebration of the Centenary of the Law Faculty of the University of Lisbon. Congratulations to faculty, students, administration and alumni on such a significant achievement for the public good!

This law faculty is a special place for me because of the warm experiences I have enjoyed here with such a hospitable and generous faculty and so many wonderful students. It is also a special institution for other reasons. As we know, all universities are not created equal. After twenty-seven years in legal education, and travelling to many law faculties around the world, my experience tells me that what I see here reflects an authentic university, that is, a stimulating center for intellectual inquiry and growth – unlike some modern educational pretenders that sell diplomas and serve essentially as centers for social life and sports.

I know many of your students and I know your faculty, and its pedigree – these walls are alive with intellectual energy. This is my third weeklong visit to teach here, and I had the pleasure as well to participate in the excellent conference here celebrating the 25th anniversary of Portugal joining the EU and of the law faculty's European Institute.

Of course, I am always delighted to be in historic and beautiful Portugal, especially in these important days. I am also pleased to visit again my good friends and colleagues, Prof. Vasco Pereiro da Silva, Prof. Eduardo Paz Ferreira, Prof. Nuno Cunha Rodrigues, & the Dean, Prof. Eduard Vera-Cruz Pinto, as well as my distinguished colleagues here on the panel this morning, Prof. Bernd Oppermann and Prof. Luis de Lima Pinheiro.

Finally, I must acknowledge clearly that my perception of events relevant to our topic today cannot be as full as those of the people who live and reside here and elsewhere in Europe, and I ask your indulgence because I recognize the inadequacies of an outsider's view.[1] Being an American, I modestly hope to offer a prospective general view of these topics from the other side of the Atlantic.

I will propose today one unremarkable endorsement of a central theme of our panel discussion on which all three panelists agree, and then I will offer an unusual – potentially remarkable -- recommendation emitting from our topic.

[1] An outsider's view may however, on occasion, offer constructive fresh impressions and viewpoints.

II. The Topic and the Forum

The four elements of our topic intersect vividly here in Lisbon, and they conduce a multi-level discussion of evolving and dramatically relevant issues of our times. The topic is all the more stimulating because the situs of our panel today is in a conflicted Portugal. I read this morning's news report of the Portuguese Constitutional Court's ruling yesterday striking down certain legislative attempts at economic reform.[2] Concentrically, Portugal is an important part of a conflicted Europe, at a time when diverse forces arising from globalization are exerting their magic as well as their mischief. We are surrounded by widespread and varied discussions about the phenomena, positive and negative, of ubiquitous cross-border movements, interdependent economies, and powerful stresses erupting, caused by the often imperfect functioning of these forces. This presents a conflicted context in which we view our specific sub-topic, the perspective of Private Law. Keep in mind that the U.S. experience, with fifty different private law systems in one country, mixing in one Civil Law based mixed jurisdiction in Louisiana, is not unlike the European experience.

Our multi-element topic can be more easily approached if we start with a basic understanding of its components: Globalization, Portugal, Europe, viewed from the perspective of Private Law. As we would happily expect, the sum or combination of the parts creates a nuanced and more interesting inquiry for us.

We all understand globalization -- this dynamic force has been functioning on steroids in recent decades,[3] as we have witnessed advanced stages of technological and commercial globalization. Now, new configurations of production, built on complex cross-border supply chains, give us a dynamic environment of intercontinental production and trade. All developed economies and especially European Union Member States "find themselves . . . exposed to the explosive pressures of economic interdependence that tacitly permeate national borders."[4]

Likewise, we all understand -- in varying degrees – Portugal and its present stance in globalized transition and catharsis. And as a part of that, we all understand Europe – with its integration and market successes and its not so successful divisions about fiscal and monetary policy in unusual times of economic struggle. The issues pertinent to our discussion ask if there should be more or less political and/or market integration and legal harmonization or will the EU morph into smaller blocs – largely out of self-defense or self-interest? Public discourse today includes topics that were considered taboo in earlier, more virtuous days of nascent European integration. Racism, xenophobia, nationalism are fellow the travelers with economic hard times. This context

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[2] *Constitutional Court rules against Labour Code*, PORTUGAL NEWS ONLINE, Sept. 26, 2013 ,http://theportugalnews.com/news/constitutional-court-rules-against-labour-code/29518.

[3] Though marginally restrained after 2008 by the global financial meltdown.

[4] Jürgen Habermas, *Democracy, Solidarity, and the European Crisis*, lecture delivered on 26 April 2013 at Leuven University, KU Leuven, at p. 6.

leads us to the evolution and accommodation of law to these intersecting components, and then of course specifically to the perspective and evolution of private law.

Historians tell us that a central chapter in the history of globalization started here in Lisbon in the Age of Global Discovery centuries ago, termed proto-globalization, from 1600-1800.[5] And we can marvel at how far that has come. Certainly today Portugal participates in the strongest cross-border trading bloc in the world, the European Union. You don't need a lecture from me about the advance in international trade relations, not to mention in fundamental legal science, that the EU exemplifies.

I am cautious to herald the EU excessively here because the news media vividly report the difficulties of economic recession, punitive austerity programs, national leaders struggling to govern effectively, pressure from outside forces, and the Portuguese people struggling with human needs. This has been, in Prime Minister Pedro Passos Coelho's words, "a truly terrible year."[6] Philip Stevens of the Financial Times criticized one European leader last week for "forcing unparalleled austerity on partners at the price of depression and record unemployment . . . not the way to build a cohesive EU."[7] European cooperation is further hindered in these times of rising nationalism fostering criticism of Brussels austerity commands and excessive rule making. Many people agree that, in fair measure, the IMF and the EU Commission economic experts got the austerity puzzle wrong.[8]

Those austerity-based requirements imposed on Portugal have worsened the economic plight of the people in Portugal, making for onerous times. Wage contraction is causing many Portuguese to emigrate.[9] "More than 25 percent of Portugal's youth (16-25) are unemployed and are looking for jobs outside the country."[10] Psychological

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[5] Proto-globalization or 'early modern globalization' is a period of the history of globalization roughly spanning the years between 1600 and 1800. First introduced by historians A. G. Hopkins and Christopher Bayly, the term describes the phase of increasing trade links and cultural exchange that characterized the period immediately preceding the advent of so-called 'modern globalization' in the 19th century. A.G. HOPKINS, GLOBALIZATION IN WORLD HISTORY (W.W. Norton, 2002).

[6] *Portugal's Economic Recovery Between Bailouts*, ECONOMIST (Aug. 31, 2013), *available at* http://www.economist.com/news/europe/21584346-few-crumbs-cheer-count-welcome-good-news-between-bail-outs.

[7] Philip Stevens, *The Audacity of Stealth – Merkel's Plan for the Euro*, FIN.TIMES, Sept. 12, 2013.

[8] Many suggest that the common currency itself was born with "birth defects." See e.g.: Sven Böll, Christian Reiermann, Michael Sauga, Klaus Wiegrefe, *Operation Self-Deceit: New Documents Shine Light on Euro Birth defects*, SPIEGEL ONLINE INTERNATIONAL, May 8, 2012, at http://www.spiegel.de/international/europe/euro-struggles-can-be-traced-to-origins-of-common-currency-a-831842.html.

[9] We are seeing similar but far less severe or dramatic market failures in the US. The job market for law graduates in the U.S. has collapsed in large measure, and the traditional relationship among law schools, law firms, and students has already radically changed – driven by the market. Too many law graduates compete for too few quality jobs, at reduced salaries, as the surplus of supply has driven law firm profits down. Technological innovation further increases availability of legal advices and services. Naturally this impacts legal education, which reacts with its own market-driven upheaval – some schools will close, some downsize, all economize. Certain leaders foresee a fundamental market shift leading to a dramatic transformation in legal education and the law profession in the U.S..

[10] *What Portugal Thinks About Globalization*, GLOBALIZATION.ORG, http://globalization.org/what-portugal-thinks-about-globalization .

and political onslaught and overload pervade the atmosphere, as everyone tries to comprehend the next month, the next year - with high anxiety. Democratic legitimacy is called into question.[11] As well, observers note considerable damage to the social fabric in many countries,[12] including Portugal. One University of Lisbon law student wrote in a survey this week:[13]

> "[T]he worst thing for me is the generalized sadness and fear in people's lives. No one knows what will happen tomorrow but everybody expects the worst. The second worse thing is the fact that more and more young people are going abroad, searching for jobs and a better life. We all grew up in a great place but now staying is not an option, if you want a job, a house, and to start a family."

The austerity measures have also caused increased unemployment for all age groups, as well as salary reductions, tax surcharges, loan foreclosures, and loss of confidence in the financial markets, yielding an overall uncertainty about the future – an unpleasant and sometimes tragic result.

On the other hand, Portugal has demonstrated its character in taking its promises of economic reform more seriously that some other nations, and government measures have produced "one of the sharpest reductions in fiscal and external imbalances in the OECD since 2009."[14] And indicators suggest that things are looking better, as Portugal is "surpassing expectations . . . [having registered] the strongest second-quarter growth in the European Union after ten quarters of contraction."[15] [Subsequent to the conference, while this paper was being edited for publication, reports praised Portugal for "keeping its . . . bailout program on track . . . amid signs the economy is performing better than expected, with the government lifting its growth forecast for 2014 and

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[11] See e.g., Fritz W. Scharpf, MONETARY UNION, FISCAL CRISIS AND THE PREEMPTION OF DEMOCRACY, London School of Economics and Political Science, LEQS Paper No. 36/2011, p. iii.

[12] See e.g., Dr. Kalypso Nicolaïdis Professor of International Relations at the University of Oxford, http://businessthinker.com/pragmatism-idealism-and-european-demoicracy/#sthash.FTpAyjle.dpuf:., observing that the Eurozone missteps have inflicted much damage to Europe's social fabric, citing Jürgen Habermas's cogent analysis explaining the loss of solidarity caused by unequal economic impacts of the Eurozone crisis, cited supra, n. 4.

[13] Sixty-three students participated in the one-week Erasmus course, Introduction to the Law of the United States, conducted at the University of Lisbon Law Faculty, which I had the honor to teach. To better understand the students' experiences with their legal system, and to relate to them, I requested the students offer their impressions of how the current austerity-related measures had affected them.

[14] *Portugal, Reforming the State to Promote Growth*, 2013 OECD, "Better Policies" Series, pp. 3-4 (includes general report on the successes of the Portuguese government's economic reforms).

[15] *Portugal's Economic Recovery Between Bailouts*, ECONOMIST, Aug. 31, 2013, *available at* http://www.economist.com/news/europe/21584346-few-crumbs-cheer-count-welcome-good-news-between-bail-outs.

projecting less of contraction of the economy this year."] [16] Add a six percent increase in exports, expanding tourism, a rise in auto sales and small decline in unemployment, [17] and one can be more hopeful.

Portugal's leadership has been prudent in other ways. "The country has invested significantly in education and training, especially in engineering and manufacturing," advancing toward its comparative advantages.[18] And Portuguese leadership in renewable energies is noteworthy, boasting innovative wave farms off the coast of Oporto. That is impressive.

These experiences, both positive and negative, can have an impact on the evolution and harmonization of laws – whether commercial and banking laws or other forms of private law.

III. The Forces Accommodating

Finally, we turn to the accommodation or evolution of these forces and the perspective of private law. We all understand how globalization encourages goods, services, capital, and people to cross legal borders, notably through commerce. We understand how such open markets produce increased efficiencies, facilitating production and consumption, all yielding a vital source of economic growth. We all favor economic growth.

People and businesses involved in this commerce - consumers, producers, sellers, and trade facilitators (bankers, insurers, shippers, etc.) - disfavor disorder. They prefer a reasonable measure of certainty in allocating resources – in foreseeing contract and other legal obligations, potential liability, and forms and costs of enforcement. They prefer clarity regarding applicable law, easy (efficient) ascertainment of relevant information, and minimal conflicts among laws. Diversity in formal legal systems or in judicial administrations in different countries suggests costly unpredictability, and this hinders the willingness of people to engage in contracts across borders.[19]

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[16] Peter Wise, *Troika Rejects Portugal Plea To Relax Deficit Targets*, FIN. TIMES, Oct. 4, 2013, at http://www.ft.com/intl/cms/s/0/5f58ae12-2cda-11e3-a0ac-00144feab7de.html?siteedition=intl#axzz2gm6Hyx00.

[17] *Portugal's Economic Recovery Between Bailouts*, ECONOMIST, Aug. 31, 2013, *available at* http://www.economist.com/news/europe/21584346-few-crumbs-cheer-count-welcome-good-news-between-bail-outs.

[18] "More than the bailout agreements for Greece or Ireland, Portugal's adjustment program is focused on economic reforms to foster export-led growth. Something is definitely changing" says Cristina Casalinho, chief economist at Banco BPI. "Exports are the only [growth] engine we have and there are encouraging signs that exporters are consistently making inroads into new markets outside Europe." Peter Wise, *Export Growth Boosts Portugal's Prospects*, FIN. TIMES, May 28, 2013, http://www.ft.com/intl/cms/s/0/b9f6334c-a8c1-11e1-a747-00144feabdc0.html#axzz2jAAUG7jE.

[19] Helmut Wagner, *Is Harmonization of Legal Rules an Appropriate Target? Lesson from the global financial crisis,* EUR J. LAW ECON 541 at 542, (2012) , Springer Science + Business Media, LLC, (add to that higher costs in exchanging goods and difficulty in making warranty claims. *Id.* at 546.

Allow me to emphasize the revolutionary commercial times we are in. It can be startling how fast and effortless commerce moves in the US market today. I respectfully suggest that it is no exaggeration to use that over-used term – revolutionary.

A recent personal experience startled me. My son told me about *Amazon Prime*, and I gave it a try. I needed a certain acid-enriched fertilizer to prepare the soil for my wife's gardenias. I drove to two different local mega-stores, in two different parts of the city, searched the aisles, with precious little help from store employees, only to find that this product was stocked only in Springtime. Upon returning home, I jumped onto the computer and easily found the specific product on Amazon's super site, and it had the special Prime designation – which means you get free two-day shipping. I placed the electronic order at around two p.m. that afternoon. I was astonished the very next afternoon at one-thirty p.m., as I was working in my study, to hear the doorbell ring. It was the FedEx deliveryman at my door in fewer than twenty-four hours. I now use this service with equal parts of efficiency and confidence. That truly is market efficiency, in my view.

When we assimilate this, and then compound it with the tech evolution of ever more advanced electronic products (such as my new high-powered yet lightweight Nexus 7 tablet), we have to worry about truly comprehending the new marketplace and 21st century skills.

In such a hypermarket context, economists hail the efficiency of harmonized laws. Our "Law & Economics" colleagues insist that people want to reduce costs, and therefore laws evolve over time favoring rules that reduce costs and thus increase efficiency. On the other hand, many national legal systems and local laws provide differing rules to solve similar problems and are often different in form. Traders would prefer for these to be harmonized. Economists trumpet the call for "efficiency gains." Some progress has been made in Europe, for instance with the Council Regulation 44/2001 on jurisdiction and the recognition and enforcement in civil and commercial matters, and the Rome I and II Regulations (2007, 2008).[20] Thus, the overarching theme that would seem to arise from these impulses is surely whether commercial law and Private Law ought to be led to adapt – change – undergo reform – to accommodate the demands of globalization as they affect Portugal and Europe.

Noted scholar Prof. Ewoud Hondius wrote earlier this year that "Europe is buzzing with excitement. . . ." as the proposed harmonization of European sales law is being "hotly debated."[21] Economics Professor Helmut Wagner wrote recently that: "The process of globalization in general and European integration in particular has, over

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Macroeconomic gains, in addition to microeconomic gains among parties, could also suggest harmonization. *Id.* at 547).

[20] Council Regulation 44/2001, Jurisdiction and The Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2000 O.J. (L 012) (EC). Council Regulation 593/2008, The Law Applicable to Contractual Obligations (Rome I), 2008 O.J. (L 177) (EC). Council Regulation 864/2007, The Law Applicable to Non-Contractual Obligations (Rome II), 2007 O.J. (L 199) (EC).

[21] Ewoud Hondius, 21 EUR. REV. PRIV. LAW 1.at 1, (2013).

the past decades, led to a broad wave of consent for more cross-border harmonization of law.[22] Another professor, Prof. Hugh Collins, suggests that the issue of more private law harmonization (in the form of a European civil code) "hovers over debates about the future of private law in Europe."[23] He recites the "fascinating intellectual ventures" represented by the various projects producing common European principles and rules, and then asks, "whether Europe really needs to go on this journey towards harmonization of private law."[24] We all acknowledge and appreciate the superlative scholarship here in Europe that has flourished, and both widely and deeply analyzed aspects of the harmonization of private law. The journals are replete with rich discussions.

These works explain the natural resistance toward too much harmonization: there is a pervasive cultural and natural human tendency not to abandon older, known comfortable customs and laws – especially regarding private law. Because private law reflects a national legal culture, as well as regional, local, and religious identities,[25] it comprises more than just legal rules, and it cannot be harmonized by the simple imposition of rules from Brussels or Vienna. One scholar described private law as "harmonization resistant."[26] A friend, who is also an eminent EU judge emeritus and scholar, described last week the "significant concern on both sides of the common law/civil law divide about the damage being done by "Europe" to their cherished legal systems."[27]

Family, succession, and property law, especially, are steeped in generations of tradition and religion, and can be especially personal. This law is often a reflection of personal culture as well as national cultural. Across Europe, the advance of the modern nation state brought codification of private law in national civil codes – and thus a deep connection between the nation and its laws and people. Understandably, diminishing this form of national culture has met resistance. The common currency is so logical, yet we understand people's affection for one's traditional escudo, lira, or franc, and their desire to rule their own economies.

How much do we really value our individual, cultural and historical preferences? In the U.S., some people criticize aspects of California private law, in particular family law, because it seems so liberal. In Louisiana, the general population tends to be very conservative and many are conservatively religious. Several European countries, such as Portugal, share this tradition and thus most Portuguese people would understand.

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[22] Helmut Wagner, *supra*, n. 19.
[23] Hugh Collins, *Why Europe Needs a Civil Code*, 21 EUR. REV. PRIVATE LAW, 907,at 907 and *et seq.*(2013).
[24] *Id.*.
[25] Jan Smits & Martijn Hesselink, *Harmonising Private Law in Europe: A Mission Impossible, Hill: Innovating Justice*, Hill: Innovating Justice Blog, http://www.hiil.org/project/harmonising-private-law-in-europe-a-mission-impossible.
[26] Jan M. Smits, *The Harmonization of Private Law in Europe: Some Insights from Evolutionary Theory*, Georgia J. of Int; & Comp Law 31, (2002) pp. 79-99. In fact, all of comparative law has been termed superficial because it fails to embrace the societal and cultural phenomena of the compared countries. *Id*.
[27] Source on file with author.

Some Louisianans would never favor California' seeming permissiveness. Though the general population of our local urbane city of New Orleans may be even more liberal than California. So these issues can be inherently complex.

Surely we leaders in the legal academy must be prudent and encourage these discussions about change, and we should allow time for reasonable people to adapt gradually to today's realities, as well as time for people to discern the occasional overlapping relationship of cultural virtue and cultural vanity. Sometime older notions and traditions are more valuable as reflections of our particular identity in the past, rather than normative recommendations for best practices today or in the future. Unfortunately, some of our old cultural and traditional beliefs and practices proved unconstructive; we all know of some unhelpful past notions about group superiority, prejudice and the like. Caution and thoughtfulness are in order as we advise a way forward.

Another factor to consider is the broader-based resistance to globalization's negative effects, in particular to the income redistribution effects of markets adjusting to the forces of globalization. Often, unfortunate negative market dynamics (lost jobs and income adjustments) disproportionately affect lower-skilled and lower-income workers. Further, we have read media accounts of worker exploitation in developing countries and some human rights abuses, and we have all seen the images of global climate change and other environmental damage excesses in some developing countries. Huge multinational oil corporations and pharmaceutical companies do not always act benevolently in the quest for profits.[28] So the backlash to globalization is widespread and well publicized.

There are other practical downsides to harmonizing laws in response to globalization. Harmonized legal rules may be inefficient when they are implemented differently, breached, and enforced differently. "The more uniform and the more complicated rules are, the more costly they tend to be for individual countries, and the interests of the individual countries can be quite different – suggesting not so quick and accurate an implementation." [29] Costs are incurred in establishing new systems of administration and enforcement, as well the concomitant transition costs from the redistribution effects brought on by the new rules, including the ever-present waste of rent-seeking lobbying.[30] Expenditures for interest group lobbying in favor of preferred versions of new laws could be high.

But we are conflicted: harmonization is smart and should be promoted, we agree, yet we question whether it is so beneficial as to justify its costs. Opponents claim that the market does very well, and all the fears about balkanized legal regimes are unwarranted. We observe that the EU has been reasonably successful in harmonizing

[28] We in Louisiana continue to recover from and repair the massive damage from the British Petroleum, Deepwater Horizon oil blow out in the Gulf of Mexico in 2010.
[29] Wagner, at 559.
[30] Wagner, at 550-51.

many national laws among its Member States. But it, various institutes, think tanks, and NGOs have failed to garner sufficient support for their initiatives promoting the harmonization of private law, notably family law, contract law, property law, and generally commercial law. The rush by some to "harmonize, parallelize, and Eurofy,"[31] things has not universally been accepted.

Prof. Hondius, again in the lead editorial in a most recent volume of the European Review of Private Law describes various private law codification projects in progress in the central and eastern European states, noting progress in some and resistance in others.[32] He cites Prof. Reinhard Zimmerman's article last year[33], in which he examines the conditions in which a codification of private law at the European level might occur, and he concludes that those conditions are not favorable at this time. He observes the lack of a common language, common court, common narrative: The arguments in favor are weak and there is no affinity with a European identity." He notes that, "even [Common European Sales Law (CESL)] raises the question of whether or not such harmonization is feasible." [34]

In that same volume Prof. Hugh Collins restates his thesis promoting a European civil code consisting of principles (rather than detailed rules) to foster in Europe a transnational civil society that will then provide "the foundations for greater political solidarity between the peoples of Europe and thereby legitimate more effective transnational institutions of governance."[35]

So far, the EU legislation aimed at harmonizing national private law is fragmentary and inconsistent, though some business leaders and scholars have called for general principles for many years. Since 1980, these groups have taken the lead in preparing a basis for general future legislation in the area of contract law. On this basis, the European Commission finally published a proposal in 2011 for an optional instrument on a Common European Sales Law (CESL), and this law is now under deliberation.[36] All of us on the panel today agree and endorse the concept of the CESL, yet we also recognize that it is not likely to become law soon.

So we have seen multiple perspectives as our topics today converge, and we must face the harmonization issue squarely. Globalization encourages legal harmonization, which in turn does improve commercial efficiency, fostering economic growth. Should this harmonization advance, in the face of resistance from those who wish to protect tradition and cultural and national identity and the other factors mentioned previously?

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[31] This demonstrative expression is quoted from correspondence of the noted EU lawyer and scholar, Mr. Ian S. Forrester, QC, to the author (on file with author).
[32] Ewoud Hondius, *Recodification of Private Law: Central and Eastern Europe Sets the Tone,* 21 EUR. REV. PRIV. LAW at 897, *et seq.*
[33] Reinhard Zimmerman, *Codification—The Civilian Experience Reconsidered on the Eve of a Common European Sales Law*, 8 EUR. REV. OF CONT. LAW 367 (2012).
[34] *Id.*
[35] Hugh Collins, *Why Europe Needs a Civil Code*, 21 Eur. Rev. Private Law 907, (2013).
[36] *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law*, COM (2011) 1165 final, 1166 final (Oct. 11, 2011).

Or can we avoid the question because it is becoming moot? One highly regarded EU lawyer and scholar, Ian S. Forrester, QC, has suggested that perhaps the harmonization of national private law has been overtaken by the forces of globalization.[37] Perhaps, the present efforts to harmonize law in Europe will be pushed aside by stronger and broader harmonization efforts on a more international level?

The distinguished U.S. Professor Henry Gabriel agrees:

> "[I]t does not look like the current projects in European contract/sales law are going to replace either the CISG or the UNIDROIT Principles. The last dozen years or so have been taken up by several European projects- the Principles of European Sales Law, the Draft Common Frame of reference and now the Common European Sales Law**.** None of these have gotten sufficient traction, and mostly because the law is already global these day- not regional. (emphasis added)[38]

Prof. Gabriel continues: "The new ELI/UNIDROIT Principles on Transnational Civil Procedure are going to be based on the American Law Institute Principles, which doesn't presage a harmonized European Civil Procedure code."[39]

IV. Path Forward

Recognizing the foregoing complex and conflicting dimensions of our discussion, I offer a recommendation for a path forward. It represents my working hypothesis today, and I solicit your views to help me think it through.

In this day of anti-globalization, anti-austerity, anti-EU pressures – harmonization of laws should be promoted softly with prudence and patience , and especially for the reform or revision of private law. In fostering this harmonization, we can be perceptive and strategic. We must acknowledge that private law comes in different forms, though the whole category is special. While private law can be cultural and local, some areas may need to be afforded more autonomy than others. For the laws of inheritance, marriage and adoption,[40] divorce law, yes, we must acknowledge the obvious reflections

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[37] Correspondence on file with author.

[38] Prof. Henry Gabriel, Elon University Law School, Member of the Governing Council of UNIDROIT; Life Member of the Uniform Law Commission.

[39] See: Matthais Weller, *From Transnational Principles to European Rules of Civil Procedure—1st Exploratory Workshop*, The ELI-UNIDROIT Project, Conflict of Laws.net (Oct. 22, 2013), http://conflictoflaws.net/2013/the-eli-unidroit-project-from-transnational-principles-to-european-rules-of-civil-procedure-1st-exploratory-workshop/.

[40] Portugal legalized same-sex marriage in 2010, though many in this traditionally Catholic country protested. *Thousands Protest Portugal's Upcoming Gay Marriage Law*, ON TOP MAGAZINE, Feb. 21, 2010http://ontopmag.com/article.aspx?id=5304&MediaType=1&Category=24, and same sex couples obtained a limited right to adoption only this year. *Gay couples in Portugal win limited adoption rights*, REUTERS, May 17, 2013, at http://www.reuters.com/assets/print?aid=USBRE94G0KV20130517.

of history, cultural and religious traditions. Such recognition is not destructive of our central goals; these areas of law do not really impact cross-border commerce so much.

The law of successions offers a good example of an area ideal for the exercise of prudence. Witness the UK House of Lords conclusion regarding European Commission efforts in the area:

> "We welcome the fact that the Commission has not proposed [harmonization] of the substantive law of succession. This would have been too ambitious given the complexity and cultural importance of property law and the law of succession in each Member State. We support the Commission's underlying, and more limited, objective of prescribing which state's law of succession is to apply to the whole of a deceased person's estate; but only to the extent of determining who is entitled to inherit what property. Our caution arises from the difficulty faced by the EU in legislating in this field at all, and the lack of empirical evidence of how far the complex legal position presently impairs free movement."
>
> "We strongly agree with the Commission that it is not appropriate to [harmonize] the *substantive law of succession across the Member States. We also agree that this is an area for a step by step approach to legislation.***"** (emphasis added)[41]

I am suggesting that such a step-by-step approach is surely the most effective and prudent way to proceed in the more sensitive areas of private law. Correspondingly, sectors of private law that are less personal and cultural could be more easily harmonized to the benefits discussed above, though with caution, as the glacial progress of the CESL demonstrates. Business law is surely an area for harmonization in some more deliberate form – money, reliability, good faith, and such rules should be led toward move efficiency. So, the best way forward is to nurture and encourage, in these areas, the gradual evolution toward economic benefit. We may well remember that every EU Treaty has emphasized the economic opportunities of harmonization; this is a language that most citizens understand and favor, and even more so in this period of economic crisis. The single market in Europe is far from complete, especially in services, the largest share of the EU's economic output. Hence this could be fertile ground for economic growth and action, if advanced prudently.

A form of this patient course would be to nurture the adaptation of the substance of existing rules, maintaining national forms where feasible.[42] Some would insist that "[h]armonization cannot be ordered from above, but must come by conviction and

[41] European Union Committee, THE EU'S REGULATION ON SUCCESSION (Report with Evidence), 2009-10, H.L. 75, at 5, 39 (U.K.).
[42] Smits, *supra*, at 9.

socialization, which takes time."[43] Exogenous pressures on today's trading system will have their effect. To those urging stronger harmonization intervention, I would recommend a "second-best," less confrontational method: aiming for basic common rules and allow flexibility to adapt the existing rules may be more effective.

There should, however, be no misunderstanding of my message. This slower, evolving, guided discovery strategy should not be passive. We need adaptive behavior and strategic intelligence. If leaders do not influence the forces at play here for and against better laws, no one knows what will happen. In volatile times, inadvertent interests may prevail and the better course of reform may become disadvantaged, even reversed. I believe that the present economic and mental torpor cannot last forever, and that the subtle yet steady and surefooted leadership can provide a way forward.

We do know the inevitable rule: Evolve with the changing world or suffer decline.[44] Only by being attentive and adapting to the changing competitive environment can businesses, cities, nations or groups of nations prosper in the long term. This presents a challenge for us all today, and more relevant to this conference, Europe and Portugal.

V. Harmonization Through Expanded Trade

This constitutes my potentially remarkable reflection from across the Atlantic for our panel today: We know that Portugal has focused on economic reforms to foster export-led growth.[45] Allow me to suggest adaptation to the market and globalization pressures today that would stimulate economic growth in Portugal and elsewhere, and as a spillover, indirectly lead to a measure of gradual harmonization of commercial law. I recommend considering building economic growth in Portugal (and beyond) by expanding dimensions of your vaunted internal market via the proposed Transatlantic Trade and Investment Partnership (TTIP). When I think of international trade here, I think of the Volkswagen plant near Lisbon, exporting so many VW Scirocco coupes to China.[46]

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[43] Wagner, *supra*, at 562.

[44] From the physicist Stephen Hawking: "Intelligence is the ability to adapt to change.", to the philosopher Eric Fromm: "In times of change, learners inherit the earth." Hawking at http://whoisstephenhawking.com/65/2013/05/21/intelligence-is-the-ability-to-adapt-to-change-stephen-hawking-2/ , and Fromm at <http://infed.org/thinkers/fromm.htm>.

[45] *Portugal beats recession with export-led growth*, AGENCE FRANCE PRESSE, Aug. 14, 2013.

[46] The Volkswagen plant near Lisbon is Portugal's second largest exporter, and it has expanded sales outside Europe from 19 per cent of the total in 2010 to 32 per cent in the first three months of this year. China is now the biggest single market for its Scirocco coupé. Portuguese exports to China grew 76 per cent in 2011. "A very significant part of our success can be attributed to Portuguese factors," says António de Melo Pires, AutoEuropa's executive director. "The country has invested significantly in education and training, especially in engineering and manufacturing. The plant, which purchases 60 per cent of its components from Portuguese suppliers, accounted for 1.4 per cent of Portugal's gross domestic product last year and 4.6 per cent of exports. Vehicles and auto components have made the biggest contribution to the recent acceleration in export growth, a sign of the increasing weight of technology in

Many economists and leading trade voices herald the benefits of a new powerful free trade area, combining the EU and the U.S., which together comprise nearly half of the globe's economic output.[47] The TTIP can help overall economic growth, as well as foster incremental harmonization of private law.

The proposed TTIP offers enticing potential benefits. These are not my estimates, but the expectations and aspirations of EU and US trade leaders who enthusiastically promote this agreement. The European Commission estimates "that every year an average European household would gain €545, as our economy would be boosted by 0.5% of GDP, or €120 billion annually, once fully implemented."[48] The U.S Congressional Research Service has also articulated the proposal and its advantages.[49] First, "the TTIP can be used as a vehicle for shaping the global rules-based trading system. The US and the EU could use commitments reached in the TTIP to advance multilateral trade liberalization, set globally-relevant rules and standards, and address challenges associated with the growing role of China and other rising economic powers (REPs) in the global economy."[50] Second, these negotiations seek new or expanded commitments in areas such as regulatory coherence and "21st century" issues, including state-owned enterprises—issues either not discussed or only modestly discussed in prior FTAs.[51] (subsequent references to the same document omitted). Better regulatory compatibility would necessarily also yield more efficient economies of scale. Third, the TTIP could allow the EU and the US to advance rules-based trade liberalization in the absence of progress in the presently stalled Doha Round. The TTIP could have direct implications for the multilateral trading system because it is likely that additional countries could join in the regime later. Trade promoters hope to use the TTIP to present common approaches for the development of relevant rules and standards in future multilateral trade negotiations. The TTIP could also develop U.S. and EU cooperation in establishing a more harmonized trading system to accommodate the growing role of developing countries in the international economy.

Portuguese goods." says Luís Saramago, marketing director, Renova, the country's leading producer of tissue and other paper goods. Wise, *supra*, at note 16.

[47] See e.g. The EU-U.S. Transatlantic Trade and Investment Partnership, Council on Foreign Relations, May 21, 2013, (speech by EU Trade Commissioner Karel De Gucht: the proposed FTA "represent[ing] half of the world's economic output . . . . would have considerable benefits . . . . predict[ing] that it could be as much as half of a percent of GDP for both sides. But it's also undeniable that it would have considerable consequences for the wider multilateral trading system . . . ." and his U.S. counterpart, in Remarks by United States Trade Representative Michael Froman at the Transatlantic Trade and Investment Partnership First Round Opening Plenary, July 8, 2013: "In the TTIP, we have the opportunity to accomplish something very significant for our economies, for our relationship, and for the global trading system as a whole. We have the opportunity to spur growth and to generate significant increases in the already substantial number of jobs supported by transatlantic trade and investment.").

[48] *In focus, The Transatlantic Trade and Investment Partnership, the biggest trade deal in the world*, European Commission, at: http://ec.europa.eu/trade/policy/in-focus/ttip/#benefits.

[49] Much of the following is set forth in the U.S.'s Congressional Research Service's *Proposed Transatlantic Trade and Investment Partnership (TTIP): In Brief*, Shayerah Ilias Akhtar and Vivian C. Jones, July 23, 2013, CRS 7-5700, R43158.

[50] *Id.* at 1.

[51] *Id., passim*.

It is conceivable that some U.S.-EU consensus on agriculture and market access could help awaken the dormant Doha Round. I must add that pressures are mounting in the U.S. to require clearer labeling for GMO products, and I personally would favor a more European approach to food standards. I trust what I eat in the U.S., but I savor the quality of what I eat here in Europe.

Fourth, the TTIP has the potential to be largest FTA ever negotiated by the US or the EU, in terms of the combined economic size, population, and investment covered. The economic gains could be huge. For example, according to one economic estimate, the increased welfare gains from a tariff-only agreement accrued by the European Union could be as much as $3 billion, and by the United States as much as $4.5 billion.[52] Dynamic welfare gains from such a deal could be higher (e.g., when taking into account factors such as the administrative costs of tariffs that accrue due to intra-firm trade between foreign affiliates), estimated by the study to be $58 billion-$86 billion for the European Union and $59 billion-$82 billion for the United States. A September article in World Finance projected that the annual gains from a fully realized TTIP are $160 billion for the EU and $128 billion for the US.[53] British Prime Minister David Cameron predicts two million new jobs.[54] And a non-inflationary boost to growth in a weak global economy would be particularly timely.

Possible ways forward in the regulatory arena include mutual recognition agreements in which officials on each side agree to accept products or services from the other side based on a "tested once – accepted everywhere" criterion.[55] We have reached mutual recognition agreements on testing and certification requirements for multiple sectors, such as telecom equipment, recreational craft, and medical devices – and in 2011 agreement on regulation of civil aviation safety came into effect.[56] There is no reason why a BMW made in Munich according to European safety standards should not be equally as safe in the U.S.!

This is an often-cited example of opportunity to reduce costs and build economic growth:

> "Even though similar cars are sold in both markets, there are widely different transatlantic standards and testing requirements for many parts, including wiper blades, headlights, light beams, and seat belts. According to one U.S. trade association, a U.S.-based producer of light trucks found that a popular U.S. model the manufacturer wanted to sell in Europe required 100 unique parts, an additional $42 million in design and development costs, incremental testing of 33 vehicle systems,

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[52] *Id.*
[53] Michael J. Boskin, *Transatlantic Trade Goes Global*, WORLD FINANCE, September 12, 2013, http://www.worldfinance.com/columnists/transatlantic-trade-goes-global.
[54] *CRS Report, supra*, note 49.
[55] *Id.* (In current trade terms, "tested/certified once – accepted everywhere." See e.g. http://www.oecd.org/tad/ntm/43864339.pdf).
[56] United States Mission to the European Union, U.S.-EU Civil Aviation Safety Agreement (2011).

> and 133 additional people to develop—all without any performance differences in terms of safety or emissions. EU manufacturers face similar issues in reverse when selling an EU-designed model in the United States. In hearings held by the USTR and the USITC, industry stakeholders pointed to similar regulatory issues and costs in many other industries, including specialty toys, apparel, and footwear."[57]

There is another, non-economic, but important dimension: The TTIP's successful conclusion could strengthen the United States' and EU's commitment to one another in general as partners in the international community.[58] Some see this as important, especially considering the Obama Administration's "rebalancing" or "pivot" eastward toward the Asia-Pacific region and the damaging leaked information about U.S. intelligence gathering in Europe.[59]

Finally and specifically relevant to our panel, could such a Free Trade Agreement affect private law? – Surely! The TTIP could have collateral benefits and consequences that include greater harmonization of commercial law. The question is how far and deep the agreement goes. If the coverage in both goods and services is ambitious, one would undoubtedly see a concerted effort inside the EU and US to harmonize rules to streamline the ability to take advantage of the agreement. At a minimum one would suspect that each Member State would try to make its market and businesses more attractive by making its domestic sales laws more navigable. One would also suspect a push by commercial centers in London, Vienna, and elsewhere to become the "go to" site for TTIP arbitration and dispute settlement. The agreement will likely give the parties the choice to use the WTO DSU or a regional panel like in NAFTA or CAFTA, with the latter being the only choice outside of domestic courts for investment disputes.

Allow me to add a final twist: Theoretically, the TTIP would radiate economic growth even further if the EU and the US further expanded the market to include Turkey (as Turkey is urging). We should take note that Turkey could get whipsawed by the TTIP because Turkey's Customs Union agreement with the EU requires that the goods of any third party with which the EU has an FTA can enter Turkey with zero tariff, while reciprocal treatment for Turkey's goods by the third party must be negotiated separately by Turkey – not fair at all).[60]

But wait! The synergy goes on. Mexico already has an FTA with the EU, and Canada is in the process of finalizing one.[61] At some point, NAFTA and TTIP will need to be harmonized. Meanwhile, the world's other countries – still accounting for more

[57] Shayerah Ilias Akhtar and Vivian C. Jones, Cong. Research Serv., R43158, Proposed Transatlantic Trade and Investment Partnership (TTIP): In Brief (2013).
[58] *Id*.
[59] *Id*.
[60] *See*: 96/142/EC: Decision No 1/95 of the EC-Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union, 1996 O.J. (L 035) 1.
[61] Boskin, *supra*, note 53..

than half of world GDP and the bulk of global trade and FDI – are wondering how the TTIP would affect each of them. One possibility, suggested by former US Trade Representative Carla Hills, is that a successful TTIP would be a major impetus for rekindling the moribund Doha Round of global free-trade talks.[62] The Uruguay Round received a similar boost soon after NAFTA was signed.[63] What an impact on economic growth that could be!

For us today, we must await what the future holds, as we exercise our academic leadership prudently and hopefully.

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[62] *Id*.
[63] *Id*.

«Portugal, Europe and Globalization in the Private Law Perspective»

Luís de Lima Pinheiro (University of Lisbon)

Introduction

As sociologists such as Anthony Giddens have pointed out, globalization is a multidimensional concept that is simultaneously economic, political, technological and cultural (1).

Economically, it means the increasing weight of the international trade, and especially of the international financial transactions, which together with the liberalization of this trade, boost national markets' integration into a world market (2).

From a technological point of view, one should stress not only the spread of modern production technologies (3), but also the development of new communication systems and media that range from radio and television to global networks such as the Internet.

These new communication systems have influenced cultural and political globalization by providing broad access to information and to cultural goods.

Therefore, the conditions have been met for the emergence of global values, including political values such as democracy and human dignity, which tend to prevail all over the world. In the political context, one should also mention increasing migration movements, which have lessened the importance of frontiers, and the aid that many industrialized countries have provided to developing countries.

Portugal has been a pioneer in the globalization process, since the first steps towards the movement of people and goods along world-wide routes were given by the Portuguese Discoveries in the 15th century.

And even though the leading role in economic globalization that began in the 19th century was played by other countries, Portugal today participates fully in all the dimensions of globalization. Its economy is highly internationalized, it has large emigration and immigration flows, it shares global political values, engages in intensive cultural exchanges and makes massive use of modern communication technologies.

Portugal has also been a member of the European Communities since 1986 and of the European Union since its creation (in 1993) (4).

The EU has established an internal market based on the freedoms of movement of goods, persons, services and capital, and has harmonized certain areas of the law in force in the Member States, in principle in so far as necessary for the proper functioning of the internal market.

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[1] - See namely Anthony GIDDENS – *Runaway World*, 1999, Ch. 1.
[2] - See namely Peter BEHRENS – "Die Bedeutung des Kollisionsrechts für die 'Globalisierung' der Wirtschaft", *in Aufbruch nach Europa. 75 Jahre Max-Planck-Institut für Privatrecht*, 381-397, Tübingen, 2001, 382-383.
[3] - Furthered by international transferences of technical knowledge.
[4] - The European Union is an association of States with some federal features which has not only an economic dimension but also a political one.

With the entry into force of the Treaty of Lisbon (in 2009), Article 3 paragraph 2 of the EU Treaty states that the Union "shall offer its citizens an area of freedom, security and justice without internal frontiers". I would like to stress that this paragraph precedes paragraph 3, which refers to the establishment of the internal market.

The Treaty on the Functioning of the EU contains a Title dedicated to this so-called "area of freedom, security and justice" (5). Judicial cooperation in civil matters is dealt with here (6), and is based on the principle of mutual recognition of judicial and extrajudicial decisions (7).

This systematization points to the autonomy of the "area of freedom, security and justice", including the judicial cooperation in civil matters, in relation to the internal market (8).

Furthermore, Article 6 of the EU Treaty assigns to the Charter of Fundamental Rights of the European Union the same legal value than the treaties (1) and provides for the accession of the Union to the European Convention for the Protection of Human Rights (2). Therefore, the EU Treaty provides for an extensive protection of fundamental rights and some of these fundamental rights concern or have an impact on Private Law.

Against this background, I will try to outline the impact of European integration and globalization on Private Law, the challenges that have arisen therefrom and the solutions for coping with them.

The subject matter is very broad, so I shall focus on the main or paradigmatic issues, without attempting to be exhaustive or provide answers for all the questions raised.

I will take into account in first line the Private Law in force in the Portuguese legal order, but also bear in mind that certain private relationships are also regulated by Transnational Law and Public International Law without the mediation of national legal orders.

1. Impact of European integration and globalization on private law

European integration and globalization have had an obvious impact on the object and sources of Portuguese Private Law.

The fundamental object of Private Law are private relationships. International relationships account for a growing proportion of private relationships (9). For instance, recent research has shown that 16% of marriages and 19% of divorces within the EU are international.

Portuguese Private Law has not only domestic sources, but also international and European sources. The impact of European integration and globalization is felt, in first place, in the process of international unification on a regional and worldwide scale. As this process is well-known my reference to it will be very brief.

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[5] - Title V of the Part Three.
[6] - In Chapter 3.
[7] - Article 81 (1).
[8] - See also ALEGRÍA BORRÁS – "Aspectos generales de la cooperación en matéria civil", *in La Cooperación en Materia Civil en La Unión Europea: Textos y Comentarios*, org. por Alegría Borrás, 25-46, Cizur Menor (Navarra), 2009, 31.
[9] - Due to the internationalization of the economy, migratory movements, the appearance of new States, regional integration processes and new information technologies.

Portugal has taken part in the process of international unification since its early beginnings. This process may have as object either the material law governing private relationships or Private International Law, namely choice-of-law rules, choice-of- jurisdiction rules and recognition of foreign judgments and awards.

Regarding material law, this process may lead to uniform law, which, being applicable both to domestic and international relationships, replaces domestic law, or to unified law, which, being applicable only to international relationships, coexists with domestic law.

This process can also be limited to a harmonization of laws, which lays down common fundamental rules or principles, leading only to an approximation of the national legal orders involved.

In the Portuguese legal order, international uniform law concerning negotiable instruments is in force (10), as is European uniform law regarding aerial carriage and maritime carriage of passengers (11).

The ratification or accession to international conventions containing material unified law has also been significant, albeit often too slow. Thus, Portugal is a contracting party to many conventions on international carriage, rights on ships and aircrafts, maritime law, intellectual property and wills, but not to any convention regarding the main sector of international trade: the international sale of goods. Nobody seems to know why Portugal has not yet ratified the Vienna Convention on the International Sale of Goods (1980).

International instruments of harmonization of laws, such as Model Laws, have played little role in Portuguese Private Law. One exception is the UNCITRAL Model Law on International Commercial Arbitration, which has exercised great influence in the Portuguese Arbitration Act of 2011.

European unification had a large impact on Portuguese Private Law. In effect, EU bodies have adopted regulations and, more often, directives in many fields of Private Law, namely as regards Company Law, Consumer Contract Law, electronic commerce, Insurance Law, Intellectual Property Law, Labor Law, product liability and Securities Law, in addition to the above-mentioned aerial carriage and maritime carriage of passengers (12).

Therefore, the impact of globalization on the sources of material Private Law in force in the Portuguese legal order is limited, while the impact of European integration is much more significant.

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[10] - Bills of exchange, cheques and promissory notes.

[11] - Reg. (EC) No 2027/97, of 9/10/97, amended by Reg. (EC) No 889/2002, de 13/5/2002, On Air Carrier Liability in the Event of Accidents; Reg. (EC) No 261/2004, of 11/2/2004, Establishing Common Rules on Compensation and Assistance to Passengers in the Event of Denied Boarding and of Cancellation or Long Delay of Flights and Repealing Reg. (EC) No 295/91; Reg. (EC) no 1107/2006, of 5/7/2006, Concerning the Rights of Disabled Persons and Persons with Reduced Mobility when Travelling by Air; Reg. (EC) No 392/2009, of 23/4/2009, On the Liability of Carriers of Passengers by Sea in the Event of Accidents; and Reg. (EU) No 1177/2010, de 24/11/ 2010, Concerning the Rights of Passengers when Travelling by Sea and Inland Waterway and Amending Regulation (EC) No 2006/2004.

[12] - See, with further references, Jürgen BASEDOW – "The Gradual Emergence of European Private Law", *in Essays Peter Nygh*, 1-18, The Hague, 2004, 11.

Nevertheless, material Private Law of international and European origin is fragmentary. It essentially deals with Patrimonial Law, and, in most cases, the differences between the systems of Member States in areas covered by EU law are not removed.

Some authors (13), who have been followed up to a certain point by EU bodies (14), have called for systematic unification of material Private Law through European legislation.

Until now these far reaching unification projects did not go ahead regarding material Private Law.

To a large extent, the unification efforts have been channeled into the drafting of "Principles of European Law" and the "Draft Common Frame of Reference" by scholars.

The "Principles of European Law" are systematized sets of rules drawn up by groups of experts on an essentially comparative basis, which, among other purposes, are designed to help the European legislator either in a systematic unification or in the adoption of limited legislative measures (15).

The "Common Frame of Reference" was initially designed for the formulation of clear definitions of legal concepts, fundamental principles and coherent models of contract law rules inspired by the European acquis or by the best solutions found in the legal orders of Member States (16). The Academic Draft of this Common Frame of Reference, published in 2009, is more ambitious both in the areas covered and in its purposes, including the evolution of the national legal orders in the direction of a Europeanization of Private Law (17).

In this context, reference shall also be made to the Commission's Proposal of a Regulation on a Common European Sales Law (of 2011), applicable by choice of the parties to cross-border contracts for the sale of goods, for the supply of digital content and for the provision of related services (Article 3).

The situation is quite different when it comes to Private International Law. This area has witnessed an overwhelming increase in international and European Union sources. Currently,

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[13] - See Hugh BEALE – "The 'Europeanisation' of Contract Law", *in Exploring the Boundaries of Contract*, org. Roger Halson, 23-47, Dartmouth et al., 1996; Ulrich DROBNIG – "Private Law in the European Union", *Forum Internationale* 22, 1996, 15 *et seq.*; contributions from CHRISTIAN VON BAR, DROBNIG, GUILHERME DE OLIVEIRA, PAMPLONA CORTE-REAL, GHESTIN and VINEY, *in Um Código Civil para a Europa*, Coimbra, 2002; Jürgen BASEDOW – "Vers un code européen des contrats", *in Estudos Isabel Magalhães Collaço*, 671-688, Coimbra, 2002; Id. – "The Gradual Emergence of European Private Law", *in Essays Peter Nygh*, 1-18, The Hague, 2004, 3 *et seq.*; and authors referred to by Julio GONZÁLEZ CAMPOS – "Diritto privato uniforme e Diritto internazionale privato", *in Diritto internazionale privato e diritto comunitario*, ed. by Paolo Picone, 33-64, Padua, 2004, 57 *et seq*.

[14] - For instance, in resolutions adopted in 1989 and 1994, the European Parliament commended the drafting of Common European Code of Private Law. Subsequently, a number of EU bodies have come out in favor of greater harmonization of private law, and especially of contract law – See GONZÁLEZ CAMPOS (fn. 13) 36 *et seq*.

[15] - See BASEDOW (fn. 13 [2004]) 16].

[16] - See Communication from the Commission to the European Parliament and the Council "European Contract Law and the revision of the acquis: the way forward" [COM(2004) 651 final. See further Klaus-Heiner LEHNE – "Auf dem Weg zu einem Europäischen Vertragsrecht", *ZeuP* 15 (2007) 1-4.

[17] - See CHRISTIAN VON BAR, Eric CLIVE e Hans SCHULTE-NÖLKE (eds.) – *Principles. Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). Oultine Edition*, Munich, 2009, 7 et seq.

the main sources of choice-of-law rules, choice-of-jurisdiction rules and recognition of judgements and awards rules in force in the Portuguese legal order are either European or international (18).

The unification of Private International Law in the EU is included in the judicial cooperation in civil matters and, therefore, is no more formally dependent on a necessity for the proper functioning of the internal market.

I turn now to the the impact of globalization on the regulation of private relationships at international and transnational levels without the mediation of national legal orders.

The time I have at my disposal does not allow for a precise picture of these developments. But I can not proceed with my presentation without saying a few words on this subject.

On the topic of the immediate regulation of private relationships by Public International Law, I shall limit myself to pointing out that private persons may, inter alia, be parties to arbitrations organized by international conventions and in some courts of international organizations and have access to certain international courts in the field of fundamental rights.

Special mention should be made of the arbitrations organized by the International Centre for the Settlement of Investment Disputes and of the European Court of Human Rights.

This development took place in the second half of the 20th century and amounts to a new dimension of globalization in law. In sum, it means that Public International Law became primarily applicable to some private relationships without the mediation of national legal orders (19).

Private relationships are regulated at a transnational level when Transnational Law is applicable by international commercial arbitral tribunals without the mediation of a national legal order.

By Transnational Law I mean those rules and principles, applicable to international business relationships, that are formed independently of the action of national and supranational bodies, i.e., the new lex mercatoria.

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[18] - In particular, the process of Europeanization of Private International was boosted by the entry into force of the Amsterdam Treaty in 1999, with a very extensive interpretation of the provisions regarding the legislative competence of the Community bodies in matters of Private International Law, and was reinforced by the Lisbon Treaty. Presently, according to Article 81 (2) of the Treaty on the Functioning of the European Union, the exercise of the competence in Private International Law and International Civil Procedure Law is no more formally dependent on a necessity for the proper functioning of the internal market. This is just one of the considerations which may be taken into account for that purpose. Therefore, it may be said that, in the EU, Private International Law tend to be common to nearly all Member States.

[19] - More limited, a similar development has occurred at the EU level, with the jurisdiction of the European Court of Justice to rule disputes arising from some private relationships (compensation for damage caused by the institutions or the agents of the Community and disputes pursuant to an "arbitration clause" contained in a contract concluded by or on behalf of the Community) – Articles 268 and 272 of the Treaty on the Functioning of the European Union. In these cases, private relationships are primarily governed by EU Law applied by a EU court. In other cases, it is not uncontested that the self-executing European Community Law has effect to private persons independently of the domestic law of the Member States.

Its sources are not only international commercial custom, custom based upon arbitral case law and rules adopted by private organizations of international trade to govern economic relationships between their members or in the framework of stock exchanges, but also international trade usages which bind the trade operators by virtue of those primary sources. Moreover, models of regulation such as the UNIDROIT Principles of International Commercial Contracts, which are not positive law, play a significant role in this context, since they are normally applied by the arbitrators when the parties refer to them and are also often applied when the parties made more general references to non-state rules and/or principles.

The positive rules and principles of this Transnational Law are fragmentary and so far have reached a stage of uneven development in the different sectors of international trade. In most sectors, the parties do not choose often the lex mercatoria, general principles or models of regulation to govern their contracts (20).

Transnationalization is, however, an important feature of the impact of globalization on Private Law, in connection with the importance of international commercial arbitration as the normal mode of resolution of disputes arising from international business relationships (21). Trade usages, for instance, play a significant role in arbitration awards, even where the parties or, in their omission, the arbitrators, have chosen a State law.

These phenomena are even the most interesting from a theoretical point of view, since they can be seen as the emergence of a global law, applied by international, supranational or transnational courts and tribunals, that extends or transcends International Law (22).

I conclude this point, remarking that I left aside the increasing influence of other national legal orders on the evolution of Portuguese Private Law, and the growing importance of Comparative Law associated with it, since it is my believe that in this respect the impact of globalization and Europeanization has been essentially a matter of degree.

II. Challenges resulting from the impact of European integration and globalization on Private Law

Regarding the challenges faced by Portuguese Private Law as a result of European integration and globalization, I would like to start with some general remarks before going into some salient topics.

The winner of the Nobel Prize for economics, Joseph Stiglitz, stressed that globalization itself is neither good nor bad.

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[20] - Cf. Feilx DASSER – "Mouse or Monster? Some Facts and Figures on the lex mercatoria", *in Globalisierung und Entstaatlichung des Rechts*, vol. II, ed by Reinhard Zimmermann, 129-158, Tübingen, 2008, 139.

[21] - With regards to the operation of the *lex mercatoria* in the international commercial arbitration, see Luís de LIMA PINHEIRO – *Direito Internacional Privado,* vol.I – *Direito de Conflitos/Parte Geral*, 2nd ed., Coimbra, 2008, § 6 E.

[22] - See Luís de LIMA PINHEIRO – *Contrato de Empreendimento Comum (Joint Venture) em Direito Internacional Privado*, Coimbra, 1998, § 18 D.

It can be a force for good, as witnessed by the globalization of democratic values, improvement in the standards of living of hundreds of millions of people and economic growth in countries that have found new export markets and welcomed foreign investment.

But globalization also has risks that were not properly addressed, having brought the loss of many jobs, the increase of social insecurity, the diminishing of democratic control over the economy and the erosion of cultural identities (23).

These risks should be addressed not only at the national level but also at the international level, requiring a global collective action.

One of the first issues to bear in mind is the fair balance between market liberalization and appropriate economic intervention and governance aimed at pursuing global public goods, such as security, economic stability, environmental protection, public health and the fight against poverty (24). This concerns mainly regulation by Public Law. Private Law, however, has also had to meet the challenges posed by globalization.

The main challenge is the appropriate regulation and dispute settlement of the growing number of international private relationships. But we have seen that globalization and Europeanization also affect domestic private relationships.

This raises the question: Is the unification of material private law the right solution for coping with the impact of globalization and European integration? Should this unification be universal or regional, namely European?

Specifically regarding international private relationships, what role should choice-of-law play? What adaptations do traditional choice-of-law systems require?

And what position should be taken regarding the internationalization (in the sense of Public International Law) and transnationalization of the law that is applicable to private relationships?

I will try to address these issues as succinctly as possible.

III. Solutions for coping with the challenges resulting from the impact of European integration and globalization on Private Law

As a preliminary remark, I share the view that a more gradual process of global integration could allow legal regimes, rather than being overwhelmed, to adapt and respond to the new challenges (25).

I also believe that the challenges that have arisen from globalization and European integration require a plurality of regulation modes rather than one single, all-purpose, solution.

Let's start with the unification of material Private Law.

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[23] - See *Globalization and Its Discontents*, London et al., 2002, 20 and 248.
[24] - Op. cit., 224 et seq. and 247.
[25] - See STIGLITZ (fn. 23) 247.

Global unification of Private Law on a worldwide scale, or even at the European level, not only seems hardly feasible but also doubtfully desirable.

With regard to common Private Law (which applies to both domestic and transnational relationships), the advantages of legal pluralism outweigh the disadvantages (26).In the first place, each country's legal system contains solutions that provide a possible response to the problems of legal regulation. The autonomy of these legal systems allows them to compete in solving these problems, and means that various possible solutions can be tried out, leading to gradual dissemination of the best solutions. In this sense, it is wholly legitimate to speak of competition between legal systems (27).

Secondly, the autonomy of the countries' legal systems allows them to adapt to local conditions of a social, economic, cultural and psychological nature, leading to solutions that are better suited to each country's reality.

Finally, legal pluralism respects the value systems of each national community. This is especially relevant in the fields of personal, family, and succession law.

The European Union is grounded on the respect of the culture, of the traditions and of the cultural identity of the Member States (§ 6 of the Preamble of the Treaty on the European Union and Articles 3(3)§ 4 and 4(2) of the same Treaty). Law is linked with culture and is part of national identity and, therefore, these values postulate the respect for the autonomy of the legal systems of the Member States and the legal pluralism inside the Union. This seems to be recognized by Article 67(1) of the Treaty on the Functioning of the European Union when stating that the" area of freedom, security and justice" respects "the different legal systems and traditions of the Member States".

European integration, even if it eventually leads to a federal State, does not necessarily require global unification of Private Law. The experiences of countries such as the United Kingdom, the USA and Canada clearly show that political unity and internal market are compatible with a plurality of legal systems (28).

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[26] - See the scathing criticisms directed at the idea of a European Civil Code made by Hein KÖTZ – "Rechtsvergleichung und gemeineuropäisches Privatrecht", *in Gemeinsames Privatrecht in der Europäischen Gemeinschaft*, ed. by Peter-Christian Müller-Graff, 149-162, 2nd ed., Baden-Baden, 1999, 149 *et seq.*, maintaining the stance taken in the previous edition (1993); and Pierre LEGRAND – "Sens et non-sens d'un code civil européen", *R. int. dr. comp.* 48 (1996) 779-812, 800 *et seq.* Jürgen BACKHAUS – "Integration, Harmonization, and Differentiation of Law within the European Context from an Economic Point of View", *in The Common Law of Europe and the Future of Legal Education*, ed, by. Bruno de WITTE and Caroline FORDER, 501-533, Deventer, 1992, 522 *et seq.* and 526, contends that the diversification of law can also be required by market dynamics. For an economic analysis of the advantages and disadvantages of regional unification, see Roger VAN DEN BERGH – "Private law in a globalizing world: economic criteria for choosing the optimal regulatory level in a multilevel government system", *in Globalization and Private Law. The Way Forward*, ed. by Michael Faure and André van der Walt, 57-95, Cheltenham, UK and Northampton, MA, USA, 2010, 59 et seq.

[27] - KÖTZ (fn. 26) 150 has already argued this, maintaining the stance taken in the previous edition (1993).

[28] - See Otto KAHN-FREUND – "Common Law and Civil Law – imaginary and real obstacles to assimilation", *in New Perspectives for a Common Law of Europe*, org. Mauro Cappelletti, 137-168, Leyden et al., 1978, 141 *et seq.*; Otto SANDROCK – "Die Europäischen Gemeinschaften und die Privatrechte ihrer Mitgliedstaaten: Einheit oder Vielfalt?", *Europäisches Wirtschafts- und Steuerrecht* (1994/1) 1-8, 6, with further examples; Hugh COLLINS – "European Private Law and the Cultural

The main drawbacks of legal pluralism are to be found in the field of international relationships (29). Here, the need to choose the applicable legal system and the more or less frequent applicability of foreign law raise difficulties and uncertainties. Moreover, there are often specificities that only a special law can take into account.

The need for unification of material law applicable to international relationships is especially felt in two cases.

First, in the area of contracts, where the differences between legal systems add to transaction costs, since it is often necessary to obtain information over foreign legal systems (30).

Second, regarding relationships that arise in connection with global communication networks, namely the Internet, or relationships involving many States, where problems of applicability of the rules of several countries or of regulatory gaps are frequent (31).

In principle, States should unify the material law applicable to international relationships through international conventions. These conventions should be universally applicable, since the regulatory issues and objectives at stake in transnational situations are the same in both intra- and extra-EU relationships (32).

In view of the difficulties of making progress towards unification on a global scale, there are grounds for unification of material law applicable to transnational relations at the EU level (33), namely with regard to contracts.

In any case, I believe that careful consideration should be given to whether this unification should be carried out through regulations or through more flexible instruments, such as model laws. I also believe that we should closely examine whether the common European Law should be mandatorily applicable or subject to the parties' choice, like the proposed Common European Sales Law.

In any case, a good unification process takes time and resources and is therefore more justified in the areas of international trade and of business to consumer transactions than in the areas of personal, family and succession law. In effect, the specificity of international

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Identity of States", *European Rev. of Private Law* 3 (1995) 353-365, 354 *et seq.*; Klaus SCHURIG – "Europäisches Zivilrecht: Vielfalt oder Einerlei?", *in FS Bernhard Großfeld*, Heidelberg, 1999, 1089-1111, 1097 *et seq.* and 1111, with further examples; António MENEZES CORDEIRO – *Da Modernização do Direito Civil*, vol. I, Coimbra, 2004, 139 *et seq.*, *maxime* 150. Nor should it be argued that in these countries the common law tradition assures a degree of homogeneity between different local systems unparalleled in Europe. Suffice it to recall that Scots Law, in the United Kingdom, the Louisiana system, in the US, and the Quebec system, in Canada, are hybrid systems not belonging to the common law family. Moreover, statute tends increasingly to form the main source of law in most of these countries, meaning that the importance of the common law tradition is waning.

[29] - See LIMA PINHEIRO (fn. 21) § 4 D.
[30] - See DROBNIG (n. 14) 17 *et seq.*, with further references.
[31] - See also Jürgen BASEDOW – "The effects of globalization on Private International Law", *in Legal Aspects of Globalization*, ed. by Jürgen BASEDOW and Toshiyuki KONO, 1-10, The Hague, London and Boston, 2000, 7.
[32] - See also DROBNIG (fn. 13) 20.
[33] - See also MOURA RAMOS – "Conclusões", *in Um Código Civil para a Europa*, 307-317, Coimbra, 2002, 312 *et seq*.

relationships is less significant in these areas, and they are more sensitive to legal-ethical values of each country.

Choice-of-law should remain not only as a last resort solution before the slow pace of material law unification, but also as the most appropriate response to those areas in which the divergences among legal systems arise out of different legal-ethical evaluations and, more in general, out of respect for each country's cultural identity (34).The choice-of-law rule, as far as it is unified or has a common content in the countries at stake, makes possible Private Law relationships which are internationally recognized and effective, based upon single national legal orders (35).

Since I ran short of time I cannot go into detail about the adaptations traditional choice-of-law systems should undergo in order to deal appropriately with the challenges of globalization and Europeanization.

I will just say that today Private International Law is much more important than before due to the increase of international relationships and the new problems concerning the scope of application of international and European material law instruments and their relations with domestic law of contracting or Member States (36).

In order to provide certainty, foreseeability and international uniformity in the regulation of international relationships, Private International Law should be internationally unified and, when unification is not feasible on a worldwide scale, it should be unified in the EU (37).

Internationalization and transnationalization should, in my opinion, be broadened and promoted.

Internationalization (in the sense of Public International Law) is appropriate to economic relationships between States or public agencies and nationals from other States, and between international organizations and private persons, which are connected with International Economic Law and cannot, without serious drawbacks, be submitted to a particular national law.

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[34] - For the view that the deepening of the community of peoples, which characterizes the globalization, should be furthered by the Choice of Law system rather than by international unification of substantive law, BEHRENS (fn. 2) 381 and 386 et seq.

[35] - Cf. BEHRENS (fn. 2) 388 and 397.

[36] - See also Marc FALLON - "Les conflits de lois et de juridictions dans un espace économique intégré. L'expérience de la Communauté Européenne", *RCADI* 253 (1995) 9-282, 213, and GONZÁLEZ CAMPOS (fn. 13) 63.

[37] - See Erik JAYME – "Identité culturelle et intégration: le droit international privé postmoderne", *RCADI* 251 (1995) 9-268, 90; Bernd VON HOFFMANN – "The Relevance of European Community Law", *in European Private International Law*, ed. by Bernd von Hoffmann, 19-37, Nijmegen, 1998, 36 et seq.; Hélène GAUDEMET-TALLON – "Quel droit international privé pour l'Union européenne?", *in International Conflict of Laws for the Third Millenium. Essays in Honor of Friedrich K. Juenger*, 317-338, Ardsley, New York, 2001, 332 et seq.; Dário MOURA VICENTE – "Um Código Civil para a Europa? Algumas reflexões", *in Direito Internacional Privado. Ensaios*, vol. I, Coimbra, 2002, 7-33, 13 et seq.; and Karl KREUZER – "Zu Stand und Perspektiven des Europäsichen Internationalen Privatrechts – Wie europäisch soll das Europäische Internationale Privatecht sein?", *RabelsZ.* 70 (2006) 1-88, 61 et seq.

It also suits the protection of human rights by providing an international level of control of compliance with these rights.

Transnational law not only enjoys the advantages of all internationally unified material law (38), but is also in conformity with the principle of subsidiarity that holds that national and supranational legal orders shall allow the autonomous regulation of international business relationships, limiting their intervention to the required to face the shortcomings of autonomous regulation in the pursuit of the legal order values (39).

Mandatory rules of international source, as well as some mandatory rules of supranational and national source, remain not only applicable by national courts regarding issues that cannot be subject to arbitration, but also by arbitrators according to criteria that may take into account all the values, policies and interests at stake. The regulation operated in the legal order of a State only ensures that the interests and policies of this State are honored. The regulation operated on a transnational level, if it doesn't ensure that the interests and policies of a given State are fully honored, allows for the taking into account of directives issued by the different States interested regarding the settlement of the case and, namely, of claims of applicability of mandatory norms that pursue public goals (40).

In light of the remarks made, I would like to conclude by pointing out that our law curricula must give due importance to those subjects that deal with globalization and European integration.

This includes Private Law subjects, and related Procedural Law subjects, such as Private International Law, International Civil Procedural Law, International Business Law, Comparative Law and Arbitration Law.

But all Private Law subjects are affected by these developments and require, to some degree, a global and a European perspectives.

With all the achievements we have realized and the wisdom we have gained over the last hundred years, the Law School of the University of Lisbon is in the best position to offer these perspectives.

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[38] - See Filip DE LY – "Emerging New Perspectives Regarding Lex Mercatoria in an Era of Increasing Globalization", *in FS Otto Sandrock*, 179-203, Heidelberg, 2000, 193-194.

[39] - Kurt SIEHR – "Vom universellen zum globalen IPR – Zur jüngsten Geschichte und Entwicklung des Internationalen Privatrechts", *in FS Erik Jayme*, vol. I, 873-886, Munich, 2004, 886, pleads for the liberalization of Private Law, not only in the area of Patrimonial Law, but also in the domain of Personal Law, namely in matters of name and family.

[40] - See Luís de LIMA PINHEIRO – *Arbitragem Transnacional. A Determinação do Estatuto da Arbitragem*, Coimbra, 2005, § 57.

Chapter II

Portugal, Europe, and the Globalization from the perspective of public law

Rainer Arnold (University of Regensburg)

«The internationalization of Constitutional Law» ►

Francisco Balaguer Callejón (University of Granada)

«Portugal, Europe and the Globalization from the perspective of Public Law» ►

Fausto de Quadros (University of Lisbon)

«Portugal, Europe and Legal Globalization» ►

Luís Pereira Coutinho (University of Lisbon)

«Report» ►

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«The internationalization of Constitutional Law»

Rainer Arnold (University of Regensburg)

It is great honour for me to participate in the celebration of the hundred years anniversary of the Law Faculty of the Lisbon State University. I congratulate very cordially the renowned Faculty which has essentially contributed to the development of law on the Portuguese, European and international level.

It is of high importance for me and I feel it a great honour to have the opportunity of working together, since long years, with some of its members, Prof. Jorge Miranda, Vasco Pereira da Silva and Fausto de Quadros.

In my short speech of today I want to present some reflections on a phenomenon which is of great importance in the context of globalization, namely the internationalization of constitutional law. This is a very complex matter so that I only can deal with some of the basic questions connected with this subject.

A Constitution is a basic legal order of the State. It organizes the society by establishing an institutional system and assures the freedoms of the individuals as members of the society by determining values, in particular by guaranteeing fundamental rights.

These functions of the Constitution, the institutional function and the value function, refer to the State; we can call them *internal functions*.

A Constitution has also *external functions* which determine the role of the State in the international community and determine, what is of highest importance in Europe, the relation of the State with the supranational community of the EU.

This second type of functions of the Constitution is the basis for the question of internationalization of constitutional law.

In this context, it has to be considered (1) what internationalization of constitutional law means, 2) in which forms and to which degree this phenomenon exists in the constitutional reality and (3) which impact it has on the State.

(1) First some reflections concerning the meaning of internationalization. We can distinguish an *external* and an *internal* aspect:

A) The *external* aspect refers mainly to the following questions: which relationship between international and State law is foreseen by the Constitution: a dualistic or a monistic system, transformation of international law into national law or direct reception of international law into the legal order of the State? Has international law primacy over national legislation or is it on the same normative level? This aspect includes also the question: Have the concepts of the Constitution with an original reference to *national* institutions and values to be extended to the *international* level?

B) The *internal* aspect of internationalization of constitutional law mainly refers to the questions: Do the legislator and judiciary when applying internal laws seek to harmonize international law with national law? Does the national Constitution require such harmonization? Especially: does the judge, in particular, the constitutional judge interpret the legislation, and even the Constitution in the light of international law, in favor of it?

To give brief answers to these questions:

A) The modern tendency in Europe (and in other parts of the world) is in favor of the monistic approach, introducing international treaties directly into the internal order and accepting primacy of international law over national legislation. When drafting new constitutions, as 20 years ago in Central, Eastern and South-Eastern Europe, this model has been chosen nearly by all the new democracies[1].

Even in traditional systems there are some attempts to relativize the dualistic perspective by either amending the Constitution (as in Italy in 2001[2]) or by interpreting the constitutional provisions referring to the introduction of international law such as Art. 59.2 German BL in a new way. This last approach is proposed by some authors[3] while the constitutional jurisprudence hesitates to reinterpret the mentioned provisions. However, jurisprudence develops *substitute instruments* which, at least in part, are functionally equivalent to the normatively established primacy of international over national law.

The main instrument to bridge the cleft between the consequences of the transformation concept and the requirements of internationalization is interpretation; normative dualism can be replaced, to a great extent, by *functional monism* effectuated by the interpretation of the Constitution in favor of international law. This instrument which has become highly important will be treated more in details under B.

Before addressing this point, it shall be noted that modern constitutions contain increasingly specific provisions on international and supranational law issues. Also this phenomenon can be seen as a sign of growing internationalization of constitutional law. Examples are manifold: references to the international law human rights protection, extradition of nationals to international criminal courts, the mechanisms of observance of decisions of international organizations, or, in the field of the EU, provisions for the adaptation of the internal institutional system to the supranational legal order, such as

[1] See Gennady M. Danilenko, Implementation of International Law in CIS States: Theory and Practice, EJIL 1999, 51-69, http://ejil.oxfordjournals.org/content/10/1/51.full.pdf

[2] See *Gazzetta Ufficiale* n. 248 del 24 ottobre 2001; see also Giuseppe Bianchi, L'efficacia dei trattati internazionali alla luce dell'art. 117, c. 1 della Costituzione, http://www.altalex.com/index.php?idnot=40084

[3] See e.g.Karl Josef Partsch, Berichte der Deutschen Gesellschaft für Völkerrecht, vol. 6 (1964); Dieter Rauschning, Bonner Kommentar zum Grundgesetz, undated no. 143, Dec.. 2009, Art. 59/ 144 – 153

particular "integration norms" (see article 23.1 of the German Basic Law (BL) or Article 88-1 of the French Constitution)[4].

Furthermore, existing constitutional provisions which originally referred to national law have been extended to international concepts. Significant examples can be the guarantee of the legal judge in German law (article 101.1 BL) which had been conceived for procedures before national courts and has now been enlarged in its protection also to supranational and international courts. In specific cases, the failure of the national Court to bring a preliminary question to the Court of Justice of the EU can be a violation of this originally national, now internationalized guarantee.[5] The same is true for reference to the Strasbourg European Court of Human Rights. If a German court fails to interpret the national fundamental rights in the light of the European Convention of Human Rights as understood by the Strasbourg Court, the *national* fundamental rights guarantee can be violated.[6]

Furthermore, to quote again the German constitutional situation, fundamental rights, which have been reserved to German citizens, such as the freedom of assembly and association (Arts. 8 and 9 BL), the professional freedom (Art. 12 BL) or the right of free movement within the German territory (Art. 11 BL), have been extended to EU citizens. A similar process of internationalization can be seen in the interpretation of article 19.3 BL. The Constitutional Court has enlarged the concept of this provision, which entitles legal persons of private law with German nationality to be holders of certain fundamental rights, to legal persons with whatever nationality within the European Union.[7]

These examples of the internationalization of constitutional law are drawn from the German constitutional order. However, they demonstrate a general, Europewide and even universal tendency that national constitutional law opens towards international law and does no longer restrict its effects exclusively or mainly to the internal order. Sovereignty based on "open statehood" opens also constitutional law.

B) Let us now refer to the *internal aspect* of the phenomenon of internationalization of constitutional law: this topic refers mainly to interpretation. While the formal reform of the Constitution is politically difficult, judges are able and even obliged to adapt the constitutional text to the fundamental social and cultural changes. The ongoing process of internationalization in politics, economics in nearly every branch of life has its reflections on the understanding of law. Sovereignty is relativized and opened by politics and economics, a fact which has its functional prolongation in the field of law, especially of constitutional law.

[4] See also Albi, Anneli (2005) ,Common Market Law Review, 42 (2). pp. 399-423.
[5] See FCC vol. 82, p. 159, 194 - 195; vol.126, p. 286, 315; vol. 128, p. 157, 187; vol. 129, p. 78, 106.
[6] http://www.bundesverfassungsgericht.de/entscheidungen/rs20041014_2bvr148104en.html/47.
[7] BVerfG, 1 BvR 1916/09 vom 19.7.2011, Absatz-Nr. (1 - 100), http://www.bverfg.de/entscheidungen/rs20110719_1bvr191609.html

Interpretation by judges cannot ignore this process. They do not create normative changes but have to express the finalities of the Constitution as they develop in the course of time. Interpretation means to communicate the will of the norm in the moment of the interpretation. This implies the necessity to take account of the changes of this will. When the Constitution is adopted, the constituent power declares its will not in a static, but in a dynamic way which is , to a certain extent, open as to its end. The character of this instrument is essentially determined by the idea of dynamism in order to be efficient and adequate as a basic regime for an unlimited time. Dynamism in interpretation is of primordial importance in the determination of values, that is in the field of fundamental rights.

The anthropocentric finality is basic for a modern democratic Constitution and therefore the protection of dignity, autonomy and liberty of the individual must be substantially and functionally efficient. This means that there cannot be any gap in the protection, this finality being considered to cover all the dangers, the newly appearing threats to the individual freedom included. It is the express or implicit task of the judges, in particular of the constitutional judges to complete the written text by interpretation, using the written rights and applying them to the new challenges. In any case, the concept of individual liberty is inherent to every fundamental rights catalogue if specifically expressed or not and, we could also say, inherent to every constitutional order, even to those rare documents which do not (or not to a satisfying extent) contain explicit fundamental rights. We can call this dimension of the anthropocentric finality of the Constitution the "necessity of substantive efficiency" of the fundamental rights protection.

This substantive aspect is completed by the dimension of "functional efficiency": fundamental rights had to be interpreted in a way that they are adequately functioning. This implies in particular the (written or unwritten) constitutional safeguard of the rights against excessive restriction by the legislator. The guarantee of the very essence of the fundamental rights as well as the principle of proportionality are of high importance for this.[8]

What is the result of this reflection for the interpretation regarding the international dimension of the constitutional development?

The dynamism in the interpretation of fundamental rights is the same in the field of international law. It can be said that the modern Constitution is particularly dynamic in developing values and in integrating the State increasingly into the international community. This process is intensified by the multiple universal coaction of politics, economics, technology progress, etc. The political and legal

[8] See R. Arnold, La multiplication des garanties et des juges dans la protection des droits fondamentaux : coexistence, cohérence et articulation entre les systèmes constitutionnels, internationaux et régionaux ? Évolution d'une décennie. Rapport allemand Aix-en-Provence, Table ronde internationale 2013

internationalization of former national concerns such as the protection of human rights has led to a multiplicity of international agreements in this matter.

The main impulse for the method of an internationalized interpretation results from the increasing embedment of the States in international obligations, in particular in the field of fundamental and human rights. The existence of international treaties gives a signal to the interpreters to respect the international obligation without regard of the formal mechanisms on the basis of which international treaties are introduced into the internal State order. The growing number of international agreements has influenced the interpreter's perspective and created the new paradigm of interpretation in favor of international law.

Interpretation can therefore be seen as an instrument to bridge the divergence between the external obligation binding the State as a whole and the internal normative rank of the international treaty within the State.[9] Normally an international treaty has a rank between ordinary legislation and Constitution, what is the solution in many countries, in some cases, as in particular in Germany, the transformation system makes the treaty internally to ordinary legislation. Interpretation makes the attempt to conform even the Constitution of the State to international law. This has far-reaching consequences, what will be demonstrated by the example of the German position.

For a long time, the German Federal Constitutional Court (FCC) has interpreted the Basic Law (BL), the German Constitution, without any consideration of international legal sources. Only in a very few cases the Court has referred to the European Convention of Human Rights, in particular by interpreting the general clause of rule of law as embodied by article 20 BL and 28.1 BL in the light of article 6.2 ECHR[10] and has insofar "constitutionalized" the Convention, which is, in its form, an international treaty, however in substance a sort of international constitutional law. It shall be underlined again that the Convention as an international treaty is transformed into German law by the Act of approval, according to article 59.2 BL. This transformation attributes, as already mentioned, only the rank of ordinary federal legislation to the treaty. The constitutionalization effect of the interpretation, as it is now largely practised by the Court, has its roots in this early (but exceptional) jurisprudence.

A landmark in the opening of the understanding towards a better recognition of international law within the internal order has been the 2004 Görgülu decision of the FCC[11]. In this decision, the Court confirmed the new understanding of the impact of international law on the national legal order by referring to the principle

[9] See R. Arnold, The external dimension of Rule of Law, Essays in Honor of Giuseppe de Vergottini, in prepration.
[10] FCC vol.35, 311, 320 ; 74, 358.
[11] Vol.111, 307; see also Rainer Arnold, La Cour constitutionnelle fédérale allemande et la Cour européenne des droits de l'homme, Révue internationale de droit comparé, 2005, 805 – 815.

of "open statehood", a concept which the Court had already developed in its former jurisprudence. This concept is now the basis for a step further: it serves for an even progressing constitutionalization of international treaties, specifically of treaties embodying human and fundamental rights. It serves in particular for functionally equating the international instrument of the most important influence on the German legal order, the ECHR, with the German constitutional order. This equation is not absolute but relative because the transformation concept does not admit to interpret internal law according to international treaty law if the national legal text is clear and not open for interpretation in favour of international law. Therefore a clear and unambiguous text of the internal law cannot be adapted to international law. This is the reason why the FCC underlines that the adaptation of the internal legal text to international treaty law can only be effectuated in accordance with the existing "methodological principles"[12]. In short, interpretation in favour of international law is not possible if the meaning of the national law is quite clearly determined and for this reason not able to be adapted by interpretation. however, it shall be noted that the interpretation of fundamental rights as laid down by the BL regularly have a broad wording and relatively open meaning so that they can easily be adapted to the ECHR. The problem of the right methodology appears more in ordinary legal texts which are more strict and detailed in their wordings than in constitutional provisions. Thus, the internationalization of constitutional law by interpretation does not be essentially hindered by methodology.

The foregoing reflections have focused on the German situation where international treaties, in particular the ECHR, are transformed into internal law and the get a rank inferior to the Constitution and equivalent to ordinary federal legislation. In countries with primacy of international treaties over legislation the judges resolve the problem not primarily by interpretation but by applying the treaty and not the national legislation.

The internationalization of constitutional law is even more significant if constitutional sanctions are connected with it. The example of the German constitutional jurisprudence is a striking importance to this respect.

The FCC has clearly pointed out that German judges violate the German Constitution, in particular the German fundamental rights, if they apply these rights without interpreting them in the light of the ECHR and give therefore less protection than the ECHR in the light of the Strasbourg jurisprudence gives. Their judgments could be brought before the Constitutional Court by individual complaint. The German Constitutional Court therefore is an institution helping to realize international law. The main argument of the German constitutional

[12] CCF http://www.bverfg.de/entscheidungen/rs20110504_2bvr236509.html/ 88 – 94.

jurisprudence in this respect is that Rule of Law requires the respect not only of national but also of international law.[13]

It can be stated that the approach to internationalize constitutional law by interpretation is a very flexible and highly efficient (maybe the most efficient) method. Of course, the FCC underlines the limits of its adapting interpretation, limits which are of importance in transformation systems as the German legal order, but it seems that in the field of fundamental rights which are normally formulated in general terms these interpretation limits are not of high effect.

We can also state that the constitutional mechanisms separating the national legal order from international law are progressively losing their functions. International law has an assimilating impact on internal law, notably on the constitutional level.

A specific form of internationalization of constitutional law takes place in the member States of the European Union. This specific form is characterized by three essential aspects: EU law is an autonomous legal order based on the transfer of national competences which has direct normative effect in the member States and enjoys primacy over their law. The transfer of national powers to the supranational level has "opened" State sovereignty, as the German FCC formulates[14], and has led to the consequence that both legal orders, the national and the supranational, have normative validity on the member of States' territories. Constitutional law is also subject to EU law primacy, at least in the perspective of the ECJ jurisprudence[15].

The impact of supranational law on the national Constitutions is of great importance. Constitutional law is functionally no longer the only "supreme law of the land"; it shares this position with all the primary as well as secondary EU law. Furthermore, a Constitution must not contradict the supranational legal order and has to be interpreted in favour of it. This interpretation rule is a parallel principle to the above-mentioned interpretation in favour of international law. Conflicts between the two legal orders can be diminished or even excluded by the application of this interpretation rule. It has already been mentioned that the national Constitution of a member State has been enriched by numerous specific provisions which have adapted the constitutional order to the supranational requirements.

The supranationalization of constitutional law is not unlimited. Statehood which finds its expression in the core elements of the Constitution must not be threatened by external law. This issue is of particular importance for the relationship of the EU and the

13 http://www.bundesverfassungsgericht.de/entscheidungen/rs20041014_2bvr148104en.html?Suchbegriff=G%F6rg%FCl%FC (English text)/63

14 FCC vol. 37, p. 271,280 (Solange I decision)

15 See ECJ 11/70, Rep. 1979, 1125

member States. The German FCC considers "constitutional identity" as the untouchable nucleus of the constitutional order and therefore of German statehood.[16] The Court refers, for defining this identity, to the so-called eternity clause of article 79.3 BL which excludes some basic structures of the BL, such as human dignity, federalism, democracy, Republic, rule of law, from a formal constitutional reform. In a similar way, the Constitutional Courts of other countries protect the identity of their Constitutions; only a few member States such as Poland and Lithuania refuse any impact of EU law on their own constitutional law[17]. However, it has also been mentioned that the supranational power itself is conscious of the importance to preserve the national constitutional orders. Therefore, article 4.2 EU Treaty guarantees explicitly the national identity of the member States which includes also the fundamental structures of the Constitutions.

It can be said that the inter- and supranationalization of national constitutional law is a necessary consequence of the progress in interstate relations which reflects the globalized coaction as a characteristic of the modern world. These phenomena relativize the traditional State-related perspective and are sign for a gradual substitution of the State as the traditional organization by multinational forms of cooperation.

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[16] http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html (English text, Lisbon Treaty Decision FCC)/ 235

[17] See R. Arnold, Verfassungsidentität und Europäische Integration. Die Perspektive der mittel- und osteuropäischen Verfassungsgerichte, in: Herbert Küpper (ed.), Von Kontinuität und Brüchen: Ostrecht im Wandel der Zeiten. Festschrift für Friedrich-Christian Schroeder zum 75. Geburtstag, , Frankfurt a.M. 2011, p.309 – 319.

«Portugal, Europe and the Globalization from the perspective of Public Law»

Francisco Balaguer Callejón (University of Granada)

Summary

1. Portugal and Europe in a globalized World.
2. Portugal in Europe. What can Europe do for Portugal in the context of globalization.
3. Portugal in Europe. What can Portugal do for Europe in the context of globalization.
4. Conclusions

1. Portugal and Europe in a globalized World.

The relation between Portugal, Europe and the Globalization from the perspective of Public Law, will be analysed in my address, taking into account the way in which Portugal needs Europe because of globalization and the way in which Portugal could contribute to Europe and to the European integration process in the context of globalization.

In despite of all the economic difficulties of the past years and the loss of democratic quality that Portugal (like Spain and other countries) has experienced Europe is not the problem (at least it is not the whole problem), it is the solution. In other words: Europe can be a part of the problem, but it is also the only possible solution. However, to be the solution, Europe needs changes in its form of integration. Changes that could mean the complete democratization of the European Union, the building of a European identity and the configuration of a political power with the necessary capacities to contend with globalization.

The contribution of Portugal to Europe in the context of globalization can be oriented in several fields. In the specific field of public law, Portugal's contribution to Europe has to do with the building of a constitutional identity for Europe and with the global position of Portugal's juridical community. A community with strong influence in countries that represent almost three hundred million people and incorporates an emergent power such as Brazil that will soon be the fifth world economy.

That position of Portugal in a globalized world also poses questions in relation with the global strategy of Europe. We have now this interesting Conference in Lisbon, the capital of a language that is the mother tongue of three hundred million people in the world. If we consider Spanish and Portuguese, two languages in which native speakers can readily understand one another, we are a community of almost eight hundred million people.

Portuguese language is a valuable asset for Europe and ought to be used in the future to improve the position of EU as a global actor. It is not only a matter of language but of culture and, in the specific field we are dealing with today, of juridical culture, an impressive heritage of Portugal that could contribute to expand and strengthen the cultural influence of EU in a globalized world.

Europe lacks a strategy in the field of languages and culture to take advantage of the potential that the cultural and linguistic projection of some European countries – such as Portugal- allows in different regions of the world. In the specific field of juridical heritage, that means a great influence in the configuration of political and constitutional systems as well as in the legal order of those countries.

In the following pages I will try to answer two questions relating to Portugal, Europe and the Globalization. The first have to do with what Europe can do for Portugal in the context of globalization, the second concerns what Portugal can do for Europe in the context of globalization. The first question is common to all the Member States of the European Union because all of them need Europe to cope with globalization. The second one is only shared by a reduced number of Member States: those that for historical reasons have a particular position in other continents and could contribute in spreading Europe's influence in the world.

2. Portugal in Europe. What can Europe do for Portugal in the context of globalization

Portugal shared with the other Member States of the EU a common destiny in the globalized world. No one of the 28 Member States could cope with the globalization by its own means. In the coming years the world will face significant changes in the distribution of global power. Small and medium-sized countries will need supranational integration to compete with the current and emerging global superpowers (USA, China and India) that will reach 50% of the gross world product[1]. The next country in the scale of the economic power will be Brazil, that will become the fourth global economy in the future, but Brazil will only have 25% of the GDP of United States (the third economic power at that time)[2].

Under these circumstances, Europe will have less and less relevance on a global

[1] Accordingly to the OECD Report "Looking to 2060: Long-Term Global Growth Prospects", OECD Economic Policy Papers, No. 03, November 2012, pp. 22-23, only China (28%) and India (18%) will reach almost the 50% o the global GDP in 2060. The combined GDP of these two countries will be larger than that of the entire OECD area (based on today's membership), while it currently amounts to only one-third of it. *Cf.* the Report, in: http://www.oecd-ilibrary.org/docserver/download/5k8zxpjsggf0.pdf?expires=1386003650&id=id&accname=guest&checksum=CFEB5442D378BD9E97AC8BABC5949896

[2] *Cf.* the Report, "The World in 2050. The accelerating shift of global economic power: challenges and opportunities" by PricewaterhouseCoopers updated January 2011, pp. 9, 13 & 18, in: http://www.pwc.com/gx/en/world-2050/the-accelerating-shift-of-global-economic-power.jhtml.

level if the process of supranational integration does not increase. Only an intensified politic and economic integration could give Europe an economic weight comparable to that of each of the three leading powers, China, India and the United States[3]. Even Germany, the number one European power will dropped to the eight or ninth position on the global scale[4].

Because of the concentration of global power in a few numbers of States, supranational integration is a natural response to globalisation. For the countries that do not integrate in supranational structures, access to natural resource markets could prove more difficult. For these countries, improving of their social and economic growth will be also be in danger in a context of a more and more competitive economy[5]. If EU does not advance in political integration, Member States could face a decline in their economic development and an increasing difficulty to implement social policies in the future.

We also have to take account of the fact that globalization has impelled the integration process in Europe from the beginning. Thanks to European integration the European countries have come together to face the challenges of globalization constituting an economic power with the capacity to establish limits for large multinational companies. Companies that cannot now have the margin of manoeuvre that could have been enjoyed in the national markets of the individual Member States. In this way, European integration has served, in a constitutional sense, as an instrument of control of global powers and of implementation of citizens' rights.

The recent development of the globalization process will pose new challenges to the EU and to the European countries beyond the control of multinational companies. If we consider the way in which the new world order is taking place, we can only avoid the need for supranational integration for a limited number of states. It is not the case of the European countries that do not have a sufficiently strong enough economic weight in order to act as actors in the adoption of decisions on a global level.

The position of Asia and particularly of China in the global distribution of power is also an important factor to consider for Europe. China will not only be the largest

[3] "The EU economy might be of broadly comparable scale to these Big 3 economies in 2050, but only if it acts as a single entity, which will always be challenging for a union of 27 member states. Individual EU member states will inevitably be much smaller than any of the Big 3 by 2050". "The World in 2050. The accelerating shift of global economic power: challenges and opportunities" p. 18.

Individual EU member states will inevitably be much smaller than any of the Big 3 by 2050".

[4] *Ibid*. pp.13 & 18.

[5] *Cf*. my work, "Federalismo e integração supranacional. As funções do Direito constitucional nos processos de integração supranacional no contexto da globalização", in Paulo Roberto Barbosa Ramos (Org.) *Constituição e federalismo no mundo globalizado*, EDUFMA, São Luis, 2011, pp. 24-47; See also Chapter 1, "El Derecho Constitucional de la integración supranacional" in Francisco Balaguer Callejón (Coordinador), Gregorio Cámara Villar, María Luisa Balaguer Callejón, José Antonio Montilla Martos, *Introducción al Derecho Constitucional*, 1st edition, Tecnos, Madrid, 2011, pp. 27 et seq.

economy in the word in the current decade. China will also acquire an economic dimension that will overtake that of the United States in a 57% by 2050[6] and will be almost the double by 2060[7]. China will have a huge power not only in terms of economic dimension but also demographic and territorial ones. The centre of gravity of the world will move towards Asia, instead of America and Europe.

That evolution has great importance from a constitutional perspective if we consider the Euro-American community of values that are not present in China where there is not currently a constitutional or democratic system. The defence and the implementation of democratic and constitutional values in the world is a further reason (and not of minor significance) for intensifying the integration process. Only a united Europe could effectively protect and promote human rights in the coming world. No one of the former European powers could do that in the future.

3. Portugal in Europe. What can Portugal do for Europe in the context of globalization

Professor Häberle has talked many times about the concept of the "European jurist", as a model[8]. If we apply this concept to Portugal's juridical community, we can use the concept of "Global jurist" in the sense of the projection of that community not only to Europe but also to the world.

As said, a community with strong influence in countries that represent almost three hundred million people and incorporate an emergent power such as Brazil that will be soon the fifth world economy and, in the coming years will reach the position of fourth economic power.

The global influence of the Portugal's juridical community is one of the most important assets that the European Union has to broadening its cultural influence in other countries and to consolidate a constitutional and public law heritage that is an important part of many constitutional systems in the world.

Moreover, in the field of the European matters, Portugal has always had a significant position with political contributions to European institutions and to European Law. This also applies to the building of a legal doctrine represented by a number of scholars that take an active part in the European public debate.

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[6] *Cf.* the Report "The World in 2050. The accelerating shift of global economic power: challenges and opportunities", cit. p.19.

[7] *Cf.* OECD Report "Looking to 2060: Long-Term Global Growth Prospects", OECD Economic Policy Papers, No. 03, November 2012, cit. p. 23. China will reach a 28% of GDP and USA will represent only a 16%.

[8] *Cf.*, for instance, Peter Häberle, "Europa como comunidad constitucional en desarrollo", *Revista de Derecho Constitucional Europeo,* nº 1, Enero-Junio de 2004, pp. 11-24. Available in Internet: http://www.ugr.es/~redce/ReDCE1/Europa%20como%20comunidad%20constitucional%20en%20desarrollo.htm.

The contribution of Portugal to the building of a European identity, from a juridical point of view is connected to the idea of a constitutional identity instead of a national identity what it is not possible for Europe in the context of the 21st century. The contribution of Portugal has to do with the cultural constitutional heritage of Portugal. The constitutional model of Portugal, with particular attention to fundamental rights and the contribution of the doctrine and the jurisprudence to the consolidation of a normative Constitution will be a part of the future European constitutional identity.

The weakness of the European identity is in part due to a genetic shaping of the process of integration based on the mediation by the Member States in a public sphere where European citizenship is practically absent. That means the reinforcement of national identity against Europe making it difficult to build a European identity. It lacks in Europe pluralist democracy with democratic alternatives instead of nationals ones. For that reason in the European sphere national identity is projected as an inherent part of the European integration process[9].

As a result of this model of integration, Europe has been charged with being responsible for all the unpopular policies implemented by the Member States. For this reason, the building of a European identity is hampered generating a tension between national interest and European interest that reinforce the national identity against the European one.

This situation has worsened its deficiencies because of the recent economic crisis. In some Member States such as Portugal, Italy, Greece and Spain the economic pressures have strongly reduced the value of pluralist democracy impeding democratic alternatives to the economic policies imposed by some other Member States through the European institutions[10]. Instead of a Europe united in the diversity we have now a Europe divided in the adversity with national interest in the forefront of the European politics.

In the national spheres of Member States, the image of Europe is decomposing because the pluralist democracy is not only absent in the European public space but also in the national one. This affects the entire constitutional system, weakening the normativity of the constitution and the fundamental rights. With a notable exception: the case of Portugal and its Constitutional Court, which has declared the unconstitutionality of some governmental policies reinforcing in that way the normativity of Portugal Constitution against the interpretation of the European requirements made by Portugal's government.

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[9] *Cf.* my "European Identity, Citizenship and the Model of Integration", in Citizenship and Solidarity in the European Union - from the Charter of Fundamental Rights to the crisis, the state of the art, PIE - Peter Lang SA - Éditions scientifiques internationales, Bruxelles, 2013.

[10] *Cf.* my work "El final de una época dorada. Una reflexión sobre la crisis económica y el declive del Derecho constitucional nacional", in Estudos em Homenagem ao Professor Doutor José Joaquim Gomes Canotilho, Coimbra Editora, Coimbra, 2012. Also my work "Crisi economica e crisi costituzionale in Europa", in Costituzione, globalizzazione e tradizione giuridica europea, a cura de Biagio Andò y Fausto Vecchio, CEDAM, Padova, 2012, and lately mi work "Crise économique et crise constitutionnelle en Europe", Constitutions, avril-juin 2013.

Regardless of the opinion one may have on the substance of this jurisprudence of the Portuguese Constitutional Court, its significance in order to restore the normativity of the national constitution that is currently in stand by in other European countries could not be denied. In this way Portugal makes an important contribution to constitutional European heritage and to the promotion of a constitutional identity beyond of the national identity.

That is also important from the point of view of the building of a European identity in the future. European identity could not be constructed as a national identity that substitutes that of the Member States. We do not have now the historical conditions, which allow the development of national identities in the past[11]. The building of an identity in Europe could be based on a constitutional identity not on a national European identity.

Conclusions

In conclusion, the relation between Portugal, Europe and the Globalization from the perspective of Public Law, is a bidirectional one: Portugal needs Europe because of the globalization and, at the same time, Portugal could also contribute to the European integration process in the context of globalization.

No one Member State of the EU can face globalization by its own means. Portugal, as other European countries, needs the European integration for having a voice and a role in a globalized world. But, at the same time, Portugal could contribute to the integration process for having a stronger Europe that could face globalization.

In the field of public law, Portugal's contribution to Europe has to do with the building of a constitutional identity for Europe and with the global position of the Portugal's juridical community. A community who have a strong influence in other countries of several continents, which share Portuguese language and culture.

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[11] *Cf*. Habermas, 'Geschichtsbewusstein und posttraditionale Identität', 1987, Spanish version by Manuel Jiménez Redondo, 'Conciencia histórica e identidad postradicional' in J. Habermas, *Identidades nacionales y postnacionales*, Tecnos, Madrid, 2007, pp. 83 et seq.

«Portugal, Europe and Legal Globalization»

Fausto de Quadros (University of Lisbon)

1. The meanings of globalization

According to a concept which is still in an embryonic phase in encyclopaedias, even in the legal and political encyclopaedias, the word 'globalisation' has multiple meanings[1] The first is that of the fast and generalised spread of telecommunications and technologies. Another, more economistic, definition is that of the growing interdependence of the States, as a result of increased movement of persons, goods, services and capital between them. A further, more political and legal meaning of "globalization", suggests the need to create a system which will regulate this interdependence, in such a way as to put it to work for peace and development, and, consequently, provide this system with a legal order. In this last sense the political science scholars talk about "*global governance*" sustained by a "*global legal space*". It seems yet too early to argue for a more or less integrated global political power, within the framework of globalisation, as it was proposed by Pope John XXIII in the Encyclica *Pacem in terris* or by Pope John Paul II, in the Encyclica *Centesimus Annus,* above all, after the United Nations, which could have taken on a role similar to this, particularly with regard to peace and security, has failed in this purpose, essentially because the organisation is obsolete and refuses to be reformed.

Globalisation began a long time ago. It is accurate to state that globalisation started with the Portuguese and Spanish discoveries. More recently we have begun to speak of it in the field of economics, with the creation of the World Trade Organisation (WTO) and the World Bank. Since then, the evolution of globalisation has been fast: the existence of a "*WTO constitution*" is now accepted, or, with this meaning, a "*World Trade Law*", which would incorporate the rules and values which regulate world trade.

In the last decades the concept of globalisation has spread to the political arena.

In fact, even if it is too early for us to have a "public authority", in the literal interpretation, at the world level – as said above -, there is already, however, globalisation which goes beyond economics and trade. Indeed, the end of the cold war and, particularly, the democratization of all States in Eastern Europe have made the launch of a New World Order (NWO) possible, based on "ethics" and "values", above

[1] See Sabino Cassese, *Lo spazio giuridico globale*, Bari, 2003. The author had previously written another book on a similar matter : *La crisi dello Stato*, Bari, 2002. On the globalisation in general, see also our article *Global Law, Plural Constitutionalism and Global Administrative Law*, in Javier Robalino-Orellana and Jaime Rodriguez-Arana Muñoz, Global Administrative Law – Towards a Lex Administrativa, London, Cameron May, 2010, p. 329; D. Held, *Democracy and the Global Order*, Oxford, 1967; B. Badie, *Un monde sans souveraineté*, Paris, 1999; O. Höffe, *Demokratie in Zeitalter der Globalisierung*, Munich, 1999; S. Gozi, *Il governo dell'Europa*, Bologna, 2000; Lier Ferreira Júnior, *Estado, globalização e integração regional*, Rio de Janeiro, 2003; G. Jáurequi, *La Democracia Planetaria*, Oviedo, 2000; M. Kaupps and P. Viotti, *The Global Philosophers: World Politics in Western Thought*, New York, 1992.

all via the strengthening of the universality of human rights and of the consequent expansion of the *ius cogens*. A well-known Professor at the Columbia Law School, LOUIS HENKIN[2] , tries, in the same manner, to find an "ethical substance" for what he calls the "post-national state", relying on KANT'S *perpetual peace*, revisited by HABERMAS, and calling for values in international relations.

2. Globalization, European Union and its member States. Plural constitutionalism: from national constitutionalism to global constitutionalism

With regard to the object of this discussion, globalisation raises two important issues.

The first of these is that the States, particularly those which are smaller in size – for this purpose this is the case of Portugal -, will have to prepare for their clash with globalisation. For this purpose, there is a close link between regional integration and globalisation. When we talk about regional integration in Europe we think about the European Union. In other words, the fact that regional integration, in our case the European Union, acts as an intermediate between globalisation and the Member States of the Union, seen as isolated states, allows it to soften the impact of globalisation on the States. The national identity of the states, which is expressly assured by the Treaties, in all its aspects, simply due to the interposition of regional integration, may be preserved in a world which is globalising. The whole legal order of the European Union will play an important role in this softening effect.

This explains why globalisation makes urgent that we deepen European integration, including legal integration.

The second observation lies in the fact that European integration provides a valuable contribution to globalisation. European Union gathers an array of values that build its cultural and civilizational foundations. They are synthetized in article 2 TEU and among them I would highlight the protection of fundamental rights. Today the European Union promotes a high level of fundamental rights, due to the Charter of Fundamental Rights and the jurisprudence of national Constitutional Courts. These values form the substance of European constitutionalism. There is already a material constitution of the European Union shaped also through these values. That is why we can correctly speak about the Constitutional Law of the European Union. But departing from here we need to go further and deeper, towards the Constitution of the Global Community, the so-called "*global constitutionalism*". It is located above European constitutionalism and benefits from it. It is formed by rules on world trade, coming from WTO, rules on international investment, provided by the World Bank and from

[2] *International Law: Politics and Values*, Dordrecht, 1995.

bilateral and multilateral investment treaties, rules on international monetary system, delivered by IMF, but also by rules on human rights that are progressing at the world level, as it is revealed by the increasing of international *ius cogens* law as a legal order of human rights at the world level. Within this modern International Law on Human Rights is included the new Law on the fight against the organized crime and terrorism. The biggest contribution of the European Union to this global community is exactly this one, it is to say, to provide it with the values of humanism and democracy that already shape the culture and civilization of the Union. Therefore above the European constitutionalism we find the *global constitutionalism*. By *global constitutionalism* we are referring to the formation of an array of values which gives an ethical and legal form to an embryonic material constitution of the "*global community*". Having arrived at the top of the pyramid we reach plural constitutionalism. Both of these notions have content. By "*plural constitutionalism*" we mean the total sum of the material constitution of the New World Order (NWO) (it is to say, the global community), the material constitution of the several integrated regional areas and the national constitutions. In the latter case, we may say that we find different levels of political power, organised in layers, expressed in the states, above them, in the regional spaces of integration (in our case, the European Union) and, on the top, in the global community. We are thus, as stated above, on the threshold of an era of *constitutionalism of scale* or *multilevel constitutionalism* at the world level. The European Union, for its part, is operating as an excellent laboratory for globalisation, which is inevitable and which is already in progress but which is intended to be based on the primacy of the human person, on the intransigent defence of democracy and freedom, and on the preservation of the political and cultural identity of the states, including respect for their constitutional traditions. We must put into the heart of the globalisation the primacy of the human being with his rights and his duties and not the markets, which sometimes exploit the human person [3]

It is not enough, though, to recognise the existence of this pyramid within the framework of plural constitutionalism. It is also necessary to realise that the three levels of this pyramid are coherent between themselves, that is, they engage in dialogue with each other and complete each other.

The dialogue and complementarity that is established between the national constitution and the European constitution is one of the most striking features of European legal integration and one of the greatest originalities of the relationship between the European Union and its Member States. Particularly in the area of the safeguarding and protection of fundamental rights, of the primacy of the Union law over national laws, and of making the dynamic process of integration compatible with the

[3] Gomes Canotilho, *Direito Constitucional e Teoria da integração*, 5th ed., Coimbra, 2002, p. 1353; N. MacCornick, *Questioning Sovereignty. Law, State and Nation in the European Commonwealth*, Oxford, 1999; André Gonçalves Pereira and Fausto de Quadros, *Manual de Direito Internacional Público*, 3rd ed., reprint, Coimbra, 2007, p. 277 et seq.

preservation of the national identity of the States, the elaboration of Union law by the Treaties, by Community case-law, by the national constitutional courts (especially the German and Italian ones) and by legal theory, has not been by means of the affirmation of a conflict, and much less of an antinomy, between the national constitutions and the European constitution, but rather by the absorption by the European constitution of the constitutional *acquis* of the Member States, or, in the words of the jurisprudence of the Court of Justice of the European Union, today contained in the Treaties (Art. 6(2) of the EU Treaty), by the absorption of the "constitutional traditions of the Member States".

In turn, the relationship between the European constitution and the global constitution is one of reciprocal enrichment.

On the one hand, the European constitution, and the European Union with it, serves, as has been said, as an excellent laboratory for globalisation and global constitutionalism. In fact the liberalisation of world trade and the promotion of social and economic development on the global scale have to be checked by the criteria which govern liberalisation, free movement and growth at the European Union level. This means, namely, that globalisation has to take into account a high level of protection of the fundamental rights of the individual, the preservation of the identity of the States and of the minorities, the principles of subsidiarity, democracy with primacy of the rule of law, a market economy based on loyal competition and the dignity of the human person, in sum, not a wild and anarchic market economy but a regulated market economy with a strong social and humanist component.

In a global constitution, based, as stated above, on the World Trade Law, elaborated within the framework of the WTO, these will be some of the most important principles.

For its part, the global constitution provides European integration with strong contributions in the sense of the primacy of the universal values which give form to the compelling International Law or *ius cogens*. This is today accepted at the world level (which does not mean, nor does it have to mean, that it is accepted by all the states of the international community or by all the Member States of the United Nations) and is largely composed by rules which, for a longer or a shorter period of time, have been part of the general or common International Law, with consuetudinary roots[4]

Finally, I want to stress that this dialogue and complementary relationship between these three levels of constitutionalism express the main features of the current legal order and put fascinating challenges to the modern legal science. In the next

[4] See Fausto de Quadros, op. cit., and also *A protecção da propriedade privada pelo Direito Internacional Público*, Coimbra, 1998, p. 548 et seq. (with a summary in English), Canotilho, op.cit., p. 1351 et seq., M. Maduro, *The Constitution of the Global Market*, in Snyder (ed.), Regional and Global Regulation of International Trade, Oxford, 2002, p. 49 et seq., Held, op.cit., p. 29 et seq., Peter Häberle, *Dallo Stato nazionale all'Unione europea: evoluzioni della Stato costituzionale*, DPCE 2002, p. 455 et seq.

decades we'll face the stimulating task of deepening this new concept of constitutionalism.

Thank you for your attention.

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«Report»

Luís Pereira Coutinho (University of Lisbon)

The three talks, by Professors Fausto de Quadros, Rainer Arnold and Francisco Balaguer Callejón addressed, in a fecund and interesting way, the same basic problem, which concerns the coexistence of different "constitutional" levels – the national, the regional and the global – in the contemporary world.

Fausto de Quadros's approach maximizes the potential of coordination and harmony between those different levels. The conceptual framework is centred on an idea of "plural constitutionalism" understood as the "total sum of the material constitution of the New World Order (NOW) (it is to say the global community), the material constitution of the several integrated regional areas and the national constitutions". The articulation of those levels is seen as unconflictive: "the three levels of this pyramid are coherent between themselves, that is, they engage in dialogue with each other and complete each other". The author emphasizes in particular the harmony existing between "European constitutionalism "and an embrionary "Global constitutionalism", taking the first as an excellent laboratory of the second.

Rainer Arnold adopts a different conceptual framework. Not acknowledging a "plural constitutionalism" with different levels, the author classically addresses the problem as regarding the relation between national constitutional law, international law, and European supranational law. Notwithstanding, the presented vision is still a vision of harmony between different legal levels. That harmony is mainly conceived as a result of two parallel phenomena with a transformative and adaptive impact on national constitutional law, which are named as "internationalization of constitutional law" and "supranationalization of constitutional law". Through both these phenomena – which involve normative changes and adaptive interpretations by judges – national Constitutions are understood as dynamic corpora, developing and integrating the states increasingly in the international and European communities.

If the conceptions offered by Professors Fausto de Quadros and Rainer Arnold substantiate visions of harmony between different legal levels, Professor Balaguer Callejón presents us with a potentially conflictive vision, particularly regarding the national and the European supranational levels. That potentiality for conflict persists while European supranational structures don't evolve towards an increased politic and economic integration capable of sheltering the economic development and social policies of states, seriously threatened by globalization. According to the author, those economic and social dimensions, relevant at the level of national Constitutions, are being defended today *contra-Europe* by the Portuguese Constitutional Court.

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Chapter III

Portugal, Europe and the Globalization from the perspective of Law and Economics

Rainer Prokisch (Maastricht University)

«Portugal, Europe and the Globalization from the perspective of Law and Economics» ►

Ana Paula Dourado, (University of Lisbon)

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«Portugal, Europe and the Globalization from the perspective of Law and Economics»

Prof. Dr. Rainer Prokisch (Maastricht University)

I. The Issue

Globalization is one of the most important and most frequently used key words of our times. It describes a far going economic integration on an international level. It became possible through the abolishment of custom duties and of restrictions on imports and exports as well as through the dismantling of control mechanisms related to capital investments. New technical developments also had a major influence. The revolution of communication has provided the preconditions to exchange information on an international level without time restraints[1].

Global trade has grown enormously during the last 60 years; international trade in goods has grown around 100 times since 1955. Links between nations and regions have increased to an extreme extent. Communication costs have declined dramatically. Transportation of people of goods has increased substantially; in 2010 there were over 2.3 million flights per month. Around 200 million migrants have entered developed countries. Globalization has in effect converted the private sector into a world without borders.

The development of Portugal was slightly different because of political circumstances. The Portuguese economy recovered slightly until 1960, at that time Portugal's per capita GDP was around 38% of the EC-12 average; it converged to 56% in 1973 partly due to high military expenses. On the other hand, Portugal became member of the EFTA and the WTO and thus participated in the international co-operation even in times of the Estado Novo. After the revolution Portugal needed time to reorganize. In 1991, the GDP as a percentage of EC-12 reached 54,9%. The accession to the EC had positive effects on the growth of the economy. However, already in 2007 Portugal came bottom of the European economic growth league (see The Economist, April 12th 2007, A new sick man of Europe, http://www.economist.come/node /9009032).

Globalization has negative and positive effects[2]. First of all, globalization offers chances for economic development, a stronger participation of developing countries in the world economy and consequently an improvement of the situation of the poor as well as opportunities to abolish poverty. However, the benefits of globalization are not achieved without own efforts of states. Globalization results in worldwide competition with all the consequences for labor markets and the social systems of states. It is obvious that opening the own markets for foreign investment will not be sufficient and it may be even contra productive. Increases of the National Gross Product do not

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1 For more information see Ulrich Beck, What Is Globalization?. Cambridge: Polity Press 1999

2 For a comprehensive treatment of the effects see Joseph E. Stiglitz, Globalization and Its Discontents, W.W. Norton & Company, New York 2002 and idem, Making Globalization Work, W.W. Norton & Company, New York 2006

automatically imply that one will automatically observe a general increase of wealth or a decrease of poverty. The fight against poverty depends therefore much on the national or regional policy of income distribution.

Nevertheless, Portugal succeeded to attract foreign investments. Volkswagen Autoeuropa and Danone Portugal are good examples. However, Portugal still has one of the lowest GDP per capita in Western Europe (Eurostat). On the other hand, research about quality of life placed Portugal 19th in the world in 2005 (ahead of France, Germany, or the UK (EIU Quality-of-life Survey). It is, however, worrying that Portuguese GDP per head has fallen from just over 80% of the EU 25 average in 1999 to just over 70% in 2007. And the economic crisis made it even worse.

The gap between rich and poor is a central problem. However, the world as a whole has become more equal. Global inequality – the income gaps between all people on the planet – has fallen since several poorer countries recently catch up with richer ones[3] (not all countries: over the last 40 years the income gap between the 10 richest countries and the 10 poorest countries has widened from 30 to 1 in 1960 to 75 to 1 in 2000). But in a world of nation states it is inequality within countries that matters. Therefore, states need better distribution policies whereby taxation plays a major role.

The financial crisis has made it obvious that uncontrolled capital flows may result in serious distortions of capital markets. Globalization needs rules that avoid such distortions of markets. This is what we learned from the crisis. But still we are thinking in national dimensions and do not understand that globalized markets need global rules. Many people believe that globalization should be blamed for the financial crisis. This is so far true as globalization made it possible that banks worldwide took irrationally risks and spread them over the whole world with the consequence that the housing bubble in the US had impact on banks worldwide. There were regulations in place but regulators mishandled the crisis, too. Regulatory reforms like the EU banking union will probably bring more stability. But this also indicates that not globalization as such should be blamed for the financial crisis but inactivity of governments in respect global regulation.

A positive development which is facilitated by a globalized economy is very much dependent on whether countries take the chance that globalized markets are offering. In the past, markets were mainly organized domestically while everywhere in the world nations try to cooperate and to create common markets. The EU is one of the most advanced federations in this respect. Member states are faced with new challenges in respect of competition and regulation.

For instance, 30 years ago the Portuguese farmer was able to sell the milk and butter on the own home market, frequently supported by state subsidies and restrictions of imports. The accession to the European Market has changed this dramatically. The

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[3] François Bourguignon and Christian Morrisson, Inequality among World Citizens: 1820-1992, The American Economic Review Vol. 92, No. 4. (Sep., 2002), pp. 727-744

common market has made it possible to Portuguese consumers to buy those products from Irish, German or Austrian farmers who have very much better conditions of production and, as a rule, have lower production costs. Actually, we can establish that the Common Agriculture Policy enforced a ban on agriculture in areas like Portugal where farming had traditionally been done. The importance of location is diminishing in a globalized world. On the other hand, there is a general tendency in Europe to "buy regional". But whether it improves situation of farmers is very often a question of wealth: do people have sufficient financial resources to buy at higher prices?

This kind of sharing on an EU level is absolutely consistent with the European idea. The common market provides opportunities that can be used for increasing the wealth of all European citizens but there may be losers who either have not taken the chances offered or were working under conditions which hindered them to participate. Competition between states and regions urges all stakeholders to determine where the strengths and weaknesses are and on which strengths to focus for the future to get a real piece of the globalization cake. The problem is: this is not a simple exercise if a country has no or few natural resources.

If, for example, a country would like to be the platform for production of basic goods for the global market it will only be successful if wages are low, sufficient skilled workers are available and the taxation climate is attractive. However, competing with countries like China, India or Bangladesh will be frustrating on the long run. And even those countries will probably loose importance if the manufacturing companies move to Africa. What remains is to focus on technology or services what explains why public investments into education and innovation are so important. Furthermore, it should not be overlooked that for instance regional clusters may have positive impact on productivity and innovation. Clusters are geographic concentrations of interconnected companies, specialized suppliers, service providers, firms in related industries, and associated institutions (e.g., universities, standards agencies, trade associations) in a particular field that compete but also cooperate[4].

Portugal has not done so badly in this respect in the past. The Global Competitiveness Report for 2005 placed Portugal 22nd, ahead of countries such as Spain or France (World Economic Forum). However, the crisis had major impact on Portuguese competitiveness. The 2013/2014 report places Portugal 51st, behind such countries like Spain or Estonia (The Global Competitiveness Index 2013–2014, World Economic Forum).

But even if a country has done its homework any crisis of the system will be global in future like the financial crisis erupted five years ago or the currency crisis in Asia 10 years ago. Many believe that the answer should be more effective global economic governance. However, the steps that were made in this direction are rather disappointing. The IMF is neutralized by its activities in Europe (just three countries

[4] Michael E. Porter, Clusters and the new economics of competition. Harvard Business Review, Vol. 76, (1998), pp. 77-90

Greece, Portugal, and Ireland account for 68% of the IMF's resources) and its governance reforms are stalled. The World Bank has yet to build up capacity to provide the economy with financial resources where needed. The EU is struggling with a Banking Union that is badly needed in order to avoid future banking crisis. The G20 promised stronger global institutions, however, one of first institutions like the Financial Stability Board (FSB) has no legal mandate or enforcement powers. Even the new Basel III banking standards have been diluted and postponed. Regions and countries have therefore to find their own ways to manage and control finance, create pooled emergency funds, and strengthen development finance.

It is obvious that the current situation in countries like Greece, Portugal, or Spain is terrible. But it should be not overlooked that such periods of crisis also offer chances. If those countries succeed in determining the existing strengths of the countries, if politicians develop visions and concrete plans how to improve the economic situation, if they are especially aware how important education and research is for future innovation, and if the EU begins finally to rethink co-operation in Europe it may be possible to overcome the crisis and to start towards a better and more equal society.

II. The tax systems and their reactions

Tax law did not remain untouched by those developments. The international economic integration is confronted with traditional national tax systems. There are especially four areas of conflicts:

- The national tax systems get under pressure: the shifting of functions and sources of income to low tax countries deprives states of revenue. Income realized in low tax countries will frequently not be repatriated but reinvested in low tax countries or shifted to tax havens.

- It is a general tendency that capital is floating around the world without that any country may be able to tax the profits adequately. The allocation of income as it is regulated in tax treaties does not function efficiently.

- New technical developments in respect of the World Wide Web and other communication developments open new opportunities for worldwide operating businesses. Frequently, it is not necessary anymore to be present in target markets. This has consequences for the allocation of income between states, which still use allocation criteria that are based on traditional distribution and sale. As far as the allocation of income will not function any more, the states in which the purchase power is located lose revenue.

- If states want to keep all the benefits of globalization and begin to stop the process of losing tax revenue they damage the globalization process and by

doing this they disturb the economic growth of developing countries. On the long run this will lead to movements of people from developing countries to developed countries with all the negative (and positive) effects on the economies and social systems of developed countries.

1. Tax Arbitrage

National tax systems always have differed. Thus, it was always possible to taxpayers to use these differences for the own benefit. As cross-border activities have increased during the last half century, those facts became more and more relevant. But actually the differences are inevitable and cannot be abolished by harmonization of national tax systems. Tax arbitrage, i.e. the beneficial usage of those differences will therefore always exist.[5]

Frequently, this kind of international tax planning is considered unfair. Only certain sophisticated taxpayers involved in cross-border transactions can benefit from it. Globalization seems to open a gap between those who participate in international business and those who do not (equality).

Governments may close the loopholes if they get aware of them or they may consider the differences in tax treaties which they conclude with respective partners. In this respect, international tax cooperation works if countries are willing to act. Interesting enough, however, frequently countries hesitate to close loopholes for rather egoistic reasons.

2. Tax competition

Corporate tax rates of the economical most important OECD member countries were on an all-time high level in 1997.[6] However, already in 1997 the tendency could be observed that the rates did not increase further and states were at the beginning to discuss the harmful effects of tax competition. Within the EU the agreement on a code of conduct resulted in the abolishment of numerous tax benefits. The work done by the OECD was rather addressed to tax havens than to businesses. It led to a somewhat aggressive attitude towards countries with low tax rates that disposed of tax efficient bank secrecies and/or opportunities to make use of tax beneficial specific business forms like foundations in Liechtenstein.

The EU code of conduct together with the fight against harmful tax measures by using the state aid rules of the EC treaty resulted in another sort of competition. As EU

[5] Cf. R.S. Avi-Yonah, Tax Competition, Tax Arbitrage and the International Tax Regime, Bulletin for International Taxation, Vol. 61 (2007), pp. 130 et seq.; H. David Rosenbloom, Cross-Border Arbitrage: The Good, the Bad and the Ugly, TAXES – The Tax Magazine March 2007, pp. 115 - 117

[6] Vito Tanzi, Globalization, Technological Developments, and the Work of Fiscal Termites, 26 Brook. J. Int'l L. 1261 (2000/2001)

member states were not able anymore to attract foreign investments with specific tax benefits they began to compete via the general corporate tax rates. The accession of several East European countries to the EU with extremely low corporate tax rates accelerated the competition[7]. Consequently, the rates decreased all over the world and tax rates like the 25% used by the Netherlands are now already rather high.

High tax countries have tried to counter this form of competition by introducing measures that ensure taxation in the home state of companies. Many countries have introduced cfc-legislation that attributes income of foreign subsidiaries to the parent company if the activities of the subsidiary are mainly passive and if the related profits are subject to low taxes. On the long run, however, it is doubtful whether such measures will be successful. On the one hand, in Europe case law of the ECJ restricts the application of cfc-legislation to rather artificial structures. On the other hand, companies will be tempted to shift the place of residence of parent companies to countries without cfc-legislation.

This is an indication of a severe problem of globalization in the field of taxation. Domestic tax laws still treat companies as if they were nationals even if those companies have made use of globalization and act worldwide. Tax administrations are still national; they implement national law facing constraints by national borders.

3. Intra-company trade

One of the consequences of globalization was an extreme increase of intra-company trade. Estimations show that nowadays more than 50% of international trades were transactions between related companies. Control and other possibilities to influence the price calculation of dependent companies opens the room for shifting profits from high tax countries to low tax countries.

It is true that many countries have reacted by introducing stronger controls of transfer pricing, however, in general those efforts are rather inefficient. It is difficult to develop legal regulations that actually may channel transactions into the correct direction. And frequently a good result depends on a transparent cooperation between taxpayers and tax administrations. Finally, we should not forget that any tax claimed by one state may cost the other state the respective tax revenue. These conflicting interest make it so difficult to come to common rules.

In this respect, it should also be noticed that globalization has made it easier to relocate functions from high tax countries to low tax countries. The outsourcing of production activities can be controlled by tax administrations to a certain extent since the transfer of existing assets is visible and therefore taxable. Nevertheless, companies are able to establish new production locations on the costs of the traditional locations by

[7] Cf. Santiago Álvarez Garcia & Elena Fernández Rodriguez & Antonio Martinez Arias, Corporate Tax Burden in the European Union, EC Tax Review 2011, 41

transferring intangibles that are used for the business abroad. Intangibles, however, are mostly rather difficult to evaluate and if they are transferred in an early stadium of development the profits will mainly be realized on the new location. It is even easier to transfer financial or investment activities to other countries without that such transactions could be caught by the home state's tax administration.

But not only developed countries suffer. Especially developing countries observe that profits from foreign investments do not remain in those countries but are shifted to other parts of the world where taxation is lower. Mispriced cross-border transactions within companies are common. In principle, it should be possible to combat mispricing but often tax administrations of developing countries are understaffed and lack the necessary skills.

But also tax administrations of developed countries are not free of failures. Often they complain about the effects of globalization and that the necessary exchange of information is complex and needs too much time. It seems that - while multinationals have faced the new challenges and have adopted correspondingly - tax legislators as well as administrations have not sufficiently recognized that they need new rules and instruments. Also in developed countries the technical expertise of national tax authorities has not developed sufficiently to cope with the growth in volume and complexity of commercial and financial transactions.

4. Tax havens

Globalization has also opened new and attractive possibilities for individuals as well as companies. They may hide their money in countries with bank secrecies; they may establish companies or foundations in countries where the owner of the company must not be unveiled; or they even may move to states where the tax burden was substantially lower or where no taxes exist. In order to avoid misunderstandings: Some of the biggest tax havens are in fact OECD economies including America, Britain, or Switzerland.

During recent years much has done to combat this form of tax evasion and avoidance. Countries with bank secrecy or low taxes got under pressure to cooperate. In particular, the exchange of information has been founded on new rules and agreements. Some countries have enacted legislation that frustrates the change of residence if an individual moves to other countries. America even limits the effects of giving up the US citizenship. Nearly all states have nowadays exit taxes that are aimed to collect taxes before individuals are moving. With other words, states try to get immunized against the opportunities of globalization and the erosion of their tax base.

All these measures may be effective for the time being although it is obvious that implementing exchange of information cause practical problems. On the long run, however, they will not hinder taxpayers to find ways to shift wealth to other locations or

to structure their affairs in a way that tracing them becomes impossible. The comprehensive action plan of the OECD remains within the traditional tax thinking and does not show any willingness to look at new horizons. The only step forward could be more transparency in respect of reporting what taxes companies are paying where. But even if we know this, under the existing international tax system states will have problems to levy tax which they feel that according to a fair system should be their tax revenue.

II. A new globalized tax system

It became obvious that states lose revenue as a consequence of worldwide globalization. This has far-going effects on the welfare system of states and the financing of infrastructure expenses. States try to protect their tax base but a longer perspective requires rethinking the existing national approach that has no real answers on the process of internationalization. There are three fields where changes have to be made.

1. The national tax mix

Tax competition mainly takes place in the area of corporation taxes. The project of a European corporate consolidated tax base (CCCTB) will certainly be a huge step forward towards a fairer playing level field. With certainty, once introduced in Europe, it will show effects on tax systems worldwide. And it will abolish the existing burdensome procedures related to transfer pricing.

Next to this states have to think about a change of the national tax mix. There is a strong need to introduce or increase environmental taxes in order to fight global warming and other harmful effects caused by production and other activities harmful for the environment. Such taxes may substitute to a greater extent the now existing corporation and income taxes. Because of their effects on international competitiveness, they require, however, extensive co-operation between states. The same is true for other excise taxes that could be introduced like a tax on electronic commerce. By doing this states can achieve that the underlying profits will be taxed in the state of the customer.

2. Allocation of income

National tax systems are still governed by the universal principle, i.e. states tax their residents with their worldwide income. These systems lose justification in a globalized world. In particular, the place of residence of companies gets difficult to determine when directors may live in other country than the managed company and

directors' meetings can take place at any spot of the world. Today frequently companies are established in countries where they never carry on business activities.

In addition, the tax allocation in tax treaties gets more and more uncertain. The traditional tax allocation works in favor of the former industrialized countries and frustrates the aims of globalization to help developing countries growing. For instance, interest income is taxed in the country of the creditor and not in the country of the debtor where the capital will be productive and the actual creation of value takes place. Another problematic field is the traditional criterion "permanent establishment" that today is not able anymore to solve the allocation of taxes correctly in all cases.

In a globalized world the origin of the investor loses importance.[8] The allocation of income should therefore follow the place where value is created and where activities are carried on.[9] On the other hand, this implies that more bilateral and multilateral mechanisms of tax collection are needed. The problems involved should not be underestimated. The world needed 50 years for developing a decent international tax system that served well for a limited period of time. It can be expected that the development of new and more adequate rules needs equally 50 years.

3. Global Taxes

Finally, globalization requires globalized taxation. To the extent that a profit orientated activity cannot be determined territorially it will be necessary in future to levy taxes on a global level. Typical fields where such taxes should be introduced are the trade of financial derivatives, the activities of hedge funds, speculations with foreign currencies, etc. The tax on financial transactions that is now seriously considered as a reaction on the financial crisis could be a first step towards global taxation. Ideally such a tax should be regulated by an international organization like the IMF, should be collected regionally, and the revenue should be allocated to countries under consideration of criteria like poverty and degree of development. Such distribution mechanism could be considered a kind of compensation for the losses of developing countries (and tax havens) that such countries suffer under the globalization effects.

All fields of potential changes need more cooperation internationally. Considering the degree to which multinational companies are working globally it is only logical that governments seek additional forms of cooperation in respect of fields where they have common interests. Some neighboring countries, however, could begin with developing international tax policy together. The OECD already provides a forum through with

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[8] M.J. Graetz, The David R. Tillinghast Lecture: Taxing International Income: Inadequate Principles, Outdated Concepts and Unsatisfactory Policies, Tax Law Review Vol. 54 (2001), pp. 261 et seq.

[9] Cf. Richard J. Vann, Taxing International Business Income: Hard-Boiled Wonderland and the End of the World, World Tax Journal 2010, pp. 291 - 346; James R. Hines, Income Misattribution under formula apportionment, European Economic Review Vol. 54 (2010), pp. 108 - 120

consultation occurs. But this does not lead necessarily to coordinated development of tax rules or policy.

IV. Final Conclusions

A globalized world means international integration of economies. This international integration requires international cooperation in the area of taxation. Cooperation in this sense has to go very much further than today. Assistance in tax collection and exchange of information will not be sufficient. Certainly, there should be also more assistance and the existing possibilities to exchange of information should be used in very much more intensive way. But: States have to say farewell to the old idea of national tax sovereignty and have to pass on competences to international organizations.[10] There is a strong need for a new order of international taxation that considers the interests of developing countries, emerging economies, as well as developed countries.[11] The aim must be to come to an allocation system that guarantees each state a fair share of the tax cake. It is, however, obvious that at the moment nobody knows how the "fair share" should be determined. Unitary taxation that is promoted by many scientists could be a way into the right direction. However, it comes with its own challenges. To find an agreement on the question where exactly business takes place in a world of services, intangible assets, and electronic commerce will certainly not be easy.

All this means that we still have a long way to go to achieve international tax justice, the discussion is just in the beginning. In the meanwhile, we should recall that there are moral aspects that should be observed by states, multinationals, and individuals. States, in particular tax administrations, should try to get the relationship with taxpayers on a new basis of mutual trust and confidence. If taxpayers oblige themselves not to use aggressive tax planning schemes for shifting profits to tax havens and they get in return certainty about the tax consequences of their tax planning we would already be an important step further. In this respect, the governance codes of conduct needs urgently expanded to tax issues by setting standards of good tax governance.[12] Otherwise, society should doubt the reputation of those companies. It is not coincidence that a threatened boycott by consumer groups drove Starbucks to offer a voluntary contribution to the UK treasury.

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[10] Victor Tanzi, Is there a need for a World Tax Organization, in: A. Razin/E. Sadka (eds.), The Economics of Globalization, Cambridge University Press, 1999, pp. 173 et seq.

[11] See Wolfgang Schön, International Tax Coordination for a Second-Best World, World Tax Journal 2009, pp. 67 et seq., 2010, pp. 65 et seq., 227 et seq.

[12] The UN Global Compact (for details see Georg Kell/David Levin, The Global Compact Network, Business and Society Review (2003) 108, p. 152) does not contain any rules on tax. We urgently need a debate about adequate rules of conduct in respect of taxation.

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«Global Governance, Global Standards and Democracy in Taxes»[1*]

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[*] This chapter is inspired in a previous chapter I wrote: "Tax Mobility in the European Union: Present and Future Trends", in *Movement of Persons and Tax Mobility*, ed. Ana Paula Dourado, IBFD, 2013, pp. 3-26. The arguments in the present chapter can be found in more detail in the aforementioned "Tax Mobility in the European Union: Present and Future Trends". A follow-up of these ideas are to be found in Ana Paula Dourado, "No Taxation without Representation in the EU: Democracy, Patriotism and Taxes", *Principles of Law: Function, Status and Impact in EU Tax Law,* ed. Cécile Brokelind, IBFD, 2013, pp. 205-233.

1. Tax Good Governance on the Global Policy Agenda, in the EU and in Portugal

Since the financial crisis of 2008, the G20, the OECD and the European Union have been joining efforts in increasing tax transparency, identifying the extent to which profit shifting to low tax jurisdictions is being carried out by multinational companies and combating base erosion and the decrease of corporate income tax revenues by those companies[1]. Enhancing administrative cooperation and developing tax good governance, interacting with tax havens and tackling aggressive tax planning are part of supra-national concrete recommendations and actions.

In respect of tax transparency and combating tax evasion and aggressive tax planning, opinion makers are focused on showing the lack of fairness and equity as a disruptive effect provoked by the global economy. However, states should also worry about the inefficient allocation of resources created by such aggressive tax planning, namely in respect of domestic corporations that have no access to the same planning possibilities[2].

The aim to increase tax transparency and to decrease tax evasion and aggressive tax planning does not imply international tax harmonization[3] or an EU harmonization of the tax base and rates (even less of tax subjects), but tax coordination is necessary[4]. In this context, allocation of taxing rights between source and residence is being revisited by OECD[5] .

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[1] In 2020, the G20 asked the OECD to analyse the topic of base erosion and profit shifting by multinationals, and to report about the progress of the work for their February 2013 meeting: as a response, the OECD (2013) issued the Report *Action Plan on Base Erosion and Profit Shifting*. The EU Reacted: *Communication from the Commission to the European Parliament and the Council, An Action Plan to Strengthen the Fight against Tax Fraud and Tax Evasion,* (187637/12) Brussels (6.12.2012), COM (2012) 722 Final; *Commission Recommendation of 6.12.2012,* Brussels (6.12.2012), C(2012) 88006 final; *Conclusions of the European Council* , Brussels (22.5.2013), EUCO 75/13, pp.6-8; ECOFIN, *Conclusions on Tax Evasion,* Brussels (14 May 2013), 9549/13, FISC 94.

[2] *The OECD Report Action Plan…, supra* n. 1, p. 8.

[3] See the discussion on the OECD Report *Harmful Tax Competition: an Emerging Global Issue* (1998) and the reactions to it; and A.P. Dourado, *Exchange of Information and Validity of Global Standards in Tax Law: Abstractionism and Expressionism or Where the Truth Lies,* EUI WP 11 (2013), pp.1-18.

[4] Cf. for tax evasion cases: N. Johannesen, *Taxing Hidden Wealth - Lessons for Policy Making,* 25 EUI Working Papers RSCAS (2012), pp. 5 et seq..

[5] A.P. Dourado, *Is it Acte Clair? General Report on the Role Played by CILFIT in Direct Taxation,* The Acte Clair in Direct Tax Law (*A.P. Dourado & R.P. Borges eds*., IBFD, 2008, pp. 28-31; F. Vanistendael, *The ECJ at Cross-Roads: Balancing Tax Sovereignty against the Imperatives of the Internal Market,* European Taxation (2006) p. 413 et seq.

It is common knowledge that mainstream media have transnational impact and act as global opinion makers, determining to a great extent the political agendas in taxes[67]. In 2012, some news in the media increased the public perception that governments lose corporate tax revenue because of tax planning by multinationals - these are accused of dodging taxes worldwide by breaking domestic and international rules on the taxation of cross-border profits[8].

This is now called Base Erosion and Profit Shifting (BEPS). BEPS behaviour consists in increasing segregation between the location where actual business activities and investment take place and the location where profits are reported for tax purposes, the shifting of risks and intangibles, and the artificial splitting of ownership of assets between legal entities within a group, transactions between such entities that would rarely take place between independent entities[9]. Evidence indicates that BEPS behaviour is widespread in a world where global value chains and fragmentation of production are dominant features[10].

As a reaction to the aforementioned news in the media and a response to a G20 mandate, the OECD presented a Report "Addressing BEPS" announcing several actions. These actions are currently being enacted and suggest measures to deal with BEPS- it is acknowledged that current international standards did not accompany the changes in global business practices, especially in the areas of intangibles and the digital economy[11].

In turn, the recent corporate income tax reform in Portugal (which entered in force in 2014) has been enacted in counter trend to the BEPS developments. The rules that are currently being recommended by the OECD BEPS actions will sooner or later weaken the core purpose of the aforementioned Portuguese reform, namely to increase competitiveness (and aggressive competition?).

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[6] As *The OECD Report Action Plan...., supra* n. 1, calls them in Chapter I: "There is a growing perception that governments lose substantial corporate tax revenue because of planning aimed at shifting profits in ways that erode the taxable base to locations where they are subject to a more favourable treatment. Recent news stories such as Bloomberg's "The Great Corporate Tax Dodge", the New York Times' "But Nobody Pays That", the Times' "Secrets of Tax Avoiders" and the Guardian's "Tax Gap" are only some examples of the increased attention mainstream media has been paying to corporate affairs".

[7] See the criticism to the short-term political agendas in Jürgen Habermas, *Ach, Europa*, *Kleine politische Schriften XI*, Suhrkamp Verlag, Frankfurt-am-Main (2008), pp. 96-108.

[8] *The OECD Report Action Plan…, supra* n. 1, p. 13.

[9] *The OECD Report Action Plan…, supra* n. 1, p. 6 and Chapter 2 (15 -21).

[10] *The OECD Report Action Plan…*, *supra* n. 1, Chapter 2.

[11] *The OECD Report Action Plan…, supra* n. 1, p. 7; Roberto Moro Visconti, *Exclusive Patents and Trademarks and Subsequent Uneasy Transaction Comparability: Some Transfer Pricing Implications,* 40 Intertax 3 (2012), pp. 212-220.

2. Revenue Interests and Globalization

Globalization (i.e., especially free movement of capital) has led to an increasing division between high and low tax jurisdictions. Nominal tax rates have decreased drastically since the eighties, even if tax transparency has increased (although the latter did not lead to a fall in the corporate tax burden, because tax base was often broadened)[12]. In spite of globalization the interests protected are still the national interests and this is also true for the EU, since corporate taxes are national taxes and there is tax competition among Member States.

The current international trend moves towards more fairness and transparency in the tax treatment of foreign direct investment, it complies with the constitutional principles of rule-of-law states and illustrates the necessity to revisit international tax law rules.

When discussing tax mobility and the anti-BEPS agenda we may not forget that EU/EEA taxpayers are entitled to the fundamental freedoms under the TFEU/EEAA provisions (they grant rights to the aforementioned taxpayers) and according to which there can be non-discriminatory treatment based on source or residence.

In most of the direct tax cross-border situations taking place within the EU/EEA territories a resident and a non-resident are considered to be in comparable positions[13]. To the extent that a tax discrimination by a EU/EEA Member State occurs (as a rule implying a less favourable treatment of the cross-border situation in comparison to a domestic situation), the national interest (loss of tax revenue) cannot, in principle, be validly invoked before the TFEU/EEAA: the loss of national tax revenue cannot justify a discriminatory treatment[14].

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[12] Statutory corporate income tax rates in OECD member countries dropped on average 7.2 percentage points between 200 and 2001 (32.6% to 25.4%) – rates have been reduced in 31 countries Tax rates have decrease: *The OECD Report "Action Plan…", supra* n. 1, pp. 15-16.

[13] Exceptions occur in the field of tax rates, comparability under personal income tax (the rule is that a resident is not comparable to a non-resident, unless most of the income is earned in the State of source – the so-called virtual residence) and comparison of treatment granted by a Member State to residents of different States (horizontal comparability): See, in this book, Frans Vanistendael, *EU at the Crossroads in 2011: EMU and/or Internal Market?* pp.

[14] S. Van Thiel, *Justifications in Community Law for Income Tax Restrictions on Free Movement: Acte Clair Rules that can be Readily Applied by National Courts,* The Acte Clair in Direct Tax Law… *supra* n. 5, pp.87-93. See among many others, the following ECJ cases: 16 July 1998, Case C-264/96 (Imperial Chemical Industries plc [ICI] v K. Hall Colmer [Her Majesty's Inspector of Taxes]); 21 September 1999, Case C-307/97 (Compagnie de Saint-Gobain v Finanzamt Aachen-Innenstadt); ECJ 8 March 2001, Cases C-397/98 and C-410/98 Metallgesellschaft Ltd a.o. v Commissioners of Inland Revenue, H.M. Attorney General); 6 June 2000, Case C-35/98, Staatssecretaris van Financiën v Verkooijen ; 7 September 2004, Case C-319/02 (Petri Mikael Manninen); 12 September 2006, Case C-196/04 (Cadbury Schweppes plc, Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue); However, the justification of "allocation of taxing rights", related to cross-border losses and exit taxes, is not substantially diferent from a "loss of revenue" argument (or a protectionist argument), because it relies on the traditional

In contrast, with regard to the difference between resident and non-resident taxpayers (or residence and source) Article 24 of the OECD MC, although providing for non-discriminatory treatment, still relies to a major extent on the difference between source and residence.

3. Tax Mobility and EU Law

The existing mobility in Europe results to a great extent from the efforts of the European Court of Justice (ECJ) to overcome the constraints raised by the legislative decision-making process. This is especially true for tax matters where the unanimity rule is still valid under the Treaty on the Functioning of the European Union (TFEU).

The European Commission tries to put forward proposals for tax harmonization[15], aimed at achieving a deeper level of integration in the European Union, and the Council, represented by national interests, relies on tax competition to assure those national interests, which can range from discriminatory taxes justified on the basis of the need to collect tax revenue to the reduction of the corporate income tax burden[16].

Notwithstanding the differences between EU law and international law, it is also true that tax mobility as a policy goal has not yet been achieved in the EU. The inconsistencies in the EU integration process weaken the EU position in the world: in the current state of affairs, EU law is hardly to be recommended as a standard either in respect of tax mobility, or as an international or regional standard regarding an anti-BEPS reaction and tax competition[17].

Apart from a few directives on specifically identified constraints to the internal market (economic double taxation, restructuring of companies, mutual assistance, double taxation of interest and royalties between associated companies), tax competition in the EU is the rule and non-discrimination of cross-border situations is the limit.

In the absence of a regular legislator on direct tax issues, the ECJ has assumed a prominent role in the protection of taxpayers' fundamental freedoms and has been focusing on the tax restrictions to those fundamental freedoms[18]. On the basis of the non-discrimination principle of EU nationals (and third-country nationals in the case of free movement of capital), which is included in the treaty provisions governing the

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international tax law concept. See M. Poulsen, *Freedom of Establishment and the Balanced Allocation of Taxing Rights,* 40 Intertax 3 (2012), pp. 203-204: the author contends that the ECJ is "prepared to accept an allocation of tax jurisdiction based on the traditional international tax interpretation" (p.203).

[15] See the case of the *Proposal for a Council Directive on a Common Corporate Consolidated Tax Base* (CCCTB), COM (2011) Final 2011/0058 (CNS); *Proposal for a Council Directive* 2008/0215 (CNS) *Amending Directive 2003/48/EC on Taxation of Savings Income in the form of Interest Payments*.

[16] P. Pistone, *Smart Tax Competition and the Geographical Boundaries of Taxing Jurisdictions: Countering Selective Advantages Amidst Disparities,* 40 Intertax 2 (2012), pp. 85-91.

[17] On the validity of international standards: A.P. Dourado, *Exchange of Information and Validity…* supra n. 3, pp. 13 et seq.

[18] See the list of cases in K. Van Raad (ed.), *Materials on International & EU Tax Law,* International Tax Center Leiden 2 (2013).

fundamental freedoms (in the TFEU and in the EEAA), the ECJ has rightly managed to address the obstacles deriving from a direct tax legislation that does not discriminate against non-nationals, but instead against non-residents (inbound situations) and foreign sources of income (outbound situations), independently of their nationality[19].

It is undeniable that the interpretation of the fundamental freedoms provisions in the TFEU and the EEAA by the European Court of Justice has very much contributed to reducing the tax rules discriminating against inbound and outbound investment and other cross-border income. It is also true that although these tax rules were firmly grounded on the distinction of taxation between residents and non-residents, Member States are still competent to rely on residence and source to design their tax codes.

However, because, according to the reasoning of the ECJ, residents and non-residents are in principle comparable[20] and a different treatment will imply discrimination incompatible with the TFEU, source and residence as connecting elements have in reality become obsolete in the European Union to a great extent, even if they are kept in written law that is in force. When comparing non-residents to residents, and EU/EEA cross-border situations to domestic ones, the ECJ is protecting tax mobility and therefore building up the internal market.

4. The ECJ Self-restraint

Nevertheless, the ECJ does not always consider non-residents comparable to residents and in that case, it still accepts the international tax law distinction. For example, in personal income taxes, residents are not, in principle, comparable to non-residents (*Schumacker* line of reasoning). This position can also be justified in the perspective of economic allegiance, under the current international rules on allocation of taxing rights (the state of residence is the state with which his personal and economic relations are closer - the centre of vital interests) and by the ability-to-pay principle: because the state of residence taxes worldwide income and progressively, it has the whole picture of the taxpayer's accrued income and is in the ideal position to distribute the tax burden among the resident taxpayers, applying parameters of equality.

The Court also traces a distinction between object-related costs (where the comparability of residents and non-residents is valid) and personal-related costs (where residents and non-residents are not comparable), but the frontier in this case is blurred and the distinction leads to complexity and not to clarification[21].

[19] This has become clearer since the Maastricht Treaty: *Inter alia*, A.P. Dourado, *Lições de Direito Fiscal Europeu,* Coimbra editora, Coimbra (2010), ch. 3.
[20] Except in the personal income tax cases (but see the criticism to this position in B. Terra, P. Wattel, supra n. **Erro! Marcador não definido.**, pp. 979-985).
[21] See the Vera Mattner case: *supra* n. Erro! Marcador não definido..

There is a difference between creation and interpretation of law, and the ECJ has set up its own limits[22].

5. Universal Tax Law Standards and Protecting Loss of National Tax Revenue

The European Union instances considered together have not managed yet to find a balanced approach to the role of national taxes in the (still to be achieved) internal market. In contrast to national principles of Administrative Law that have been incorporated or even upgraded as EU constitutional principles[23], constitutional principles of tax law have been regarded as irrelevant.

That is the case of the principle of practicability. This principle could ground a valid justification for the traditional withholding taxes on gross income of non-residents, in the case of cross-border services, instead of forcing the withholding agent to deduct the "inextricably related costs"; the principle of practicability would also justify a preference for the unilateral approach in the case of outbound dividends, instead of the internal market approach. It is virtually impossible for a withholding agent to gather the relevant information and skills on the tax rules of the residence country and to decide on that basis whether it should withhold or not withhold taxes on dividends.

But that is also the case of the principle of ability to pay that is challenged by aggressive tax planning and abuse. There has not been a consistent policy that considers together, as it should, the fundamental freedoms, sound finances in Member States, ability to pay, control of loss of revenue and allocation of taxing rights.

In many relevant cases involving groups of companies, national anti-abuse rules (anti-BEPS rules) have been tackled as exceptions to the fundamental freedoms (they are justifications to restrictions) and only considered to be proportionate if they are not designed as irrebuttable presumptions. The cross-border losses and expenses cases have been object of a different line of reasoning (the mere risk of abuse is a valid justification, together with the aforementioned risk of jeopardizing the allocation of taxing rights). But the ECJ does not explain why it follows a different reasoning in the two groups of cases (it does not handle them as a different group of cases). Thus, the precedence rule is valid to all subsequent tax cases.

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[22] See F. Vanistendael, *supra* n. 13.

[23] This is due to the fact that the Administrative Principles are related to the EU Governance: See A.von Bogdandy *Gegenstand, Grundlagen und Grundbegriffen,* Europäisches Verfassungsrecht, Theoretische und dogmatische Grundzuge (von Bogdandy & J. Bast, eds.) Heidelberg, Springer (2010), pp. 15-50; in the same book: C. Möllers, *Verfassunggebende Gewalt – Verfassung- Konstitutionalisierung,* pp. 268-269; Wyatt & Dashwood's *European Union Law*, London, Sweet & Maxwell (2006), chapter 7.

6. Imperfect Tax Mobility, BEPS and Tax Competition

Tax mobility is far from having been achieved in the EU, and the European Court of Justice cannot replace the legislator in achieving this goal. The ECJ has been either accused of protecting the taxpayer without paying due attention to the risk of tax avoidance and loss of national revenue, or, recently, of protecting the revenue interests[24]. The problem does not lie in the interpretation of the law, but in the insufficient policy action and harmonization of direct taxes[25].

The fact that mobility has not yet been achieved within the EU and the EEA and therefore creates obstacles to the setting up of an internal market stimulates BEPS behaviour - they would not exist within the EU if corporate taxation was completely neutral (whether harmonized or not), or if a CCCTB directive with formulary apportionment would be in force, even if other abusive behaviour would occur[26]; imperfect mobility also leads to tax competition between EU Member States (as well as between the EEA Member States).

The features of BEPS behaviour and tax competition in the aforementioned regional areas do not differ substantially from the situation towards the rest of the world and in the rest of the world. This can be demonstrated by the anti-abuse rules in the national corporate tax codes, in the Parent-Subsidiary Directive and in the Merger Directive, and by the public outcomes of the transfer pricing forum, such as the Code of Conduct on the Arbitration Convention and the recommendation to Member States to conclude advanced pricing agreements (APAs)[27]: none of them are different from the rules used in respect of non-EU cross-border situations, although EU hard and soft law instruments aim at multilateral instead of bilateral solutions.

7. BEPS, the EU and the OECD

Because the EU has its own governance, its own agenda and primary law obligations to achieve mobility, as well as its own cases of tax abuse, it could decide to address the above-mentioned BEPS behaviour autonomously. It could respond by harmonizing regimes, or enacting codes of conduct anticipating the OECD work.

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[24] E.C.C.M. Kemmeren, *Recovery of Income Taxes: ECJ Tends to Allow Member States more Leeway,* 22 EC Tax Review 1 (2013), pp. 2-8.

[25] See e.g. alternative reform options on cross-border taxation of portfolio dividends: C. Spengel, L. Evers, *The Cross-border Taxation of Dividens in the Case of Individual Portfolio Investors: Issues and Possible Solutions,* EC Tax Review 1 (2012) at pp. 17-32.

[26] See W. Hellerstein in this book: *Formulary Apportionment in the EU and the US: A Comparative Perspective on the Sharing Mechanism of the Proposed Common Consolidated Corporate Tax Base.*

[27] A. C. M. Zaidan, *The External Tax Treaty Making Powers of the Member States: Defining Limits and Obligations under the Current European Legal Order* 41 Intertax 5 (2013), pp. 274-293

The past decades show us that the Council and also the European Commission do not normally anticipate solutions to cross-border problems when these are being addressed by the OECD. There is no "technical" advantage for the EU to tackle those topics on its own, before solid progress has been made at the OECD level: the issues that have to be addressed in respect of BEPS are primarily global problems that have to be tackled by global answers.

But it could still be counter-argued that any potential EU law out-of-the-box solutions to mobility and its responses to transnational problems could bring external political recognition to the EU. Those solutions could be recommended to groups of other third countries, as inspiring examples of supra-national law – best practices - to the rest of the world. An inspiring example to the rest of the world can, to a certain extent, be granted by the new mutual assistance directive which moves towards automatic exchange of information: taken together with the Savings Directive, the EU shows ambition in this area and has been at the forefront of the tax transparency movement: however, also in respect of tax transparency, there has been an EU/OECD hand-in-hand progress[28].

Moreover, in the current stage of EU integration and mobility, and while/as long as the CCCTB proposed directive is not approved, BEPS behaviour is not yet to be dealt with within the EU substantially differently from the manner in which it is being addressed in the OECD Report. This does not hinder the EU from taking the forefront in implementing some of the OECD recommendations, as has happened in respect of mutual assistance.

9. International Reaction to BEPS

Taking into account the current situation as described in the OECD "Addressing BEPS" Report - increased mobility in its international meaning - and assuming that the widespread aggressive tax planning is a fact, it is herein contended that tax rules on allocation of taxing rights should, whenever possible, be improved instead of being radically changed.

This is the case of transfer pricing rules as compared to a world corporate consolidated tax base (CCTB) where allocation of revenues is implemented by formulary apportionment. In order to work perfectly, the latter system recommends harmonization of tax bases, a common currency and trust between national tax administrations. The greater the number of states involved, the more difficult it is to

[28] See K. Spies, *Influence of International Mutual Assistance on EU Tax Law,* 40 Intertax 10 (2012) pp. 518-530There are, however, serious problems in EU Member States, not caused by EU Law, concerning taxpayers rights and related to the use in some Member States of information illicitly obtained and to other taxpayers' fundamental rights: A. Dourado, *Exchange of Information and Validity..., supra* n. 3, pp. 17 et seq.; A. Rust , *Data Protection as a Fundamental Right* (Rust A.& Fort E.eds.), Exchange of Information and Bank Secrecy, (2012) pp. 180-181.

implement a common CCTB[29]. Even in the European Union, a CCCTB will be difficult to implement without a federal budget, where the corporate income tax revenue would be at least partially an EU tax[30] because Member States (mainly the tax administrations and governments) react suspiciously to different rules on allocation of taxing rights (not to mention other existing obstacles) and the possibility of revenue decrease[31].

Thus, an anti-BEPS agenda aiming to set out international standards and acknowledging the interests of and difficulties faced by emerging and developing countries must have very specific targets and must be realistic enough. Such standards need to be implemented quickly, and any radical alteration of the allocation of taxing rights rules will lead discussions to a halt.

Both the League of Nations and the OECD Models are a post-war product, a result of new world orders. Full tax reforms at the national level, as opposed to partial tax reforms, also occur after a radical change in the constitutional order or in times of serious economic and social crisis[32]. In contrast, in times of peace and stable international relations, it will be hardly possible to enact a new tax treaty model introducing a different balance to the current rules on allocation of taxing rights.

Actions have to be coordinated, but they will have to simultaneously respect national sovereignties. Joint audits, improvement of anti-abuse rules and corporate responsibility are examples of measures to be taken that are mentioned in the OECD Report and will not imply a limitation of national sovereignty.

A response to the current BEPS behaviour corresponding to an out-of-the-box thinking implies an alternative tax, such as a destination-based corporate tax. This will have to be first tested at national level, and if corporate taxation is effectively replaced in one OECD jurisdiction, it will take long before this is duly reflected in international coordination.

10. Fair Distribution of Tax Burdens, Allocation of Taxing Rights and Harmful Tax Competition

It can be safely concluded that, if the policy debate is targeted at decreasing tax evasion and aggressive tax planning, the fair distribution of the tax burden is still to be determined according to national parameters – i.e. in each jurisdiction, at the state level

[29] The same is true for the constitution of a political union: J. Habermas, *Um Ensaio sobre a Constituição da Europa,* Lisboa, Edições 70 (2012) (Essay zur Verfassung Europas, Suhrkamp, 2011) pp. 61-114.
[30] See the proposal by M. P. Maduro, *A New Governance for the European Union and the Euro: Democracy and Justice*, RSCAS PP (2012/11).
[31] See the results achieved by: R. Koch, A. Oestreicher, D. Vorndamme & S. Hohls, *Possible Effects of a Common Consolidated Corporate Tax Base on EU Tax Budget,* in this book.

[32] See the Portuguese proposal for a corporate income tax reform: T. C. Neves, *Opening Pandora's Box: Ten International Dimensions of the Portuguese Corporate Tax Reform*, Tax Notes International, Special Reports (September 23, 2013).

- , which implies that the meaning of equality among taxpayers is to be defined, as usual, by national law, in compliance with constitutional principles. Tax equality can then pursue either capital export or capital import neutrality or none of them.

And in fact, the allocation of taxing rights among jurisdictions is not questioned in the current agenda, unless there is harmful tax competition. If the latter occurs, states are encouraged by the OECD to take anti-abuse measures[33].

In the EU, this implies, so far, the prohibition of existing State Aid[34]. However, because harmful tax competition is characterized by the ring-fencing of the regime[35] (broadly corresponding to selectivity in the EU), it does not avoid a race to the bottom that covers domestic companies investing abroad: national tax measures fostering conduit companies does not fall, per se, in the definition of harmful tax competition, as long as there is no ring fence and no discrimination.

All this means that the anti-BEPS agenda aims at protecting the national fiscal interest (i.e. at collecting national tax revenue). There is, however, strong awareness that this interest cannot be achieved without global governance. Global tax governance is a condition to address BEPS and to assure tax mobility (they are two faces of the same coin), since unilateral measures will either prove to be inefficient to tackle abuse or to provoke double taxation and other tax obstacles, economic distortions and inefficiencies.

11. **Global Tax Governance and EU Tax Governance**

Global tax governance is to be achieved by concerted action towards enactment of international standards and subsequent transposition in legally binding instruments (i.e., hard law). In the European Union, the European Commission has enacted two recommendations on 6 December 2012 in order to address BEPS that do not differ substantially from the broad suggestions in the OECD Report. They include a model of a GAAR that converges with the ECJ case law on artificial arrangements, and that is to be adopted by all EU Member States.

The EC recommendations constitute soft law[36] but may have binding effects if adopted by the Member States. In that case, the ECJ will be competent to interpret whether the recommendations, as enacted under national law, comply with the TFEU

[33] *The OECD Report Action Plan... supra* n. 1, Chapter 5.
[34] R. Luja (*Re)shaping Fiscal State Aid: Selected Recent Cases and Their Impact* 40 Intertax 2 (2012), pp. 120 -131.
[35] *The OECD Report Action Plan... supra* n. 1, p. 29.
[36] D. Sarmiento, *The Function of EU Soft Law,* Traditional and Alternative Routes to European Tax Integration, D. Weber (ed.), Amsterdam, IBFD (2010), pp. 53-65.

(for example, with the fundamental freedoms) and contribute to a uniform interpretation of the recommendations in the EU Member States[37].

In the International Public Law frame, the exchange of information standard has been granted legal value by means of conclusion of TIEAs and renegotiation of exchange of information provisions in tax treaties, implementation of peer reviews to assess whether the standard has been effectively implemented, and to some extent, also the US FATCA measures[38]. Moreover, both the OECD approach to BEPS, as well as the transfer pricing forum in the EU, seem to be willing to keep the arm's length principle, and to look for solutions based on substance versus form approaches, adapting it to today's global business environment.

The fact that the reaction to BEPS must be granted globally can have two implications for the EU influence on global tax governance. It can be argued that global governance and global answers do not eliminate multi-decision levels and, consequently, the EU will still have to tackle BEPS, whether working in parallel to the G20/OECD response or after what the right answers are having been clarified, for a global dimension.

That would be the best way for the EU to fulfil its own policies constitutionally required (the creation of the internal market) and to comply with its constitutional principles (the non-discrimination principle). One way of addressing BEPS in the EU would be to approve the CCCTB proposal of directive. The G20 worries and the OECD Report could reinforce the need to abandon the arm's length principle within the EU.

In a more critical approach to the inefficient EU decision-making process, a global reaction to BEPS, led by the G20 and the OECD would mean that tax mobility in the EU is not, after all, a constitutional right (derived from a principle), requiring a specific answer (an EU answer) but merely a policy goal. If that is the case, tax mobility within the EU can be compatible with global standards and national answers to abuse of that mobility.

In other words, the global recommendations to address BEPS could be freely adopted by each EU Member State, according to its own policy targets (to be more or less competitive) and revenue interests (anti-abuse rules targeted at cross-border situations would be admissible as long as they are proportionate).

This would also mean that the degree of integration within the EU – the internal market and the fundamental freedoms – is still far from assuring tax mobility to the EU nationals, that the goal of achieving tax mobility within the EU can be postponed *sine die* and that the Member States are still competent to address tax mobility. Both view-

[37] Cf. the ECJ 13 December 1989, Case C-322/88 (Salvatore Grimaldi v Fonds des maladies professionnelles).
[38] A. G. Soriano, *Toward an Automatic but Asymmetric Exchange of Information: the US Foreign Account Tax Compliance Act (FATCA) AS Inflection Point,* 40 Intertax 10 (2012), pp. 540-555.

points and related arguments are valid to a certain extent, and are not the end of the story.

12. The Deficit of EU Tax Governance and the Increasing Tax Competition: The Need for a Fiscal Union

The fact that tax harmonization in direct taxes is so difficult to achieve (because of the unanimity rule which is effectively used by the Council to divide itself) seems to lead Member States to an increasing tax competition, of which the patent box regimes introduced by some Member States are an example[39], and where the adoption of participation exemption regimes by some of them follows the world-wide trend[40]. This tax competition, taking place not only worldwide but also within the EU, foments BEPS behaviour.

Participation exemption regimes, if not only directed at active business abroad and if not accompanied by harsh CFC and switch-over clauses, is attractive to the set up of conduit companies in the EU, and to the laundering of exempted income in non-cooperative jurisdictions[41]. Tax competition in Europe does not contribute to tax mobility, either, but, on the contrary, leads to the introduction of unilateral obstacles by the Member States that are negatively affected by those policies.

Finally, it can even be argued that the international standard on exchange of information, the US FATCA and the general move to tax transparency (including identification of beneficial owners of income) can contribute to increased global tax competition[42]. In fact, low tax jurisdictions that were based on bank secrecy and lack of transparency in general may well cease to be attractive. In a (ideal) world of transparency, territorial tax systems or participation exemption systems will continue to increase and without proper global tax governance (and without EU tax governance) the entire world, including the EU Member States, will engage in tax competition.

Thus, it is herein contended that the EU also has to react to BEPS behaviour, even if accompanying the progress achieved by the OECD and by means of soft law. An EU wide-GAAR, elimination of patent-box regimes and the list of actions already identified

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[39] See the case of Netherlands: M. Boterman and B. Van Der Gulik, *Netherlands,* The Taxation of Foreign Passive Income for Groups of Companies, 98a Cahiers de Droit Fiscal International (2013) pp. 502-503, 515.

[40] See the examples of France, Nicolas Jacquot, Cahiers… *supra* n .39, pp. 321 et seq.; and of the Netherlands, M. Boterman and B. Van Der Gulik, Cahiers…, *supra* n. 39, pp. 505-506; and the comments on the proposal to introduce a participation exemption regime in Portugal: A. P. Dourado, *A Dupla Não Tributação, a Competitividade e o que Queremos Ser e Parecer,* Jornal de Negócios (28 August 2013); and T. C. Neves, *Opening Pandora's Box...*, *supra* n. 32, at 3.3.

[41] M. Dahlberg, B. Wiman, *General Report,, Cahiers… supra* n. 39, pp. 20-22.

[42] D. Dharmapala , J.R. Hines Jr., *Which Countries become Tax Havens*, 93 Journal of Public Economics (2009), at 1058; D. Dharmapala, *What Problems and Opportunities are Created by Tax Havens* 24 Oxford Review of Economic Policy (2008), at 661.
A. P. Dourado, *supra* n. 3.

in the OECD Report must be implemented within the EU: implementation of joint audits, joint risk assessment of MNEs, improved risk management, enhanced relationship, spontaneous exchange of information, good corporate citizens, country-by-country reporting, elimination of mismatches between different tax systems.

As a result of the financial crisis in late 2008 and the euro crisis in 2010, but especially in the context of the G20 and the OECD initiatives, the EU policy focus related to the movement of persons in the context of tax mobility has switched from the necessity of creating an internal market with no obstacles to that movement, to the necessity of fighting cross-border tax evasion and aggressive tax planning. If we believe that good tax governance is not a mere slogan, we have to be aware that political agendas in the EU Member States are increasingly targeted at short-term goals linked to the electoral cycles[43]. For good and bad reasons, the latter pressure does not exist in respect of the EU agenda itself. The good reasons are linked to the role of a supranational entity that focuses on supra-national interests and therefore is presumably more aware of the common interests in the Union. This role is played by the European Commission, but not by the Council. There are at least three bad reasons for the absence of electoral pressure within the EU: they lie in the fact that political agendas ought to be determined by the public interest but that that interest does not necessarily coincide with the opinion makers' viewpoints (e.g. the mainstream media); in the democratic deficit in Europe; and in a deep alienation of the European citizens from the EU decision makers[44].

13. The Current EU Tax Policy Agenda and Tax Justice and Tax Efficiency

It is fair enough to recognize, that, after all, the EU tax policy agenda (finally) reflects the good old national economic and fiscal law debate about tax justice and tax efficiency. Whereas mobility within the EU is necessary for (efficient) economic growth and the increase of public revenue (if there is no tax abuse or evasion), a determined reaction to BEPS and any other cross-border tax abuse and evasion has to be taken. In fact, equality among taxpayers has to be guaranteed so that paying taxes is perceived as a public obligation. However, the aforementioned classic goals of justice and efficiency and the related principles of tax law will not be enforceable in the EU in the absence of political integration and of EU taxes[45]. They have to be part of the globally sound finances. Alternatively, tax competition among Member States, BEPS behaviour and subsequent unilateral reactions will increase.

[43] See the criticism in J. Habermas, *Ach, Europa*….pp. 102-104.
[44] Cf. J. Habermas, *Ach, Europa*….*supra* n.*6*.
[45] A joint fiscal policy is also a condition for the EMU: See J. Luque, M. Morelli and J. Tavares, *A Volatility-based Theory of Fiscal Union Formation*, EUI WP 21 (2012), pp. 1-41; see e.g. Idem, p. 28: "Either all or part of the countries move towards fiscal union; or the Euro might colapse and at least some countries will have to revert to autarky"

This chapter aimed at showing the inconsistencies and tensions regarding tax mobility in the European Union. The above mentioned insufficient policy action and harmonization of direct taxes can only be solved with more Europe: a fiscal and political union, both of which require direct democratic legitimacy of the EU decision-making powers and a federal budget (in order to comply with the no taxation without representation)[46].

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[46] J. Habermas, criticizing the current decision-making rules, for not granting enough democratic legitimacy to the European Union decisions (or "output"): S*upra* n. 44. Habermas cross refers to S. Oeter and the concept of Executive Federalism as an insufficient one: S. Oeter, *Föderalismus und Demokratie,* Europaïsches Verfassungsrecht..., *supra* n. 23, p. 103.

Chapter IV

Portugal, Europe and the Globalization from the perspective of Law History

Janez Kranjc (University of Ljubljana)
«Legal education in the time of globalization – the case of Roman law and legal history» ►

Caroula Kervegan (University of Cergy-Pontoise)
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«Legal education in the time of globalization – the case of Roman law and legal history»

Janez Kranjc (University of Ljubljana)

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Let me first congratulate the Faculty of Law of the Lisbon University on the occasion of its high anniversary and at the same time thank the organizers, especially my friend Professor Vasco Pereira da Silva, for the invitation to this prestigious meeting and for its splendid organization.

The topic of the meeting is globalization. How can we combine this process, which is shaping not just our future but also the present, with Roman law and legal history which seem to have their domicile in the past? The only shared point of the two seems to be legal education using the past experience so as to provide the legal skills and profiles able to shape the future. In this context, there is an additional reason to mention Roman law. Roman law was a core subject of legal education over centuries and at the same time the backbone of the European cultural and legal developments that unified Europe in the field of law.

The question I would like to deal with today is why we should teach Roman law in the 21st century. I would like to say some words about the added value Roman law and legal history have for the profile of an educated lawyer and what they can add to the common legal culture.

In shaping the legal curriculum there are, as we know, two different approaches. The pragmatic approach requires that the curriculum should transmit very concrete competences related to valid law. The other approach – unfortunately a minority view at the moment – still maintains that legal education should produce broadly educated intellectuals. The problem I want to discuss here is in what way can the teaching of Roman law and legal history contribute to the general legal education and the intellectual profile of a lawyer?

We all know that sometimes the facts of a particular legal case came into existence in a different social context in the past. In such a case, the dispute between the parties cannot be resolved in a satisfactory manner if we do not take into consideration this social context and its development over time. It is thus necessary to be aware of legal developments over time. To do so, the lawyer has to master the method of dealing with dynamic aspects of law.

The same is true for the interpretation of legal norms which have all been promulgated in the past. The interpretation can also depend on the context of time. Including this dimension into legal discourse can contribute to its fairness and quality. To obtain a comprehensive interpretation of a legal norm an all-encompassing approach also taking into consideration its temporal perspective has to be applied.

But the temporal perspective is not only important to make us understand past events. It can also teach us to avoid past mistakes and not to experiment with solutions which seem to be new but have in the past proved to be wrong.

The third important element requiring a comprehensive approach to legal problems including the temporal perspective is the need to ensure the continuity and legal certainty. The natural and harmonious developments are continuous. Only revolutions bring about discontinuity and we know what their consequences can be. The continuity requires an organic development which can result in a natural disappearance and elimination of inappropriate and

unsuitable provisions and solutions and the introduction of better ones. Moreover, the sense of continuity can prevent us from throwing out the baby with the bathwater.

Roman law can be regarded as the common denominator of legal education in different European countries. Roman law is probably the most European among legal disciplines in the present legal curricula. Becoming familiar with Roman law also means becoming familiar with the fundaments of private law of more or less all European and many other countries.

And last but not least, studying Roman law normally makes us aware of the cultural dimension of law. It reflects those features of law that have stood the test of time and have been regarded in the past as the best achievements of a legal mind. Let me only remind you of Roman legal maxims and sayings as an example of this cultural heritage.

The lawyer must be aware of the importance of a comprehensive approach to solving legal problems. It is thus the duty of legal education to develop this sensitivity and to teach the student how to do this in a proper way.

All these qualities have to be transmitted to the student and later cultivated by him. Although the development over time can be demonstrated in each discipline separately, the most suitable subjects to show the advancement of legal institutes and notions in their temporal dimension are Roman law and legal history. This has been their main task over centuries and they have developed to this purpose the appropriate expertize and know-how.

Why is it necessary to argue about this? It is because of recent trends trying to reduce or even eliminate these two subjects from the legal curriculum as superfluous. It is possible to maintain that eliminating Roman law and legal history from a legal curriculum would deprive the legal education of important aspects of legal culture, method and substance.

Over the past centuries, Roman law was the core element of legal teaching at the university on the European continent. It was a sort of legal anatomy and the fundament of legal education in the field of private law. Despite the diminished quantity and to some extent a new approach to teaching of Roman law, the main focus remains the same even today. By and large it is based on the same salient points. They are:

- to present legal institutions of private law as a harmonious system with its internal relations and structure,

- to teach the students a clear legal terminology, enabling them to distinguish between particular terms,

- to bring about the ability of analysing legal texts, distinguishing neatly between facts and law,

- to give the students the opportunity of solving practical cases and arguing pro et contra,

- to present Roman law in its historic and social dimensions,

- to make students aware of the reciprocal relation between law and society in terms of the impact of particular legal norms on the social environment and vice versa,

- to show the importance of a concise, precise, and elegant legal language.

The main aim of the so-called Bologna reform was to re-examine the entire law curriculum and to draft it according to learning outcomes. It endeavoured to shorten legal studies and to shape them in the context of the so-called lifelong learning. On the other hand, it tried to stimulate the creativity of students by reducing the amount of contact hours to the minimum. By doing so, the reform intended to give the students enough time to develop their own professional profiles by choosing among a variety of elective subjects and to leave them enough time for individual research and studies. To achieve this goal, it was necessary to limit teaching to the bare essentials and to eliminate unnecessary and out-of-date subjects.

Consequently, one of the main problems of the reform was to establish which subjects should become the so-called core subjects, which ones should only be optional, and which subjects should be abandoned altogether. This problem has been closely connected to the main problem of legal education, namely to its general profile. The common denominator of all graduates are the core subjects. Consequently, with the exception of the core subjects, legal education varies from one graduate to another.

If we want to define the core subjects of a legal curriculum, we first have to identify the learning outcomes as the final goal of legal studies (which is also the starting point of any serious discussion about the legal curriculum).

The learning outcomes of legal studies should correspond to the main activities of the legal profession, which are:

- recognising a legal problem;
- finding and applying the extant law to specific cases (i.e. to individualize it)
- the settling of cases without trial (negotiation, mediation, reconciliation, compromise);
- providing aid in shaping a transaction (to avoid disputes or legal difficulties in the future) through counselling and negotiation;
- representation of clients before non-judicial bodies (commissions, committees etc.).

The graduate of a law school should therefore be able to solve complex legal problems. He or she should be able to define the problem, find, apply and interpret the valid legal norms and adopt or argue for an appropriate decision. This expertise has two elements:

- the knowledge of legal notions, system and regulations and
- the mastering of the legal method.

Although applying and interpreting the law is at the core of the legal profession, this does not mean that the lawyer is merely reproducing it. The real meaning of legal work is the ability to properly position a specific legal regulation inside the legal system and to apply it correspondingly by interpreting it in conformity with the general legal values and principles, taking into consideration the legal system as a whole. He or she has to do this in accordance with fundamental legal values and principles, especially that of the rule of law. A lawyer

without firm ethical standards and not dedicated to the principle of justice can never be more than a legal technician or a blind bureaucrat.

This is only possible if a student is made aware of the importance of these principles and values during his or her studies. These qualities can be obtained only if the student is not required to simply memorize and maybe mechanically interpret the texts of particular legal regulations but is encouraged to make an effort to understand them in their broader context, comprising wide-ranging social dimensions. Among them, the historical perspective is of imminent importance.

Appreciating the need to also take into consideration the historical viewpoint of a given case or a legal problem develops the ability of a lawyer to see and evaluate legal phenomena in their dynamic perspective of time and space. Such an approach gives the lawyer a comprehensive picture of a given event. Thus, it makes it easier to distinguish between what is essential and what is not, it facilitates avoiding repeating mistakes from the past etc. Traditionally, the subjects that stimulated such an approach were Roman law and legal history. Their role has been, on the one hand, to develop the analytic method and, on the other hand, to strengthen the legal culture and the intellectual nature of legal education requiring of a lawyer to be a critical observer and analyst of historic developments.

The product of legal education has to be an intellectual trained in law. To achieve this, a simple transfer of knowledge and skills does not suffice. The legal studies should provoke a process of thinking and reflection, and not only one of memorising.

The first step in this direction is a thoroughly conceived and accurately implemented *admission process*. It is an illusion that everyone is able to study law well and become a good lawyer. It is therefore necessary to find a way of selecting those who have both the talent and due diligence to study law.

The second step in motivating students is *a good curriculum*. It has to offer students a broad spectrum of law-related knowledge that can attract their interest. The third step is a *creative atmosphere* generated by both teachers and students. Such an atmosphere can contribute considerably to the quality of graduates. A graduate, as the final result of legal studies, has to be a creative and responsible lawyer, able to solve the most complex legal problems. Moreover, he or she has to be a critical and broadly educated and independent professional, able to recognise and resist manipulation.

A lawyer should be a promoter of legal values and of the rule of law. This cannot be done without having a broader idea of what the role of law in a society should be. And this, in turn, cannot be achieved by only learning the positive law.

If we look at all these requirements, we see that only a portion of required qualifications can really be taught at all. Rather, much of it has to be learned from experience. In the new, ever more competitive and unstable environment, graduates of law will have to possess the ability to face change without losing too much time to adapt and without diminishing the quality of their work. This, however, is only possible if their education meets several demands. Specifically, the teaching and learning should:

- not be focused merely on facts but predominantly on the legal method of analysis and synthesis,
- not be limited to positive law but should transmit some insight into the broader social and historical dimensions of law;
- give enough opportunity for problem solving in terms of analysing cases in a broader theoretical context;
- focus on a clear and precise legal language, since we know that many problems arise from an imprecise wording of contracts, etc.
- stimulate a broader, especially comparative dimension of legal work.

We can maintain that the subjects of Roman law and legal history are directly related to the qualities we have defined as crucial. Thus they can and should be regarded as indispensable for a comprehensive legal education.

At the beginning of the studies, it is usually difficult to find a subject which would simultaneously be both legal and general or introductory. Roman law meets this criterion easily: it is law *par excellence*, but it is not part of the positive law. Its substance has been verified over many centuries. The same is true for its didactics and terminology. It also offers a lot of cases by means of which the teaching can be made both interactive and practice-oriented. This can facilitate the learning of the legal method. By examining Roman cases, the student will learn how to solve practical problems. So a freshman can easily gain a systematic access to a comprehensive understanding of a legal system. He will learn both the system and the way to deal with practical cases.

Roman law is the system of legal *terms, institutes and categories* which grew over centuries from Roman roots into *a European theory of civil law***.** Nowadays it is the only traditional legal discipline which represents a real common law in Europe with the same terminology, institutes and sources. In this sense it has a unifying impact. Using Roman legal terms, a student of law will find no difficulty in understanding his or her counterpart who studied law in a different legal system and language. Furthermore, with its terminology and systematic approach it contributes largely towards mobility and the possible future unification of the European civil law. And, finally, the student of law will have no difficulty in understanding changes of positive law because he or she will have a clear picture of a dynamic nature of any legal system.

One of the demands of legal education is the flexibility of a law graduate. A law graduate will have to be able to cope with any change in law and in society. The knowledge of legal history can importantly facilitate this process. Only by understanding the past is it possible to anticipate the future and to correctly interpret the contemporary social processes.

Thus, the question cannot be "*Do we need Roman law and legal history?"* but rather "*How to make the best use of them?"*. No student of law should be deprived of the opportunity to get in touch with them.

There are no substitutes for Roman law and legal history in the legal curriculum. If we do not want to reduce legal education to mere technical or even bureaucratic skills, we have to, also in the future, retain them as core subjects. One wonders why different reformers invent surrogates and conduct untested experiments when we have originals which can be adapted and upgraded to the needs of today.

The legal curriculum should reflect the equilibrium between general and special, between core and optional as well as between positive, the general legal and meta-legal subjects. A certain balance is also necessary in realizing the requirements of the changing environment. In the swiftly changing world, it is necessary to retain at least some fixed points. They are indispensable if we want to control the process of change and avoid an uncontrolled development. Only a broader perspective taking into consideration past experience can upgrade change into improvement and bridge the gap between the past and the future.

We must not forget that mistakes and wrong decisions in the field of education can damage generations. Thus finding the appropriate balance between the tendencies to reform and a sound reserve and moderation can only help the reform to succeed and not to remain a mere change. And we have to bear in mind that a true improvement is much more a problem of substance than of form. All this speaks strongly in favour of Roman law and legal history as a firm part of a modern legal curriculum.

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«Ancient and Modern Globalization: a few history lessons»

Caroula Kervegan (University of Cergy-Pontoise)

The current phenomenon of globalization obliges us to reconsider the rules of operation governing our societies from an economic, social, juridical and philosophical point of view. In order to comprehend the social transformations unfolding before our eyes, we often have to try to think the legal system from an external standpoint, and examine its relevance. The manner in which we consider globalization is marked by deeply ingrained eurocentrism. Western science – of European origins – as well as Western values have been spread over the rest of the planet. We are used to considering Europe as the centre or as one of the centres of the modern world. In the historical study of law, this way of seeing things originated in the work of the founding fathers of modern legal historiography in the years following the Second World War.[1] Now, however, we notice that Europe is no more than one single piece of the global puzzle, with a certain 'imperialist' tendency.

Western law has thus evolved in a socio-historical context that has not stopped evolving itself. In history one is constantly faced with phenomena of openings and closure, displacement from centres, and transformation. It could be said that the current transformation that we commonly call globalization is nothing more than a normal phase of historical evolution which has already occurred in the past in one manner or another.

Thanks to the process of globalization social movements are no longer contained within one country, one continent, or one geographical zone alone. For this very reason the different actors have to orientate themselves and adapt to the actions and demands of their partners. The consequence of this process is a questioning of the economic and legal power of states. They now find themselves in competition with parallel institutions that are spatially diffuse, transnational, and which produce constraining norms. Thus one could argue that the State is losing its power, or even worse, it is searching for itself, trying to find a space in which it can still play a dominant role.[2]

Yet, according to our usual juridico-political framework, we consider the State to be the principal actor in all social and political domains. In classical juridical theory, from R.Jhering to Kelsen, the State is the ultimate origin of law or of fundamental norms. However, the process of globalization confronts us with a contrary fact: that of the pluralism of legal systems and sources of law. How can these two opposed factors co-exist – on the one hand, the State which commands, regulates and ordains, and, on the other hand, sources of law like international rules, international agreements, the actions of non-governmental organizations? How can they tune their respective

[1] Both P.Koschaker's book, *Europa und das römische Recht*, Biederstein, 1947, and Fr.Wieacker's book *Privatrechtsgeschichte der Neuzeit*, Vanderhoeck und Ruprecht, 1952, set out to establish the common origins of Europe after the disaster of the two world wars. Cf. Th. Duve, *Global Legal History-Global Perspectives*, Max Planck Institute for European Legal History, Research paper series No 2013-06.
[2] Cf. C. Schmitt, Der Begriff des Politischen, Duncker & Humblot 1979, Vorwort p. 10.

instruments such that harmonious music results? What must be examined is the play that takes place between centralized state power, and law, or those laws existing at a given historical moment.

During the 2500 years that make up the history of Western world, one can detect at several moments phenomena that could be more or less compared to the process of globalization. The first example whose sources we know relatively well goes back to the Roman Empire, from the third century A.D. In that epoch Rome occupied a good part if not all of the known world. This little town, or village, founded, according to the tradition, in the eighth century before Christ extended its power over almost the entirety of Europe, over Asia, and over North Africa. Within this vast empire peoples co-existed who had their own particular legal and political traditions, and who nevertheless entertained commercial and personal relationships with Roman citizens. Yet Roman civil law, as we know, was applicable solely to Roman citizens.[3] Under the pressure of foreign populations, the Romans will very slowly – namely towards the beginning of the first century before Christ, and thanks to intelligent foresight and policy – extend diverse rights to neighbouring peoples and 'foreigners'. These rights were part of the *jus civile*, such as the right to engage in commerce, for example, and the right to contract marriage according to the rules of Roman law. Under the Empire, and on the initiative of emperors, the right of citizenship is later accorded to all peoples living within the territory of the Roman Empire.[4]

First of all, the extension of the right of citizenship to foreigners appears to have been, in that epoch, an expected consequence of the evolution of customs and mores. The inhabitants of the provinces had already been admitted into the Senate over a century ago. A sizeable part of the population of the provinces had obtained the rights of citizenship for enrolling in the army or having to pay taxes. However, according to the sources available, that attribution of the rights of citizenship never undermined the validity of local or customary law for new citizens.[5] This point is changed by the 212A.D edict, or the *constitutio antoniniana*. From that moment onwards, Roman law begins to replace local legal proceedings during trials.[6]

However, the application of the same system of laws throughout the territory and to every subject went directly against the established legal system that had been in place since the very beginning of the Roman *res publica*. Until that moment, the entire Roman legal system had been founded on the bipartition of the individual's legal status.

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[3] E. Deniaux, Rome, de la Cité-Etat à l'Empire, Institutions et vie politique, Hachette 2001, p. 37sq.; P.Fr. Girard, Manuel élémentaire de droit romain, Dalloz 2003 , p. 118sq.

[4] R. Villers, Rome et le droit privé, Albin Michel 1977, p. 202sq. ; J. Gaudemet, Les Institutions de l'Antiquité, Domat, Montchrestien, 2002, p. 312 ; F. de Visscher, L'expansion de la cité romaine et la diffusion du droit romain, *Museum Helveticum*, vol. XIV, 1957, p. 164-174 ; J. Ellul, Histoire des Institutions, L' Antiquité, Quadrige PUF, 1999, p. 489sq.

[5] Evidence for this is found in the 2nd century Tabula of Banasa. Cf. W. Seston, M. Euzennat, *La citoyenneté romaine au temps de Marc Aurèle et de Commode, d'après la Tabula Banasitana*, CRAI, 105-2, 1961, p. 317-324 ; J.-L. Halperin, *Profils des mondialisations du droit*, Dalloz 2009, p. 65 sq. ; Cl. Ando, L'Empire et le Droit, Invention juridique et réalités historiques à Rome, Odile Jacob, 2013, p. 61.

[6] Cl. Ando, loc.cit. p. 74.

Rome was the centre, and its law formed the privileged legal system; the provinces and their inhabitants were satellites that were jealously maintained at a distance. However, the jurists themselves had already undertaken some work of harmonisation, and they had introduced in several different contexts the *fictio civitatis*, that is, the fiction which allowed the judge to deal with foreigners' affairs by temporarily assimilating them into Roman citizens. [7]

Nevertheless, what was new in 212A.D. with the *constitutio antoniniana* was the fact that this time the harmonisation originated from on high, from the Emperor, from the leader of the State who was actually imposing a legal harmonisation throughout the Roman Empire. Jurists succeeded in creating homogeneity out of situations that were actually entirely different, through the use of innovative concepts. Thus they had recourse to different concepts from the *jus gentium*, natural law or from customary law to overcome differences whilst giving primacy to Roman law.[8]

One can see that the extension of the rights of citizenship to all the inhabitants of the vast Roman Empire constituted the first globalization of law on the scale of entire civilized world. It is a globalization, which simply confirms an already established reality.[9] The end of this legal globalization takes place at the same time as the end of the Western Roman Empire and its splitting into several barbarian kingdoms, each of which developed its own legal system. Indeed after the fall of the Roman Empire, Europe itself underwent such a period of 'pluralism' for several centuries, from the end of late antiquity until the late Middle Ages.

The second wave of globalization took place at the time of the 'papal revolution' as H.Berman called this phenomenon.[10] This was not the work of a secular leader, but that of a religious leader, the pope. The bishop of Rome had in the 11th century unequalled power on an economic level and on the moral and legal levels. First of all, unlike the kings who were still itinerant, the pope possessed a localized headquarters in a town, that of Rome. His spiritual power was neither contained within a State nor divided amongst unstable and fragile kingdoms, at the mercy of temporary alliances between feudal chiefs, but covered the entirety of Western Europe. The pope even contested political power with kings. To impose his political vision, he disposed of not only speech and political means, but also of an army, and this at a time in which kings had not yet definitively organized 'national' armies. Finally, in the realm of law, the jurisdiction of the Holy Office was a powerful instrument, enjoying validity in the Christian kingdoms of the West. At this moment, papal power had to organize a centralized administration, through the Cluny monastery, which administered close to a

[7] Gaius, Institutes, 4.37; Cl. Ando, loc.cit., p. 64 ; Y. Thomas, Fictio Legis, L'empire de la fiction romaine et ses limites médiévales, in Idem, Les opérations du droit, Seuil/Gallimard, 2011, p. 133-186.
[8] Cl. Ando, loc.cit., p. 58 ; J.-L. Halpérin, Profils, p. 67.
[9] About the late roman empire, cf ; P. Brown, The Making of Late Antiquity, Harvard University Press, 1996; A.H.M. Jones, The later roman empire, 284-602, A Social, Economic and Administrative Survey, Johns Hopkins University press, 1986.
[10] H. J Berman, Law and Revolution, The Formation of the Western Legal Tradition, Harvard University Press, 1983, t. 1, p. 85sq.

thousand monasteries scattered throughout Europe. Papal power also had to organize the clergy by submitting them to its legal and disciplinary control. Finally the pope submitted secular society to his jurisdiction in several domains like those of marriage and inheritance. He thus constituted a unique centralized power, one that again was capable of controlling and homogenizing the peoples of Western Europe.[11]

During this period law turned out to be a precious tool. The doctrine of the two swords supported the pre-eminence of papal power over the power of the Emperor. This doctrine – which maintains that the pope transmits temporal power to the Emperor through a sacred ceremony – is supposed to be of divine origin. As such, no secular law can be imposed upon him.[12] At the same time in the 12th century, Gratian's decree offered the Catholic Church the legal means thanks to which it could thenceforth direct the affairs of all Catholics in a uniform manner.[13]

Gratian's decree is the theological aspect of the legal system that begins to operate in Europe from the 12th century onwards. The secular aspect is 'rediscovered' Roman law, elaborated and taught at Bologna from the moment in time, and then later in most European universities. However, the two legal systems, canon law and Roman law, were supposed to have the same origin. According to this conception God himself inspired the Roman jurisconsults when they created Roman law. A seventeenth century author tells us "The laws of the Romans were dictated to their emperors by divine wisdom according … to Saint Augustine, as reported by Gratien."[14] In this manner jurists consider the law that they apply in a unified way to a unified Empire to be the expression of divine will.[15]

It is Roman law, enriched by the 12th century jurists, which will progressively create the common law of the universal people of western Europe. Roman law is therefore a universal idea, transmitted by the Christian religion, which allows the introduction, at the late Middle Ages, of a legal system that is common to the entire Catholic Christian world.[16] This is a globalization that – in the absence of a strong secular state – calls for a unique thinking that is represented in the philosophical sphere

[11] H. Berman, loc.cit., p. 113 sq. ; D. Goldman, Globalisation and the Western Legal Tradition, Recurring Patterns of Law and Authority, Cambridge University Press, 2007, p. 97 sq.
[12] O.v. Gierke, Les théories politiques du Moyen Age, intr. J.-L. Halpérin, Dalloz 2008, p. 112sq.
[13] M. Villey, La formation de la pensée juridique moderne, PUF, 2009, p. 134-137 ;J. Gaudemet, Les sources du droit canonique VIIIe –XXe siècle, Repères canoniques, sources occidentales, Cerf, 1993 ; St. Kuttner, Gratien, canoniste du XIIe siècle, in Dictionnaire d'histoire et de géographie ecclésiastiques, vol. 21, 1986, c. 1235-1239 ;St. Kuttner, Gratian and the Schools of Law, 1140-1234, Variorum Reprints 1983 ; J.-L. Halpérin, Profils, p. 79.
[14] A. Duck, De l'usage et de l'autorité du droit civil dans les états des princes chrétiens, Paris 1689, p.26 ; Cf. M.-Fr. Renoux Zagamé, La méthode du droit commun : Réflexions sur la logique des droits non codifiés, Revue d'histoire des facultés de droit et de la science juridique, 10-11, 1990, pp. 133-152, p . 151.
[15] M-Fr. Renoux-Zagamé, Le droit commun européen entre histoire et raison, Droits, 14(1991)27-37 ; O. Tholozan, Vers un droit commun mondial, in J.-Y. Chérot, /B. Frydman, La science du droit dans la globalisation, Bruylant, 2012 p. 274sq.
[16] Cf. C. Argyriadis-Kervegan, L'histoire du droit européen et son einseignement dans un contexte modialisé, in B. Oppermann (sous la dir. de) International Legal Studies by European Scholars of the ELPIS Network, Universitätsverlag Halle-Wittenberg, 2009, pp.11-18.

by Christianity, and in the legal-political sphere by Roman law. As R. Jhering wrote "Roman law and canon law…powerful centres, emerge above the multitude of isolated sources of the law. They amalgamate the practice and the science of the most diverse nations in a common action.".[17]

We have thus examined the phenomenon of a European harmonization, which takes place on the one hand under the pressure of commercial needs, and on the other hand under the spiritual and political hegemony of a centre which is incorporated in the city of Rome and incarnated in the latter's Bishop. This evolution arises precisely where there is a lack of a strong nation-state, the latter disposing of a fixed structure and well defined geographical and intellectual boundaries.

However, from the 14th century onwards, this process will reverse. At this time, the constitution of European nation-states begins, very gradually. Under the direction of a king who was jealous of his prerogatives, jurists were called to support his power, and to provide him with instruments to legitimize his role and his powers. This process is synonymous with the limitation, the re-centring, and the fixation of frontiers between here and there, between "us" and "them". What is established is thus the opposite of an 'open society'. From the 16th century onwards, theories of royal sovereignty are elaborated which will halt any pluralist movement. Once they are created, nation-states have one main concern at a legal level: to fix the limits, diversify, and render exact those rules that make up national law.

The question thus arises: who determines what counts as law? Law is no longer a tool in the hands of judges or professors that serves to resolve conflicts or to reflect in a more or less abstract manner. Law becomes an instrument of domination, an instrument of government. It is in this manner that the role of the king, very gradually, is no longer that of judge, in the first degree, but that of legislator. This shift took place in France under the reign of Philip the Handsome, at the end of the 13th and at the beginning of the 14th century. On the occasion of a deep disagreement with the Pope, the king convoked an assembly of feudal princes and prelates who recognized his sovereignty in the kingdom. With the ordonnance of 1312 Philip the Handsome thus established the study of Roman law at the University of Orleans.[18] From that moment on the teaching of Roman law was authorized in France precisely because its importance was recognized by the King.[19] So he recognized Roman law as possessing a certain importance close to that of established sources of law. France was a very particular case, however. Other European countries followed different routes from the end of the Middle Ages until the

[17]R. Jhering, Der Geist des römischen Rechts, vol. 1, 2nd ed., Leipzig 1866, p. 10.

[18] Ordonnances des roys de France de la troisième race, recueillies par ordre chronologique par M. de Laurière, Paris 1773, vol. 1, p. 501sq.

[19] P. Grossi, L'Europe du droit , Seuil 2011, p. 91 ; A. Rigaudière, La royauté, le parlement et le droit écrit aux alentours des années 1300, Comptes rendus des séances de l'Académie des Inscriptions et Belles Lettres, 140, 1996, No 3, p. 885-908 ; A. Gouron, Ordonnances des rois de France et droits savants (XIIIe-XVe siècle), Comptes rendus, 135, No 4, 1991, p. 851-865, p. 861 ; J. Krynen, Entre science juridique et dirigisme : le glas médiéval de la coutume, CRMH, 7, 2000 ; S. Petit-Renaud, Le roi, les légistes et le Parlement de Paris au XIVe-XVe siècle : contradictions dans la perception du pouvoir de « faire loy» ? CRMH 7, 2000.

modern epoch. Nevertheless the result is the same: European common law has adapted to a context of nation-states, each possessing its own particular characteristics.

The question of sovereignty was posed in these terms. But the principle of sovereignty has two faces: it concerns not only a State's domestic policy, royal power versus feudal forces, but also the relations between sovereign states. It supposes the mutual recognition of the power and independence of separate states.[20] This principle is established between the 16th and 17th century, in particular by means of the Westphalia Treaty in 1648.[21] These political evolutions gave rise to an entire series of theoretical reflections that make up the first treatises in international law; Grotius constructed his system of balance between European states on the foundations built by the theologians, the first specialists of international law. The idea of balance and of tolerance between different European sovereign states finally became accepted.[22] On the one hand each State and each sovereign was understood to possess power such that none of its foreign counterparts were tempted to dispute its prerogatives, and on the other hand, a principle was established that states could intervene in the domestic affairs of another state when natural or universal principles had been publically violated and had to be re-established, or when a threatened equilibrium needed to be re-established.[23] International law was thus a kind of firewall, which in a certain manner affirmed the authority of the nation-state.

From the Westphalia Treaty and the Treaty of Utrecht up till the 20th century, the nation-state blocked any kind of sentiment of belonging legally to a community that crossed state borders. Over the centuries the way law spread into spaces beyond the territory of the nation-state was in colonies, yet this was in a fragmented manner. Nevertheless, the great economic and technological evolutions, as well as the American Revolution and especially the French Revolution, favoured the spread of new concepts and ideals, which, although relatively abstract at first, impregnated political and public life and inspired if not imposed lines of conduct on national legal and political systems. The French Revolution, which placed the triptych of Liberty, Equality, and (a little later) Fraternity in the positions of axioms, elaborated ideological material that was easy to understand and thus potentially adaptable to different political systems. In the 19th century it thus constituted an exportable ideology, which *a priori* did not affect frontiers and state sovereignty, but was applicable within each state.[24] This is why certain ideals proclaimed in the 1789 Declaration, like the principle of equality or of liberty, were gradually adopted by other European countries. As such, from the 19th century onwards, the model of parliamentarianism, and of constitutionalism, was adopted first by the

[20] I. Wallerstein, Comprendre le monde, Découvertes 2009, p. 74.
[21] W. Grewe, Epochen der Völkerrechtsgeschichte, Nomos Verlag, 1984, p. 259 sq.; A.-J. Arnaud, Pour une pensée juridique européenne, PUF 1991, p. 37 sq.
[22] W. Grewe, loc. cit , p. 332 sq.
[23] A.-J. Arnaud, Entre modernité et mondialisation, Leçons d'histoire de la philosophie du droit, et de l'Etat, LGDJ, 2004, p. 133 ; D. Gaurier, Histoire du droit international, PUR, 2005, p. 381 sq. ; W. Grewe, Epochen der Völkerrechtsgeschichte, p. 254sq.; cf. Hugo Grotius, Le droit de la guerre et de la paix, L. II, I.
[24] Cf. P. Grossi, L'Europe du droit, p. 144sq.

countries of continental Europe and then it gradually spread outside Europe towards Latin America and Asia.[25] In parallel with the spread of the model of constitutional law, Europe exercised a considerable influence – on the basis of the Napoleonic codifications – within the domain of private law. The civil law codes were the fruit of legislators' will and in this sense they provided a counter-example to the multiple regulation of medieval and feudal society. Nevertheless the European codification model was adopted in several countries all over the world. After the widespread diffusion of the Napoleonic Code in Europe, and in Latin American countries it was the turn of the German Civil Code which spread across the continents. This kind of legal unification has imposed itself despite the best efforts of conservative States, and nationalisms. Today it makes up the ideological background of a real economic and mediatised harmonization. Through this last process, it is European (legal) culture which has spread across the world outside Europe, and with it European moral and political values.[26]

The question that arises, and which concerns this time the future and not the past, is the following: is it possible to harmonize the multiple legal systems existing today in view of the creation of a global law? What would be the function and role of the State in such a context? History has shown us that each time a 'harmonization' of law, a 'globalization' has occurred, this has been brought about in a top-down manner, thanks to a centralized authoritarian power, like that of the Roman Emperor or the Pope. Otherwise we have to deal with parallel or juxtaposed legal systems which try, for better or worse, to co-exist.

In these times it is a fact that the role of legislator is attributed to one actor alone, the nation-state. Yet within its function as the producer of legal norms the nation-state is joined and filled in by international organizations, like the European Union, the United Nations, the World Bank, by NGOs, or even multinational companies. The state is supplemented by programs and organizations that have headquarters above and outside nation-states.[27] These actors contribute to the regulation of some extremely important questions, like the environment. So the state is sometimes replaced by international markets that deal with questions on a case-by-case basis without necessarily employing state-based law. [28]

At the same time one can observe the renaissance of a very dynamic civil society which no longer considers itself to be confined by national geographic borders, but which is founded on common political or social interests. There is a new civil society that has a global engagement, a world community. For the most part, this society escapes state regulations, and is developing a planetary public conscience.

Nevertheless, the entirety of our legal culture has been thrown into question.[29] The modern legal system was founded on a pyramidal structure. In contrast, the global

[25] J.-L. Halpérin, Profils, p. 152sq.
[26] I. Wallerstein, European Universalism. The rhetoric of power, The New Press, 2006, p. 71sq.
[27] U. Wesel, Geschichte des Rechts, Beck, 2001, p. 589sq.
[28] Cf. A-J. Arnaud, Entre modernité et mondialisation, p. 121sq.
[29] A. Schiavone, Jus. L'invention du droit en Occident, Belin, 2008, p. 27sq.

system, and consequently, global law, functions according to a network in which social actors must constantly negotiate in order to establish common solutions.[30] So, the State such as we know it today, needs to be rethought. So legal theory has to open up new perspectives and to indicate what could form the future bases of the legal institutions.[31] It seems to me that if history can give us a clue that might lead to a way out, then it must be the following: we can no longer speak of the traditional sovereign State in the same sense as up until now. Sovereignty itself has changed its content: it is much less an absolute sphere of autonomy;[32] rather it has become an authority that allows the state to play a protective role for peoples. Far from having fixed solid frontiers, States are the only institutions that can construct some kind of barrage against a savage and disordered globalization.[33]

In this manner a new face for the state is emerging for the future: it will be one of the actors in international affairs, alongside international organizations, NGOs, citizens' associations, syndicates etc. But perhaps the most intense expectations on the part of citizens will always be directed at the state, because it has been the object and the fruit of so many Revolutions and claims on the part of peoples. So actually, the state has to be a go-between and to guarantee international solidarity.[34] If the 21st century is a period of upheaval, states have to guarantee the emergence of a new just international order. – This is precisely the task of nation-states and in particular the current European states: to be the watchdog of citizens' rights in the heart of the new centre that will necessarily emerge after a period of crisis.[35]

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[30] A.-J. Arnaud, Entre modernité et mondialisation, p. 138 sq. ; Idem, Critique de la raison juridique, 2. Gouvernants sans frontières, Entre mondialisation et post-mondialisation, LGDJ, 2003, p. 183 sq. ; J-Y Chérot, Concept de droit et globalisation, in Chérot/Frydman, loc.cit ; p. 3-16 ; J. Habermas, Après l'Etat Nation : Une nouvelle constellation politique, Fayard, 2000, 127sq.

[31] Concerning the complexity of this approach cf. P.S. Berman, Global legal pluralism, Southern California Law Review, vol. 80, 2007,p. 1155 sq.; N. Mac Cormick, Beyond the sovereign state, The modern law review, vol. 56, January 1993, No 1, p. 1-18.

[32] J.-B. Auby, La globalisation, le droit et l'Etat, LGDJ, 2010, p. 136sq, 143.

[33] K. Polanyi, La grande transformation, aux origines politiques et économiques de notre temps, Gallimard, 1983, p. 328sq.

[34] Cf. J. Habermas, loc. cit., p. 118 sq., 142sq.

[35] Cf. F. Braudel: "*Bad economic times end up by destroying the old centre and confirming the emergence of the new*." in Idem, Dynamique du capitalisme, Flammarion, Champs Histoire, 2008, p. 90.

«Final report of the session "Portugal, Europe and the Globalization from the perspective of Law History"»

Miguel Romão (University of Lisbon)

Thank you, Professor Dr. Vasco Pereira da Silva, for this kind invitation, and good afternoon to you all.

I will be very brief and I will just share some notes on the last panel this afternoon, dealing with Legal History. And I am very lucky because we have still with us our foreign guests, Professor Dr. Janez Krancj, of the University of Ljubljana, and Professor Dr. Caroula Kervegan, of the University Cergy-Pontoise. I will do a bit like Roman lawyers used to do, focusing on the substance and not being very sistematic as lawyers became over the centuries.

Prof. Janez Krancj gave us a very clear lecture on how Roman Law and Legal History are still today probably the most powerful tools to introduce Law to a future lawyer.

Roman Law as "law of empire" but, at the same time, also as "law of union", that two thousand years after the empire, still cames to force. Why to teach Roman Law and Legal History in the 21st century was the first question he raised – and he gave us his view on how legal education should address the broader issue of legal culture. In that sense, history and the social context of law, not only mere legislation, should be necessarily included in legal studies. That will probably reinforce our ability to interpretate and it will give a new substance to what we call interpretation. And it will help a future lawyer to better evaluate his context and to find better solutions.
I would also highlight in this presentation the idea of a continuum in our European legal culture. That shows us the need of the concept of prudence in our legal order, that is to say, the need to acknowledge how justice has been served over time and not only to take into account our "new solutions" of today.
In the following presentation, Prof. Caroula Kervegan shared with the audience this idea of lawyers as "pioneers in globalization". In a very rich presentation, we have followed the long-term evolution of European Law, helping us to think on how Legal History and Legal Philosophy can do its part in changing the world. And how they can help us to understand how change is happening in our world, by understanding our evolution as a legal system.

Prof. Kervegan also addressed the position of the State in the new order we live in and she shared with us the historical dimension of the political cathegories of empire, force, rights, citizenship and legal system. It was a very rich presentation and Professor ended by mentioning that the ideia of sovereignity, that has been questioned in the last decades, is still necessarily a topic to be placed *vis-a-vis* with the ideia of a "full global law".

At the last intervention of the panel, Professor Dr. Pedro Barbas Homem raised the question, that he called a paradox, on how concepts and words can mean very

different things to different people in different parts of the world. That is a very simple guideline that may help us to be sucessful regarding the ethic needs of history and of law, when we address a concept that only apparentely is the same for everyone.
Prof. Barbas Homem also stressed an interesting idea: we can only speak of globalization, in this perspective of legal theory and legal history, thinking about the second half of the 20th century, this era of human rights and democracy – or, at least, of a very deliberate search for human rights, democracy and peace. He concluded that we cannot talk about legal globalization if we don't connect its contents to the needs of democracy, respect of human rights and peace. So I would say that we were lucky enough to have three very interesting presentations.

Legal history research, in the last decades and today, has been focusing very much on how European legal culture and European legal experience has migrated to other parts of the world and on what that reception basically ment for both parties. That is one of the topics, also here in this Faculty, we are dealing with and of course, if not seen in a very eurocentric perspective, it is probably one of the most rewarding studies in the domain of legal history that can be done, honoring this idea of a never-ending globalization for which legal historians are used to place its begining at least at the 3rd century BC.

Thank you very much.

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