

# **The Politics of a European Civil Code**

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## Chapter 2 Thoughts on Coherence, Social Values and National Tradition in Private Law

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My aim in this brief essay is to reflect, very much from an outsider's point of view, on three concepts or notions that seem to recur in the discourse of my European colleagues (and friends) who are working on the Europeanization of private law. The first is the notion of 'the coherence of private law,' as in the sentence: 'the Commission's directives threaten to destroy the coherence of private law.' The second is the notion of 'the social values of European law,' as in the sentence: 'Harmonization should reflect the social values of European law.' The third is the notion of 'the particularity of national legal traditions,' as in the sentence: 'Harmonization should be respectful of the particularity of national legal traditions.'

I don't mean to suggest that these sentences are everywhere or that every scholar or even most scholars working in this area would agree with them, not at all. But coherence, social values and national tradition come up quite often. I have the impression that not using, refusing to use, one or another of these concepts defines one's position negatively but sometimes clearly. As an American participant/observer in this discussion over the last few years, I have come to recognize in myself a moment of puzzlement. The three notions are virtually never explicated fully. They are each quite complex. The relationship between them is not clear.

So, for example, it has occurred to me to ask: 'Do those who think that what is important in harmonizing is the fate of social values reject the idea of coherence?' 'Do they care about national traditions otherwise than as the vehicle for preserving social values?' And so forth. 'Does reference to preserving the coherence of private law mark one as a political conservative or as a methodological conservative – or both, or neither – and do we expect conservatives to reject social values in private law?'

If I were a European, I imagine I would have a much better idea than I do about how to answer these questions, because I would have a better idea of what is meant by coherence, social values and national tradition in European private law discourse.

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Not being a European, I thought I might contribute to the discussion by summarizing and elaborating, for what it's worth, some of my own work, not likely to be at all familiar in Europe, on each of these notions as it appears in the American context.

## I. COHERENCE

The notion of coherence does not play a central role in the everyday discourse of private law in the US. Three explanations: (1) US law is so thoroughly lacking in coherence that no one would think it useful either to criticize it or to reform it with coherence in mind. (2) The notion of the coherence of private law was central to Classical Legal Thought (CLT) in the US, and was critiqued in a devastating way by the sociological jurists and legal realists, so that we Americans are 'beyond' it, unlike Europeans who may have invented the critiques but lost touch with them after the Second World War. (3) Coherence is the obsession of private law legal theorists in the US, from Fried and Barnett to Macaulay and Macneil to Posner, and also of Dworkin, but goes under other names (e.g., 'fit'), or is unnamed (and jurists operating below the abstract level of legal theory have little interest, for reason one or reason two above).

But before beginning the discussion of coherence, I have to confess something well described as 'profound puzzlement' about what Europeans are referring to when they speak of 'private law.' Sometimes it seems they are speaking of the sections of Continental civil codes that cover the law of obligations; sometimes that they mean to include family law; and sometimes that they mean to include along with the law of obligations the various statutory regimes covering labour law, consumer law, landlord tenant law, the law regulating land use beyond the law of private nuisance, and so forth. And where does the regulation of sexuality and reproduction through good faith, good morals and *ordre publique* clauses in the civil codes fit into the discussion of private law? What about commercial law?

The question of definition is obviously important for a discussion of coherence. For example, Wieacker, in his famous discussion of social law, states emphatically that the social law of labour, tenancy, environment, etc, has 'destroyed the coherence of private law.'<sup>1</sup> He seems to think, though it is not clear, that the code law of obligations was and perhaps still is coherent, but that the subtraction from it of these domains of statutory regulation poses two juristic problems. The first is that social law is not itself coherent, but rather ad hoc. The second, only implicit, is that we cannot regard the whole of his broad private law category as coherent unless we have coherent criteria to explain what parts have remained in the 'individualist' codified core and which have been selected out.

Then there is the fact that the new Dutch civil code apparently reverses the secular tendency to preserve coherence by segregation, and re-includes the regulatory

<sup>1</sup> F. Wieacker, *A History of Private Law (with Special Reference to Germany)*, trans. Tony Weir (New York, 1995) pp. 431-41.

domains, and that the Mussolini era Italian civil code seems to combine the elements without an effort of conceptual integration. What do these points about arrangement indicate? Certainly not, as far as I can tell, that the sense of incoherence has disappeared in the new synthesis for which Wieacker (plaintively) called.

A jurist adopting an external point of view, i.e., engaged in trying to characterize a private law regime as an observer, might describe a legal order as coherent or not coherent in various ways. A jurist adopting the internal point of view will always or at least generally have presupposed some such characterization of the field s/he is working in before s/he sets out to try to state a rule or body of rules 'correctly.'

*Total coherence* (everyone knows it's impossible). The external observer, or the jurist before s/he begins internally oriented work, might think, though I don't think any do in fact think, that the system of private law was coherent in a very strong sense. All the rules of the system, s/he might think, follow (in some sense, tightly or loosely, etc) from a set of principles that are either consistent with one another, or apportioned among parts of the rule system through meta principles that are consistent with one another. These principles might be capable of resolving any new situation arising within their respective domains. For example, s/he might think that labour law is fully governed by a consistent set of social principles, whereas contract law is governed by a consistent set of individualist principles, and that the boundary between contract law and labour law is clear (for example, because labour law covers all transactions involving labour power as a commodity). Obviously no one claims that the private law of any country is coherent in this maximal sense.

*Coherence at the level of principle.* The observer might conclude that the system contains, as the basis for legal interpretation, a set of principles that are either consistent with one another or apportioned to parts of the system according to a coherent set of meta-principles. In this version, it is understood that many concrete rules of the system may be inconsistent with the principles that should govern them and that there may be conflicts, and that gaps may appear as new cases arise.

The observer might conclude that the principles and meta-principles enable jurists to 'operate' the system in the sense of coming up with solutions to problems posed by past errors, and solutions for some, but not necessarily all, conflicts and gaps. These solutions, in this model, follow, for the jurist doing particular interpretations, either as a matter of meaning from the principles correctly understood, or from correct teleological reasoning from the principles understood as goals of the legal order. In this model, there can be deep and long standing disagreement about the correct application of the principles, and even about what exactly the principles are, without putting into question the idea that the system is coherent, albeit in this more modest mode.

The private law regimes of the different European states could be coherent in this sense, and there could be a coherent 'European private law' in this sense, even if the lower level rules of the different states were very different. The differences would simply be instances of disagreement about how to perform the interpretive task given the shared larger principles.

A jurist who regarded the system as coherent in this manner could treat the interpretive task as to carry out the 'logic of the system' by choosing the solution to the question at hand that seemed to him or her to be dictated by the applicable principles within the given area of law. Indeed, this approach might seem to be compelled by the very idea that the jurist has adopted the internal point of view, given that the coherent set of principles is part of the legal order, and solutions seem to follow from the elucidation of their meaning or purpose. On second thought, this is not as obviously correct as it at first appears.

The jurist could decide to adopt a particular solution, or a whole set of solutions, that differ from those dictated by the principles and meta-principles, on the ground that there exists a meta-meta-principle, say of adaptation of the law to changing social realities or preservation of supra-legally defined individual rights. In this case, the jurist's solution will make the private law regime inconsistent, unless the jurist redoes the whole thing at one blow.

Putting the 'logic of the system' into effect would then be reduced to one of the goals of legal interpretation, to be 'traded off' against other goals. At the extreme, the jurist could regard the putting into effect of system logic as irrelevant to the juristic role, understanding himself or herself, say, as obliged to decide cases 'on their individual merits,' or to choose the 'best moral solution,' or to put a 'higher law' into effect, even when any of these conflicted with system logic.

Speaking of the US system from the internal point of view, I think the argument that there is a meta-meta-rule that the jurist's job is to enact the system's logic is wrong. I prefer the view of Cardozo: that the jurist is sometimes acting morally and professionally correctly when s/he interprets according to morality or justice or policy against the solution s/he believes required by coherence.<sup>2</sup> But I also find the whole discussion of limited interest because most jurists, myself included, long since stopped perceiving or presupposing that private law as a whole (i.e., including social law and family law as well as the law of obligations) is endowed with coherent substantive principles for fields along with meta-principles for apportioning cases among fields.

The reasons for the change in perception or presupposition about private law are probably many and complex, but we certainly share across the Atlantic a common narrative, already alluded to, in which the rise of 'the social' is the main culprit or hero, depending. I have already mentioned Wieacker's version, in which the core of private law remains coherent, while the social subtractions from the core destroy the coherence of the whole field, because they are themselves internally ad hoc rather than principled, and (perhaps) we lack principles for deciding when to subtract and when not to.

American critics have tended to reject the Wieacker formulation. First, the core of private law has never been coherent, and, second, the social subtractions, while not coherent, are far from ad hoc. In this view, the law of obligations even in its purest late 19th century civil law or common law forms and most technical domains

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<sup>2</sup> B. Cardozo, *The Nature of the Judicial Process* (New Haven, 1957) p. 98.

(e.g., offer and acceptance, conditions) was structured internally by the conflict of individualist and altruist strategies.<sup>3</sup> Moreover, fields like labour law and landlord/tenant represented compromises of these same factors, situationally determined by the balance of forces, but in no way piecemeal or chaotic.<sup>4</sup>

Family law was the same. Although based, in the Savignian scheme, on an anti-individualist principle of intra-family fusion, the field was in fact internally contradictory in a way strictly analogous to the law of obligations and social law.<sup>5</sup> (This way of describing the structure of private law is sometimes called 'nesting,' or 'chiasmus' or the 'fractile' quality.<sup>6</sup>) Finally, the divisions between the law of obligations, social law and family law now appear arbitrary rather than commonsensical or practical.

*Coherence as 'the effect of necessity.'*<sup>7</sup> That conflict and contradiction at the level of principle seem (to me) to be everywhere in private law does not mean that jurists experience no differences in doctrinal structure, from field to field, or between sub-fields within a domain. My approach has been to try to substitute for the notion of coherence, understood as consistency or non-contradiction at the level of principle, the notion that a jurist who has an 'agenda,' or a 'how-I-want-to-come-out,' will experience legal fields as differing in the degree to which they produce 'the effect of necessity.' The effect of necessity is the sense, with respect to an actual or hypothetical case, that the legal materials dictate a result.

The legal materials in the US and European systems include enacted norms (both very concrete ones and more abstract principles), decided cases, and doctrinal authorities' views about what the norms are or ought to be. They also include canonical projects of rationalization of particular decisions and larger fields, whether produced by judges or by academics. When the jurist perceives the field to be governed by elaborate legislation, which has given rise to many judicial decisions that include sustained reasoning about what norms govern beyond the legislative ones, and there is dense academic commentary that is in agreement about what the norms are, what they mean, and that they fit together harmoniously, we might describe the field as 'impacted.'

<sup>3</sup> D. Kennedy, 'The Political Stakes in "Merely Technical" Issues of Contract Law' (2001) 1 *European Review of Private Law* 7. D. Kennedy, 'Form and Substance in Private Law Adjudication' (1976) 89 *Harvard Law Review* 1685.

<sup>4</sup> K. Klare, 'The Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness: 1937-1941' (1978) 62 *Minnesota Law Review* 265.

<sup>5</sup> F. Olsen, 'The Family and the Market: A Study of Ideology and Social Reform' (1983) 96 *Harvard Law Review* 1497.

<sup>6</sup> D. Kennedy, 'A Semiotics of Legal Argument' (1991) 42 *Syracuse Law Review* 75; reprinted with European Introduction: Four Objections' and bibliographies in 3 *Collected Courses of the Academy of European Law*, Book 2, pp. 309-365 (Kluwer Academic Publishers: Netherlands 1994). J. Balkin, 'Nested Oppositions' (1990) 99 *Yale Law Journal* 1669.

<sup>7</sup> See generally, D. Kennedy *A Critique of Adjudication [fin de siècle]* (Cambridge, Massachusetts, 1997), D. Kennedy, 'Freedom & Constraint in Adjudication: A Critical Phenomenology' (1986) 36 *J. Leg. Ed.* p. 518.

As cases arise, we expect that jurists will find 'straightforward' solutions, and lawyers will advise litigation only when the stakes are high enough to merit taking a chance on a counter-intuitive result, or the client has an eccentric motive for refusing to settle. Other fields may look quite different. For instance, in a 'contradictory field' the observer notes that the enacted principles and the principles adduced by judges and scholars are conflicting, and that there are many cases, with facts close together, seeming to derive from each principle. New cases will commonly pose the interesting question of which conflicting principle will be judged to govern, which analogies will be deemed persuasive, and so forth.

Another possibility is that the field will initially present itself as 'unrationalized,' with few decisions, little relevant legislation, an undeveloped scholarly literature, and few attempts at rationalization either in opinions or in doctrine. Here, as in the contradictory field, the effect of necessity will be weak or absent when new cases present themselves. This list of types is obviously not exhaustive.

This approach is phenomenological, in the sense that it asks not whether a given field is 'really' or 'truly' coherent in the sense of consistently principled, but whether it is experienced as structured so as to compel particular results in many cases. A crucial aspect of this approach is that it can take into account that the jurist's initial perception or cognition of the field is not the end of the story. The reason for this is that the jurist can choose to work on the field, trying to change the way s/he and others perceive it.

The possibility of doing juristic work on the field is obvious for the lawyer advocating for a client, but no less real for the judge or the academic. Even in an impacted field, that is, one that presents itself as both coherently and densely regulated, it is always open to the jurist to try to reformulate not just the facts of a particular case but also the relevant norms and their rationales, so that what appeared at first blush the inevitable result is reversed, or at least rendered questionable.

The motives for this activity may vary. One motive is the financial gain of the advocate, another the jurist's search for the 'truth of law,' and another the urge to make law correspond to an extra-juristic view of what would be the just outcome or the best legal norm in the circumstances. But the motive is irrelevant in the sense that the procedure of legal work to reconfigure the field, thereby modifying the effect of necessity, is legitimate according to the meta-meta-principles of Western legal systems.

At the same time, it is open to the jurist to simply accept the initial apprehension of the field, with whatever effect of necessity it generates in the case in hand, and move on. In other words, work is permitted and perhaps morally required of both the lawyer and the judge or academic, but work time must be allocated, and often it makes sense to accept, say, that the field is so impacted that work to destabilize it is wasted.

Let's suppose the jurist decides to work on the field, for whatever legitimate reason. The work will change the field, making it, for example, impacted in a different way with a different result in the case at hand, or making it less impacted or more impacted, more or less contradictory, more or less rationalized. The jurist



who sets out to work on the field can adopt various points of view with respect to these effects.

These vary from field-type to field-type but the most interesting for our purposes is the case of the impacted field that the jurist wishes to reconfigure so as to produce a different result in a case, or different results across a broad range of cases. For example, the project of promoting objective liability in worker accidents or in tort in general in the late 19th century context of a highly developed law of negligence. Or the modern US project of 'tort reform' by reducing liability for defective products by changing multiple sub-rules of the pro-plaintiff regime that emerged between 1945 and 1980.

The jurist might reject any such agenda outright, adopting the position that coherence is the only legitimate goal for his or her work. S/he might regard it as permissible to intervene to shape the field, by describing and re-describing it in order to make it as coherent as possible, but impermissible to have an agenda as to the substantive outcomes that are made more likely by the particular version of coherence produced. Joseph Raz<sup>8</sup> trenchantly critiques this position, arguing that once we recognize that coherence is relative and local, and that the interpreter is dealing with a question that has not been 'authoritatively' settled, then s/he should work toward the most morally desirable outcome (with morality understood to be the sum of legitimate motives in interpretation).

The substantive commitment to deciding 'morally' is distinct from that of preserving the coherence of the field, because more morality might require less coherence. In other words, the jurist might end up making the conflicts between principles and the inconsistency of results more rather than less salient. As Raz recognizes, this doesn't make coherence 'irrelevant,' since there may be good reasons to give it weight in deciding what the morally correct solution to a given problem might be. It merely reduces it to the status of a policy to be balanced with others.

Raz seems to me to reify the distinction between the 'authoritative' and the 'morally correct,' and so to miss the significance of juristic work on each of the poles. He also slights what has traditionally been the most important of the motives for giving coherence weight. This is the idea that impacted fields constrain judicial power in the sense of judicial discretion in assessing particular cases and also of judicial legislative power to develop new rules.

In the approach I have been developing here, the reason for this is that it takes more work to destabilize an impacted field than to rationalize a result in a contradictory field or defend a solution in an unrationalized field. In other words, without conceding for a minute that legal fields can be 'truly' or 'essentially' coherent in a way that constrains the judge, we can eagerly affirm that configurations that are experienced as impacted are more resistant than others, because more work, without a guarantee of success, will be required to fight what at first blush seems the obvious and inevitable outcome.

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<sup>8</sup> J. Raz, 'The Relevance of Coherence' (1992) 72 *B.U. Law Review* 273.



One of the instrumental reasons Raz points out for giving weight to preserving coherence derives from the interdependence of the elements in a given field and the limited ability that a judge or jurist (as opposed to the idealized legislator) has to re-work a whole field at a single blow. Looking for the ideal rule to cover one aspect of the situation may be counterproductive given the presence of elements the jurist is at least temporarily powerless to transform. For example, if a system combines a strong commitment to fault with strong compensatory and punitive damage rules, moving to strict liability without reducing the damage measures could produce a less than ideal new balance of externalized and internalized costs allocated to plaintiffs and defendants.

What counts as a legitimate motive for giving weight to coherence depends as well on one's theory of the judicial (or juristic) role. For example, suppose that the judge believes that his or her solution in a given area will be controversial. In this case, s/he may want to maximize the impacted character of the field configuration toward which s/he is working in order to 'make it stick,' that is, to make it difficult for subsequent jurists to destabilize it. In other words, coherence can appear as a mere instrument of a particular substantive agenda, rather than as a value itself. Depending on how one assesses the legitimate role of politics or substance in the judge's professional self-understanding, this might be a legitimate or an illegitimate reason for giving coherence weight.

The devolution, so to speak, of coherence as the supreme legal value is part of the story of the rise of the social, already described. The reduction of coherence to a policy, and possibly to a mere instrument of substantive agendas, fits into the story of the gradual rise of balancing, or proportionality, or 'conflicting considerations' as the default method of legal reasoning in Western legal systems. This development permits a reformulation of coherence in a new and much more modest mode.

*Coherence as proportionality.*<sup>9</sup> This fourth, modest type of coherence is that of a system in which the conflicting principles that animate it are named, there are criteria for acceptable principles, and decision is by the method of proportionality or balancing when the prior methods of textual exegesis and local coherence at the level of principle don't work in solving particular problems. The most important criteria for acceptable principles in systems understood to be coherent in this way are: (a) that they should be enacted, or explicitly adopted in case law, or at least inferable from the body of norms recognized to be valid; (b) principles must be

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<sup>9</sup> See generally D. Kennedy, 'The Disenchantment of Logically Formal Legal Rationality or M. Weber's Sociology of Law in the Genealogy of Modern Legal Consciousness' (2004) 55 *Hastings Law Journal* 1031; D. Kennedy, 'From the Will Theory to the Principle of Private Autonomy: Lon Fuller's Consideration and Form' (2000) 100 *Columbia Law Review* 94. D. Kennedy, Kennedy (1997), n 7 above. R. Alexy, *A Theory of Constitutional Rights*, trans. J. Rivers (Oxford, 2002); D. Beatty, *The Ultimate Rule of Law* (New York, 2004); F. Ost & M. van de Kerchove, *De la pyramide au reseau? Pour une theorie dialectique du droit* (Brussels, 2002).

universalizable in the Habermasian<sup>10</sup> if not necessarily the Kantian sense (so that materially distributive or sectarian religious or politically ideological principles are excluded),

Coherence as proportionality can have normative power. It can, sometimes, guide or influence or even strongly constrain decision. It can generate the 'effect of necessity,' just as simple exegesis and coherence at the level of principle can, sometimes, do this. It is radically different from coherence at the level of principle because it operates by restricting what can be a principle (the requirements of positivity and of universalizability) and then by prescribing the method of proportionality. The effect of necessity is generated, first, when the jurist (with his agenda, or his 'how I want to come out') finds that s/he can't find a plausibly intra-systemic universalizable principle to support the outcome.

Second, the process of adjudication over time generates precedents that have to be interpreted as instances of balancing or weighing acceptable principles, understood as 'real,' that is, as existing in the normative plane like objects with gravitational fields in the physical world. A precedent establishes relative weights for a given case. A new case is 'a fortiori,' *vis-à-vis* a precedent, if the new case seems to involve the same principles to be balanced, and the principle held to dominate in the first case seems even more dominant in the new one.

The jurist who decides to work to destabilize the effect of necessity generated by the materials, in order to support a specific outcome or to reconfigure some subset of outcomes, has to re-order the principles, restate and reinterpret the facts of cases, and perhaps introduce new principles. Once again, as with coherence at the level of principle, there is no guarantee of success, but also no way of establishing *ex ante* that the work will fail.

The conflicting principles that have to be balanced in a weakly coherent system of this type can include all the different kinds of principles that all agree animate modern legal orders. Rights as principles are understood in this mode to be chronically (though not necessarily always) in conflict. This sense has been growing steadily for fifty years as more and more constitutions combine social rights and classic individual rights, or attach a social clause to the classic rights, as in the frequent case of declaring the social function of private property. The 'constitutionalization of private law' has turned out to be closely connected to the rise of proportionality as legal method.

But there can be conflicting utilitarian principles (efficiency by internalizing costs versus efficiency by maximizing freedom of action) and conflicting moral principles (*pacta sunt servanda sed rebus sic stantibus*). General clauses in codes embed this possibility. Principles of different types can be balanced against one another, as in rights vs efficiency, and rights can also be balanced against powers-national security vs civil liberties, etc.

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<sup>10</sup> J. Habermas, *The Theory of Communicative Action* (Cambridge: Polity Press, 1986–1989) Vol. I.

Proportionality can be the method for adjudicating among powers as well as among rights, including conflicts of separated governmental powers (judiciary vs legislature vs executive) or among the elements of a federation or a transnational formation like the EU, or between domestic and international instances. The principles can also be at the level of system maintenance. For example, a right can be balanced against the need for certainty or flexibility.

The great reassuring virtue of coherence at the level of principle, the reason why one would want to preserve the impacted character of fields and work to make contradictory or unrationalized fields impacted whenever possible, is that the more of it there is the less likely it is, in theory, that the interpreter will confront a gap or conflict without guidance. It is less important where the legal culture takes it for granted that most questions can be resolved 'exegetically,' meaning by appeal to the meaning of norms taken one by one, just as proportionality will seem less important in a legal culture where it is assumed that coherence at the level of principle will almost always work. As faith in exegesis weakens, coherence takes over. As faith in coherence weakens, the interpreter is forced to resort to the method of proportionality.

Proportionality is thus historically a 'counsel of despair.' A key factor in its emergence has been the work of internal critique by jurists pursuing their particular agendas, each 'clearing the ground' as a preliminary to their preferred reconstruction of legal reason in the wake of the rise of the social. The cumulative impact of these efforts has been not reconstruction, but the progressive revelation of just how much 'abuse of deduction' or 'social conceptualism' has been necessary to preserve the idea that Western legal systems secure the separation of powers.

It is therefore quite nonsensical to say things like: 'I have a problem with proportionality, which is that it is a weak form of rationality and lacks certainty and is manipulable,' if the speaker means that we should therefore stay with exegesis and coherence as principle. No one proposes weak proportionality until they believe that stronger modes are simply unavailable in the circumstances, typically because in the area in question the conflict of principles (or purposes) seems inescapable.

When we understand the legal order in terms of the balancing of conflicting principles and policies, we still experience fields as differently configured. They are still impacted, contradictory, unrationalized, and so forth. As in the case of coherence at the level of principle, we can ask whether it is legitimate for the jurist to work to produce an outcome s/he thinks is just at the expense of the impacted or coherent character of the field, but now in the sense of a field where the principles are a defined set and there are many cases that seem to establish relative weights consistently. Here, as with coherence of principles, the jurist works to generate the effect of necessity for the desired outcome. But this can involve de-rationalizing as well as rationalizing the field.

We can ask whether there is a meta-meta-rule of the system that says that, if you can't figure out a way to make a convincing proportionality argument for your solution, you have to abandon it. Or on the contrary whether there is a meta-meta-rule that allows rejecting the balance of principles and policies as

previously established in case law in favour of a solution that will represent social justice, or justice in the particular case, or adaptation to social change, or supra-legal rights, or whatever.

The weakness of proportionality, what might lead us to reject decision according to the balance of principles developed in earlier cases, is the universalization requirement for principles along with the odd (neo-Kantian) imagery in which principles are treated as normative vectors analogous to physical forces. This can be understood as very Habermasian and good, or as a rejection of the truth of our ethical experience of undecidability – as pre-modern, pre-Kierkegaard, pre-Nietzsche, pre-Weber, pre-Schmitt.<sup>11</sup>

## II. SOCIAL VALUES

The social originally meant contrast with rules whose problem was that they ignored interdependence. In this version, the social was a critique of the ‘individualism’ of classical private law. The social, of course, could be right wing or left wing or centrist. But in whatever form, its advocates saw individualist law as having a very strong internal logic-leading to the regime of the will theory, starting from absolute property rights. As the social people saw it, this conceptual structure lead directly to a series of positive law regimes. It lead to a labour law regime in which unions could not bind their members *in invitum*, to fault as the basis of industrial accident law, to a regime of no liability of landlords for defective premises or for the public health externalities of slum properties, to *caveat emptor* across the board in consumer law, and to the under-regulation of securities markets.

A social regime was designed to make actors liable for the consequences of their actions in ‘an interdependent world,’ taking into account inequality of bargaining power and the dangers of ‘downward spirals,’ with ‘adaptation to new social conditions’ and ‘the public interest’ as the guiding normative ideas.

I don't think this is exactly what European private lawyers mean today by social values, although in their discourse there is quite frequent allusion to this earlier analysis, and the specific reforms brought about by the social current remain as the starting point for modern advocacy of social values. In place of the analysis in terms of interdependence, adaptation to new social conditions and the public interest, today's rhetoric seems to be that of ‘solidarity’ and ‘weak parties.’

Particular weak parties are defined in relation to particular strong parties, as: workers in relation to employers, women in relation to men, consumers in relation to professional sellers, the poor in relation to the middle class and the rich, illegal immigrants in relation to legal immigrants and citizens, the chronically unemployed *vis-à-vis* the employed, children *vis-à-vis* adults, the mentally ill *vis-à-vis* the ‘normal,’ the physically disabled *vis-à-vis* the abled, and so forth. Solidarity means

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<sup>11</sup> D. Kennedy, ‘A Semiotics of Critique’ (2001) 22 *Cardozo Law Review* 1147.

a private law regime that takes the weakness of weak parties into account, and tries to compensate for it, in defining their legal relations with strong parties.

Whereas the social ideology originally asserted interdependence and the consequent danger to the social whole of individualist law, with the public interest as the criterion for deciding on reforms, the current framing in terms of solidarity with weak parties is quite different. It is much more explicitly 'distributive,' in the sense of advocating private law rules that require strong parties to make concessions to weak parties, for the good of the weak parties. The argument that oppressive social conditions are a threat to the 'normal' middle class citizen, because they breed crime or disease or industrial warfare or terrorism, for example, is still present, but it has lost primacy to a more straightforwardly ethical argument. The imperative of solidarity seems to be based on a notion of human rights or social rights or human dignity or 'love of the other' or common membership in the national community.

The easy formula of solidarity is to reject discrimination against weak parties, meaning differences in formal legal treatment. A second easy meaning is to work against their marginalization, against societal blindness to their situation, against the failure to pay attention to their suffering and allocate resources to alleviate it. In the law of obligations, these are not the focus. The focus is freedom of contract between strong and weak and the scope of tort liability of the strong to the weak. In social law, the focus is on the coverage of social safety nets and on their cost, and on freedom to contract out of protection. In the law of sex, reproduction and the family, the issues involve the traditionalist claims of cultural pluralism against the liberalizing law of the dominant culture, the claims of Western traditionalism against those same liberalizers, those of cultural feminists against libertarian or queer feminists, and the like.

When the rules at stake regulate markets by contract and tort law, it puzzles me that Europeans interested in social values in private law don't seem to have answers to criticisms of the social that are standard and dangerously powerful in the United States. The first of these is that restrictions of freedom of contract, where there is no price control, lead the strong party to pass on the cost of protection to the beneficiaries, forcing them to take something they would not voluntarily contract for and forcing some of them out of the market.

The second criticism is even more serious. It is that social protections in general, when they do indeed benefit the class of weak parties, operate by cross-subsidies that are *prima facie* unjustifiable. The more traditional version of this argument is that strong protection for workers in formal employment is at the expense of the weakest part of the labour force. The weakest sector suffers higher unemployment as a result of high costs, and when employed in the informal sector gets no protection at all. High levels of social benefits in general are feasible only so long as they exclude the people at the bottom of the pyramid, who may be illegal immigrants or just the poor, and, in the US case, predominantly African American populations of formerly industrial urban centres.

The more recent version is the inverse. Protections against risk in consumer law or accident law supposedly operate as a cross-subsidy from the more responsible



or competent part of the weak group to the less responsible and competent. For example, products liability and welfare require the responsible and competent members of the lower middle class and working classes to subsidize the irresponsible, opportunistic and venal at their level or below them. Social law seems to demand solidarity among weak parties, at least as the parties conceive themselves, rather than between the weak and the strong. (The dilemma is mockingly referred to in Italian as the problem of '*socialismo in una sola classe*.')

The third problem is that social law is implicated in identity formation: by rewarding irresponsibility, opportunism and venality, it supposedly promotes these as character traits. This has been argued for a generation for the case of welfare dependency, but the legal representatives of strong market actors have transferred the argument to consumer protection, tenant protection, and so forth. Regulating the contracts of the strong with the weak destroys their incentive to look after themselves while offering them opportunities to cheat the protective system at the expense of their more responsible co-contractors.

My own view is that these arguments are sometimes valid but much more often spurious and even dishonest. But it seems necessary to have a way to analyze the pursuit of social values in private law, whether understood narrowly as the law of obligations or widely to include social law. This mode of analysis has to deal with the economic arguments on their own terms, rather than simply denouncing the Commission as neo-liberal when it declares that freedom of contract is the rule and protection an exception that bears the burden of proving its efficiency.<sup>12</sup>

In short, the phrase social values is not self-explanatory when we are speaking of private law rules of contract and tort. The frank assessment of distributive and identity formation effects seems necessary.<sup>13</sup> Is this just the paranoia of an American left that has seen the social program lose its political base to the argument that, rather than promote justice between the strong and the weak, or even between the middle class and the working class, it shifts resources around within the bottom half of the income distribution, leaving everyone discontented for one reason or another?

When we move from the private or social law of markets to the law of reproduction, sex and the family, the notion of social values acquires a whole new set of ambiguities.<sup>14</sup> Familial relations were a constant though often implicit reference

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<sup>12</sup> See, for attempts to do this kind of defense of the social in private law, D. Kennedy, 'Distributive and Paternalist Motives in Contract and Tort Law' (1982) 41 *Maryland Law Review* 563; D. Kennedy, 'The Effect of the Warranty of Habitability on Low Income Housing: "Milking" and Class Violence' (1987) 15 *Fla. St. L. Rev.* p. 485; D. Kennedy, 'The Legal Economics of Low Income Housing Markets in Light of Informality Analysis' (2002) 4 *Journal of Law and Society* 71. See also the articles by other authors pursuing a similar agenda on the Housing page of my website, [www.duncankennedy.net](http://www.duncankennedy.net).

<sup>13</sup> See generally, D. Kennedy, 'The Stakes of Law or Hale and Foucault!' (1991) 15 *Legal Studies Forum* 327.

<sup>14</sup> M.R. Marella, 'The NON-Subversive Function of European Private Law: The Case of Harmonization of Family Law', unpublished paper available from the author; D. Kennedy, 'Two



in the development of the social program for the market. The law of interdependence was supposed to recognize that the larger social whole organized through the market had many of the characteristics of the family. The duties of the patriarchal household head, which the 19th century had little by little restricted to the nuclear blood family and then rendered unenforceable as merely 'moral,' were, in effect, to be reimposed on employers and owners in the public interest broadly conceived.

But the reference to the family was ambiguous. On the one hand, the family was the locus of duties of solidarity; on the other it was the locus of relations of authority based on gender and paternity. The social program for the family could be progressive, involving enforcing the high moral duties (no domestic abuse, child support) that Classical Legal Thought had recognized but rendered unenforceable. It could look to the bad consequences of denial of rights to illegitimate children, denial of a right to divorce, denial of rights to mistresses, denial of a right to abortion, denial of rights to prostitutes, outlawing of homosexuals, and produce a highly progressive reform agenda.

But it could also go in the opposite direction, supporting the reinforcement of paternal power, the accentuation of male/female role differentiation (separate spheres) and the policing of sexual behaviour, also in the name of the social bond and the welfare of society as a whole. In the post Second World War period, just as the social in the market became more and more associated with a left rather than a traditionalist (e.g., social Catholic or fascist) agenda, so the social in the law of reproduction, sex and family became more and more associated with authority and tradition, whether Catholic, Greek Orthodox, Islamic or fundamentalist Protestant.

The conservative discourse of opposition to abortion, or to parenthood for same sex couples, is very explicitly one of solidarity, with the foetus or the child. Simultaneously, progressives have more and more adopted liberal egalitarian, or autonomy-based, as opposed to social rationales for reform. Their discourse has strong undertones of Classical Legal Thought, deploying tropes that are considered reactionary in the law of the market.

As in the law of the market, the issues involve the distributive consequences of different legal regimes, and these are as if not more complex as in the market domain.<sup>15</sup> For example, the rules governing the rights of mistresses and prostitutes affect the welfare of wives. Issues of identity are prominent, both as the basis for positions about legal rules and as stakes that will be affected by what legal rules are in force. But today the social in the law of reproduction, sex and the family has the opposite valence from the one it has in the law of the market.<sup>16</sup>

The border between the market domain and that of sex, procreation and the family is unstable: the wife who guarantees her husband's debt to a commercial

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Globalizations of Law and Legal Thought: 1850–1968' (2003) 36 *Suffolk University Law Review* 631.

<sup>15</sup> D. Kennedy, 'Sexual Abuse, Sexy Dressing and the Eroticization of Domination' (1992) 26 *New England Law Review* 1309.

<sup>16</sup> Kennedy, n 14 above.

bank is inside the law of obligations, but brings the ambiguities of the meaning of the social with her from family law, along with the distributive complexities of consumer protection law. The good faith, good morals and public order clauses in continental civil codes, as they apply to sex, reproduction and family relations, make any attempt at a clear boundary problematic.

None of this means that the social is merely ad hoc. Rather it means that it is a contested concept, as is liberal individualism. This becomes even clearer when we ask its relation to the full domain of policies and interests that are involved in disputes about private law in a transnational context. For example, among the questions that the social does not answer unequivocally, in situations of at least formal national independence and at least formal internal democracy, is how power should be distributed among law making institutions.

In what we might call the horizontal dimension, courts, legislatures, administrative agencies, academics and powerful litigants (multinational corporations, NGOs), at the national, sub-national and trans-national (European) levels, all struggle to control the making of private law. There is a discourse as to the proper distribution of power among them that may sometimes be merely instrumentalized by those with social or liberal individualist agendas. But sometimes what the actors care about is not the underlying 'substantive' issue at stake but the appropriate distribution of power seen as a value in itself. The same is true as to the distribution of power in private law between the local, regional, national and European levels, with the issues cross-cutting that of horizontal distribution between courts, legislatures, etc.<sup>17</sup>

Without belabouring the point, all this means that it is not possible, as it once was, to use the opposition between liberal individualism and the social as an overarching orientation to private law. That distinction, moreover, had the purpose and the bad effect of masking the irreducible element of left/right politics, and other forms of politics as well, that inhabit the process of private law making.

But . . . it won't work to resolve these complexities by proposing the ideological division between left and right as the 'real' explanatory variable and the 'real' source of normative orientation. The reason for this is that modern leftism and rightism are no more internally coherent than liberal individualism and the social. The left/right opposition, like the individualist/social opposition, is indispensable when we try to understand our situation as lawmakers and the orientation to action not just of others but of ourselves as well. But neither is adequate if by adequate we mean adequate to warrant confidence in ourselves in the decisionist moment.<sup>18</sup>

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<sup>17</sup> See F. Nicola, 'Constitutional Asymmetry and the Transformation of European Federalism: The Europeanization of Private Law' (unpublished paper available from the author).

<sup>18</sup> Kennedy, (1997) n 7 above; Kennedy, (2001) n 11 above; Kennedy, (2004) n 9 above.

## III. NATIONAL TRADITION

National private law systems, within some set that we single out for analysis, can differ in many ways. They can have different rules governing similar cases. For example, one system might have adopted a regime of liability without fault in products liability whereas another might use negligence. Different systems develop different legal concepts to govern broad areas, as for example the contrast between the English and the Continental systems in that the English reject good faith in contract law while it is central to the German and German influenced systems, or that the Continental systems make the notion of patrimony a key to the law of damages whereas the English do not.

Then there are national differences in juristic method. These can be quite formal, as in differences in the way legal judgments are written and reasoned, or implicit, as in differences in the degree of 'formalism' or 'policy orientation' characteristic of legal reasoning in general. In the old days, it was common to believe that there were many profound differences between the common law and the civil law. But it was also common to think that the French were more 'exegetic' than the Germans. One system might give professors more actual power as authorities than another, whatever the doctrine of 'sources' might specify.

At some point, it makes sense to use a stronger word than mere difference to contrast systems. Tradition, or culture, affirms that there is something very 'basic' at stake in a particular difference.<sup>19</sup> 'Respect for the particularity of national legal traditions' appeals to this sense of serious or profound difference. The notion of tradition or culture is the basis for an argument: when we set out to assess or reform or harmonize a set of systems, there is something to take into account – tradition or culture – other than how 'we', the jurists operating trans-nationally, feel about the substantive solutions to legal problems adopted in the systems in question.

It might be an argument for limiting the area to be harmonized to avoid areas where conflict in national rules is either great or of great symbolic importance. It might be an argument for harmonizing slowly rather than rapidly. And it might be an argument for harmonizing by 'soft law' rather than 'hard law.' It might also be an argument for harmonizing not by regulatory soft law but by 'dialogue' between jurists, professors, judges and others, of different systems.

There is a parallel between the argument for respecting traditions and the argument for respecting the coherence of a system. Each presupposes a possible tension between forward looking, substantive, moral or utilitarian or political considerations, and the valued 'isness' of the system in question. We might ask Raz's question about tradition: if there is no 'authoritative' rule at stake, or if the jurist (harmonizer) is in the position of the legislator, is there any reason at all for respecting tradition at the expense of 'morality' (or substantial justice, however we define it)? Supposing we reject here, as in the case of coherence, the position that

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<sup>19</sup> See D. Caruso, 'The Missing View of the Cathedral: The Private Law Paradigm of European Legal Integration' (1997) 3 *European Law Journal* 3, p. 19.

tradition should simply trump all other considerations, we can ask in what sense it is 'relevant.'

As with coherence, the kind of important difference that we might want to call tradition turns out to have quite different possible meanings. We might begin by distinguishing two extreme positions on how to understand the evident differences among national legal systems within some set, which might be the whole world, or a region (South America, the Arab Middle East, Europe) or a federal system with autonomous sub-national private law authorities (the US). The first is organicist and the second 'semiotic' (used here to avoid the ambiguity of the word 'structuralist').<sup>20</sup>

*National traditions might be 'organic'* in the sense that they are one of the important parts that constitute and are dialectically constituted by the 'whole' of a national culture or spirit. Each whole of this kind would be unique, a product both of abstract cultural traits and of the vicissitudes of a specific national history. Within the whole that is the national culture, the legal tradition would also be a whole, that is an entity with its own animating spirit and its own history. The elite that produces it, in this model, may make it as much a function of other legal wholes, that, for example of a dominant foreign legal culture, as of local non-legal culture. We understand historical change whether at the national or the legal level through the images of growth, development, maturity, decay, etc.

It is crucial but difficult to keep distinct the different senses in which we deploy the metaphor of the organism. Using organicist methodology, we treat the civil law, the common law and any other system that interests us as an organism. But it is common to use the adjective 'organic' to describe a trait, as when the British harbour the conviction that their tradition is in some sense 'more organic' (less rationalist or less mechanical) than the civil law tradition. This mode links to Burkean rather than Savignian organicism, in which implicit, and perhaps rationally ungraspable deep-seated laws of the whole, when the whole is British, are always in danger from well meaning utopian meddling.<sup>21</sup>

This often seems silly to an American. The British seem to believe simultaneously that they decide the case on the facts, that they practice precedential formalism, and that they are actually more policy oriented than the continentals.<sup>22</sup> In any case, respect for national tradition, following Raz, shouldn't mean respect for the elements that seem confused or behind the curve or philistine in the tradition, no matter how organic the traditionalists believe their tradition to be.

The metaphor of the organism is also at the root of functionalism in comparative law, linked as it is to the idea that law 'adapts' to 'social conditions,' so that we expect similar societies to develop roughly similar solutions to similar problems of their type of social order. This form of organicism allows us to identify as worthy of respect in the national tradition (i.e., entitled to weight when we have to decide)

<sup>20</sup> See generally, Kennedy, n 11 above.

<sup>21</sup> See R. Gordon, 'Law and Disorder' (1989) 64 *Indiana Law Journal* 247.

<sup>22</sup> This puzzle is illustrated by B. Markesinis, 'A Matter of Style' (1994) 110 *L.Q.R.* 607.

the interdependence of the elements of a national solution to a typical dilemma of social order. So the harmonizer must take into account that a partial harmonization may upset a nationally specific balance, say between formalism in offer and acceptance and informality in quasi-contract, producing bad results in one system, as the price of good results in another.

It is worth noting that 'respect for national tradition' is here close to 'preserving the coherence of private law' – in this case, an implicit coherence evident to the eye of the comparativist, rather than the formal coherence of enacted principles –, as in Raz's analysis described above. And it is also worth noting that this form of comparative law functionalist coherence is the intellectual product of the social current, starting with Lambert.

I don't think we can dispense with this kind of organicist thinking, in spite of the dangers of vagueness, romantic exaggeration and obscurantism (the familiar critique of Savigny's *Volksgeist*). It even seems to me undeniable that there are national differences, for example, in the standard array of available character types (not the national character type) within which individuals develop infinite variations. It also seems plain to me that there are unities of this kind that we grasp intuitively, pre-reflectively. When a person fails to grasp pre-reflectively in this way, they come across as incompetent in dealing cross-culturally.<sup>23</sup>

*The semiotic view of national particularity* rigorously rejects organicist accounts of national difference. We imagine that the national legal elites across the set that interests us operate with a common conceptual vocabulary for specifying the terms of a legal rule, and with a common repertoire of potential rule solutions for new problems and arguments pro and con. They come up with different specific rules to govern specific cases, but we should understand these as 'parole,' in the 'langue' of regional legal discourse.

This is a very specific adaptation of the Saussurian distinction. The valid norm, or the proposed valid norm, is like a sentence—a unit of legal speech. Thus the rule that the contract by correspondence is valid on the mailing of the acceptance is a normative utterance; but in the legal langue the jurisdiction might also have 'said' that it was valid only on receipt of the acceptance. Or the rule might be that where the offeror revokes after mailing of the acceptance, but before receipt, he is liable for the reasonable reliance of the offeree.

We explain the choice between one utterance or another on offer and acceptance not by a reference to the national culture viewed as a whole, but to the balance between forces that are represented in every country in the set. The idea is that national traditions, across the geographical space that interests us, don't exist except as accumulated speech. Of course, to the extent that nationals participate in the illusion that they possess national legal traditions, that belief may influence what they choose to 'say.'

<sup>23</sup> See generally Herbert Marcuse, *Reason and Revolution: Hegel and the Rise of Social Theory*, (Boston, 1968).

Though this approach is often mechanistic and reductionist (the familiar critique of Levi-Strauss's structuralism), I don't think we can dispense with it any more than we can dispense with organicism. It sometimes seems undeniable that what participants understand to be a highly original, contextually determined (national) discourse appears in a wider view to be no more than the playing of the changes on a rigidly pre-determined set of options.

The notion of legal consciousness<sup>24</sup>, as developed in US cls, is a kind of compromise of organicist and semiotic approaches, operating (like 'coherence as proportionality') as a counsel of despair. In this case, in despair of transcending the opposition of the two methodologies (compare the problem of wave and particle theories of light<sup>25</sup>).

The notion of consciousness is a heuristic: it is a 'way of looking' at a legal order; it is a check list of elements whose identification in a context may make the context more 'intelligible' than it was before we tried to identify, say, the langue involved, or the primary conventional divisions of the legal corpus, or the series of transformations that move from one totalization to another.

The concept has three synchronic dimensions. First, legal actors are acquainted with a vast number of positive rules of law, however established and however problematically or unproblematically 'valid.' Second, legal actors understand this mass to be organized or structured horizontally into fields and vertically according to principles. Fields as already stated can be more or less impacted, contradictory, unrationalized, etc. This is the 'structure' of the consciousness.

Third, the dynamic dimension of the consciousness is a langue, which provides a vast legal lexicon and a set of rules of operation through which actors produce proposals as to legal rules, proposals that do or do not get enacted, and 'grammatically correct' legal arguments for and against rules (e.g., this rule is good because it promotes security of transaction vs this rule is good because it permits equitable flexibility).

The first, positive dimension of norms and the second conceptual dimension of horizontal and vertical arrangement are the product of the third, discursive dimension of legal practice. They are parole spoken in the langue. It is crucial to understanding this scheme that there are an infinite number of 'grammatically' correct norms, legal arguments and conceptual orderings available to be 'spoken' in the legal langue, just as there are in ordinary language. These are, of course, 'channelled' by the pre-existing mass of rules and the conceptual order, as well as by more complex elements such as Sacco's 'cryptotypes'<sup>26</sup> and Bourdieu's 'habitus.'<sup>27</sup>

<sup>24</sup> See D. Kennedy, 'Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America: 1850–1940', in Spitzer (eds), 3 *Research in Law & Soc.* (1980); D. Kennedy, 'The Structure of Blackstone's Commentaries' (1979) 28 *Buffalo Law Review* p. 205; D. Kennedy, (2000) n 9 above; Kennedy, (2003) n 14 above.

<sup>25</sup> P. Feyerabend, *Against Method* (London, 1988).

<sup>26</sup> R. Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law' (1991) 39 *American Journal of Comparative Law* 1,343.

<sup>27</sup> P. Bourdieu, *Outline of a Theory of Practice*, R. Nice, trans. (Cambridge, England, 1977).



We study the history of a consciousness by the genealogical method (of Nietzsche<sup>28</sup> and Foucault<sup>29</sup>), looking not for origins, but for the pre-existing elements that actors combine at moments of change to produce a new version of the consciousness as positive order, conceptual arrangement and langue. Again following Foucault, the history of legal consciousnesses in the West is marked by conceptual and linguistic transformations that go beyond incremental change, and a given consciousness is likely to retain these in a sedimentary or 'layered' pattern, with the new superimposed on remaining dispersed elements of the old, rather than generating a new totality.<sup>30</sup> Organic metaphors are perfectly appropriate to describe the processes of change in this kind of quasi-whole.

*Consciousnesses in relation to one another.* In the modern order of national legal systems, we can distinguish systems as more or less open or closed, both internally, *vis-à-vis* the national 'society,' and externally, *vis-à-vis* the legal world beyond their national borders.<sup>31</sup> We can also distinguish systems as more or less integrated with other systems, in the sense of sharing a larger or smaller quantum of positive norms, conceptual ordering and langue. External openness means interaction, but may or may not lead to integration.

In the case of the US, the state jurisdictions, which have (within federal constitutional limits) final say over their private law regimes nonetheless are relatively open to one another and relatively integrated from the point of view of norms, conceptual arrangement and langue. Up to the First World War, the US private law system viewed as a whole was relatively open to the British and Continental systems, and integrated first with the British and then with the Continental at all levels. After the Second World War, it turned relatively closed *vis-à-vis* the rest of the world, while remaining relatively integrated. We might ask similar questions, although I certainly would not dare to answer them, about South America, the Arab Middle East and Europe, viewed as ensembles of private law sovereigns.

National legal consciousnesses existing in a system of relative openness and integration, as say in the US, South America, the Arab Middle East and Europe can be seen as sharing a common regional consciousness – can be seen this way, that is, when it seems useful to see them this way. Such a regional consciousness will be in a relation of relative openness or closedness *vis-à-vis* other systems of comparable scale. A major issue for all the regional systems today is their relation of openness and integration *vis-à-vis* the US.

*National tradition and social values.* Using the notion still in this very loose, merely heuristic way, I would suggest that over the last 150 years, there have been

<sup>28</sup> F. Nietzsche, *The Genealogy of Morals: A Polemic*, R. Hurley trans. (New York, 1924).

<sup>29</sup> M. Foucault, 'Nietzsche, Genealogy, History', in D.F. Bouchard (ed), *Language, Counter-Memory, Practice: Selected Essays and Interviews*, D.F. Bouchard & S. Simon trans, (New York: Cornell University Press, 1977).

<sup>30</sup> M. Foucault, *The History of Sexuality, Volume III*, Robert Hurley, trans. (New York, 1990).

<sup>31</sup> M. Lupoi, *Sistemi giuridici comparati: Traccia di un corso* (Naples, 2001).

a series of three world scale Western trans-national legal consciousnesses – Classical legal thought, the Social and contemporary legal consciousness – that have provided conceptual structure and a langue for many national systems worldwide. National systems that received CLT or the Social or the contemporary mode have put them into effect ('spoken them') in different ways. With the advent of the social, for example, they developed different regimes for industrial accidents, regulation of slum housing conditions, and so forth. These are parole, in the sense of utterance in the transnationally developed and nationally received langue. The specific regimes are infinitely varied in detail but fall into a relatively small number of patterns, reproduced in country after country.

Contemporary legal consciousness on a world scale is characterized by, among other things, the perennial unresolved conflict between classical and social approaches to private law, with the odd structure described above in which the social is progressive in the law of the market and traditionalist in sex, reproduction and family law (with classical individualism the opposite). One way to understand national diversity is to see it as simply diversity of solutions, within a common conceptual structure and with a common langue, reflecting the strength of these tendencies in different countries, on different issues, at different times. In other words, national tradition would be no more than another way to describe the relative strength of classical and social trans-national forces as they have played out in specific contexts.

But this mode of explanation is always incomplete. It explains nothing to say that the choice of a rule was 'caused' by the 'balance of forces,' unless we have an explanation of why the balance was one way rather than another. Such an explanation moves from the trans-national and semiotic to the contextual, at which point we will face once again the choice between organicism and the semiotic as modes of understanding. It is nonetheless worth noting that in Europe today it seems as though every country except Britain claims that one of the things that is distinctive about its national tradition is its highly social character.<sup>32</sup>

*The dimension of domination.* Within a transnational system like the European, and between trans-national consciousnesses, there will be various kinds of complex relations of hierarchy, power, dominance, hegemony, and so forth.<sup>33</sup> One issue of dominance has to do with the constitution and diffusion of the trans-national consciousness for the region. Jurists in some countries have more input than those in other countries, and some countries are well described as receiving rather than producing developments in the conceptual structure and langue.

Strong countries also influence other countries directly. The modes of influence include direct forceful imposition of elements of the transnational consciousness (Napoleon, Stalin, legal reform in Kosovo), bargaining (legal reform as a condition of admission to the EU), and prestige. The reception process, however, is always

<sup>32</sup> Cf. Kennedy, (2003) n 14 above for a similar point in the global context.

<sup>33</sup> D. Lopez Medina, *Teoría impura del derecho: La transformación de la cultura jurídica latinoamericana* (Bogotá, 2004).

complex. Reception is carried out by local jurists who have interests and orientations, so that there is always an element of 'selection,' along with the element of imposition. The national systems are so complex and so embedded in the non-legal national culture, and the elements imposed or received are so ambiguous (they are classic floating signifiers), that the reception process is a producer of difference as well as of integration.<sup>34</sup>

*The rhetoric of tradition in private law.* In this context, appeals to national legal traditions, along with appeals to the European legal tradition, can have many meanings. I mean the next five paragraphs as a provocation rather than as a scientific observation. Quite possibly every assertion is false. I would say, in my defence, only that, as a left over 60s person, I miss in the discourse of my progressive European colleagues the kind of reductive analysis I try here.

My impression is that when the Germans or French appeal to the particularity of their national traditions in private law, they understand themselves to be speaking from a strong sense that each is really and truly different from other European countries. But they also speak as hegemonic legal powers, with spheres of influence. They have a long-term investment in their dominance in the East and South. As competitive hegemonic powers they are somewhat conscious of one another and influence one another, but neither is much influenced by the countries within its sphere, let alone by countries in the sphere of the other.

When they appeal to the European legal tradition, it seems sometimes they mean to constitute an entity under their joint influence that can countervail the influence of US dominated global contemporary legal consciousness. Sometimes European tradition in private law turns out to represent the high class legal science of the will theory and Classical Legal Thought against the putative incoherence and totalitarian tendency of the social, and against American sloppiness. Sometimes, with equal probability, the Europeans mean the social defined against the putative hyper-individualism of the United States.

National legal tradition seems to have a different function for the British and Scandinavians. They seem to understand themselves as very different from their neighbours, but minoritarian, with no chance of becoming dominant anywhere in Europe. The British are proudly organicist, not to say primitive, and the Scandinavians are the opposite, claiming to be at once the most social in the law of the market and the most liberal in family law.

For each, one strategy is to resist integration, with tradition being an appeal for relative closure, or a negotiating strategy to minimize how much they will have to give up. Another strategy is to play up the idea of a European legal tradition in order to constitute a transnational space within which, working as cosmopolitans, they have a chance of exercising more influence than would be possible in a world of dispersed national systems with strong German and French blocs.

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<sup>34</sup> Cf. G. Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergencies' (1998) 61 *Modern Law Review* 11, p. 11.

I find it harder to characterize the way the categories of national and European legal tradition work in the legal consciousnesses of countries within spheres of influence, or at the eastern limits where rejoining an imagined European tradition seems more important than any difference internal to Europe, or even than the differences between European and US legal consciousness. The Italians and Dutch require a category (or two) of their own. But I think these uncertainties on my part are symptoms of the strength of relations of domination in Europe, which orient observation as they differentially authorize Europeans to speak with authority and self-confidence.

#### IV. CONCLUSION

I don't think the kind of elaboration I've attempted here of coherence, social values and national tradition is likely to be directly helpful in developing positions about the Europeanization or harmonization of private law. Although I've tried to phrase them in a vocabulary that is transnational, my points remain very much rooted in the US experience, and in US approaches to private law theory. The conclusions I reach with respect to each notion are bland: there are many possible interpretations: it doesn't make sense to use the notions without specifying which version one means: the extreme and therefore clear versions are not helpful; the plausible ones are full of ambiguities; each notion is sometimes useful in understanding private law and in thinking about it normatively, provided it is treated as an invitation to further work and study. But none of the notions will help us avoid a decisionist moment.

I do think that it emerges that the three notions are quite closely related: the vicissitudes of coherence are linked to the rise of an ideology of social values, and the particularity of national traditions often refers to supposedly distinct ways of incorporating and developing social values. Above all, I hope I've managed to extend an invitation to European colleagues to push beyond these outsider observations toward a common theoretical base for the discussion of Europeanization, a discussion that seems to me perhaps the most interesting underway in private law anywhere.