German Federal Republic which sees itself, anchored within the continental European tradition, as an intervening cultural state. A further retreat of the State from financing the academic sector, following the American or Thatcher model, would have unforeseeable consequences, as long as the private sector does not dramatically change it's financial contribution.

The University of Augsburg can in the future rest assured that the core of its work will be safeguarded by Federal funding. Nevertheless it will seek out all possibilities for further financial support from the community while at the same time retaining its autonomy in teaching and research. It's efforts will continue to be oriented toward increasing „culturally sensitive learning" in areas of research, study and teaching, proportionately according to its competence, thereby contributing to a „knowledge based society", in which increasingly well trained graduates join the entire work force. Only in this manner can the preconditions for technological development and its social implications be successfully met.

European and National Civil Law

Prof. Dr. Thomas Möllers

I. The European Community in Unexplored Territory

1. Lack of Identity as a Threat to Europe?

Voices questioning European integration and identity are understandingly becoming louder.[1] The Euro introduced as a common currency in 1999 is becoming weaker; the Commission recently resigned en bloc amid accusations of nepotism, the European electorate declines to vote and stays away from the European parliament elections.[2] The Treaty of Nice failed to pro-duce the desired European institutional reforms necessary for an expansion to the East, and the bazaar mentality again prevailed, as the Member States lost sight of the greater common interest in their continued defense of individual national advantage.[3]

Europe is at the crossroads. Recently the opinion was expressed that European integration would fail because without a distinctive history of their own, Europeans lack the fundamental consensus on which to build a common identity.[4] This weakness of identity threatens Europe from within[5].

In South Africa, numerous peoples live together which occasionally fought each other in the past, which speak various languages and which each have a distinct cultural heritage. There-fore, the South African nation searches for its national idendity. Possibly the following remarks may help to avoid certain mistakes in the integration of the South African peoples.

This study is concerned neither with the ultimate aim of the European Community, nor with the turn of the century dream,[6] a United States of Europe,[7] or with the concrete implementation of the union of states.[8] The question of the future route to European integration remains open and correspondingly difficult to answer.

My more modest purpose is to investigate the accuracy of the negative view that Europe is threatened by a lack of identity. As a first step (I.). I argue that neither aspirations of peace, nor economic freedom, nor a European legal community in its present condition can any longer by themselves justify the European integration process, but rather that bad European law is leading in a variety of ways to dissatisfaction. As a second step (II.), I differ with the opinion of *Weidenfeld*. Common tasks, paths of development and the shared goals of Europe, which justify further European integration, will be delineated. The third step (III.) is to show how European and national law must be further developed into a European legislative theory and methodology, so that better law at the European and national levels can be created on the basis of acceptance and European identity. The article ends with a consideration of the im-mense significance of communication and language (IV.).

This study explores European law at the European level and its relationship to the Member States. At the level of the Member States I will focus to Germany as a reference for monitor-ing. Germany shows, as under a magnifying glass very clearly that people are willing to sup-port European Integration because of German history. But Germany also shows that there are still a lot of steps to be done before reaching a better European legal harmonization.

2. The Creation and Loss of Purpose in Europe

Realizing the Vision of Peace

The desire for peace was the driving force behind the establishment of the Council of Europe and NATO half a century ago and of the European Economic Community with its six founding Member States almost a decade later. The ensuing fifty years and more of peace are without parallel for a continent on which the peoples of Europe fought countless battles throughout the centuries. Today's generation born into affluence no longer knows war, and peace between the European Member States hardly impresses any longer – on the contrary, peace is taken for granted.[9]

The EC as an Economic Community

It is no accident that the EC was known as the European Economic Community until the Maastricht Treaty 1992, as the aspiration for peace was from the outset combined with economic freedom as one of the pillars of the EC Treaty. However, the idea of economic freedom *per se* for undertakings and citizens in Europe no longer provides a focus for identification. For businesses it has largely been realized over the last decade in the internal market without frontiers[10] and thus, like the idea of peace, is seen as given.[11]

Law as the Engine of Integration?

•lus commune and a European Civil Code

A final source of identity remains: the EC has always been seen as a „legal community". Possessing no enforcement agencies, no police force or prosecution service of its own, the EC has to rely on its Member States for the application of European law.[12] *Walter Hallstein* characterizes EEC legislation as essentially promoting integration, ascribing to it a dynamic that to some extent is *self-fulfilling* dynamic.[13] This „spill over effect" also is apparent in the introduction of the currency union, and hopes that economic

union inevitably will lead to political union. Jurists have added new variants of the idea of using law as an engine for European integration.[14]

Legal historians such as *Reinhard Zimmermann* and *Rolf Knütel*,[15] for example, have called for an overhaul, informed by Roman *ius commune*, of the systematic, conceptual, and historic intellectual bases of European law, which are buried under the debris of two centuries of national legal development.[16] Reference to Roman law would, however, disregard the last three centuries of legal development,[17] thereby ignoring modern currents such as consumer law or laws of equity, financial markets and competition.[18]

The alternative of utilising the integrative tendencies of law strikes a more modern note: work on a *European Civil Code*[19] as initiated by the European Parliament.[20] Nevertheless the prevailing view is that a European Civil Code will not rapidly replace the national codes of European states, but, rather, at best would constitute a model code amounting only to soft law.[21]

• Categories of European Law of Inferior Quality

It seems doubtful that law will be seen as creating a sense of purpose within the European integration process in view of the often inferior law created in the last decades on the european but as well on national level.

Deficiencies on the European Level:

On the European level, harmonization of laws between Member States according to a standard defined by the Economic Community was a priority for the first twenty years of its existence.[22] In recent years, partial rather than total harmonization has been emphasized increasingly.[23] This so-called minimum harmonization complicates legal matters not a little,[24] and at least three groups of cases may be identified.

– EC legislative procedures have for years been criticized as uneven and patchy.[25] Rather than treating a legal field such as the law of obligations as a whole, only aspects of the field are harmonized at the EC level thereby creating individual islands of harmonized law based on EC law, such as a directive in labor law dealing with the equal treatment for persons applying for a job. Opposed to this, there is no harmonization for the employment contract itself or the notice of termination of the employment contract. On the European level there is a lack of general concepts covering several legal fields.[27] Indeed, there is a real danger that these minimum harmonization measures frequently cause friction and conflict with non-harmonized national law.

– Apart from this, so-called *opening clauses* are highly problematic in that they allow the individual Member State to continue to apply stricter national law alongside law created by a Directive. Thus, European law does not replace earlier national law, but rather old national law continues to be valid and European law is introduced alongside it. In such cases, original and new law are of equal validity.

This *duality* often has serious disadvantages. On the one hand, national and European law are applied alongside each other, leading to a laborious *double checking*. The result is that European law unnecessarily complicates the applicable law, making law expensive and impractical. Alternatively, new law based on European principles is completely ignored, because the older and „stricter" national law continues to be applied. The *Product liability* Directive provides an example.[28] The university student learns to carry out a double check on numerous disputed questions of applicability.[29] In practice, however, the courts ignore the Product Liability Law (ProdHaftG),[30] because the BGH introduced quasi strict liability by means of easing the burden of proof as long ago as 1969,[31] and the Product Liability Law, by virtue of its retention element and the lack of non-economic damage, is less attractive than German tort law.[32]

– The list of negative examples should also include cases in which the European legislature permits *optional* clauses in a Directive. These optional clauses make it possible to choose between the laws of various jurisdictions. In this way, the European legislature has abandoned the opportunity to create harmonized European law. The Seventh Company Law Directive, for example, sought to harmonize the requirements of a company balance sheet.[33] European law requires in a general clause based on the *true and fair view principle*,[34] that the annual statement of accounts give a truly proportionate picture of the assets, finance and profit situation of the corporation. This transparency requirement is counteracted, however, by the fact that the Fourth Council Directive on the Annual Accounts of Certain Types of Companies, permits differing accounting principles.[35] In this way, optional balance sheet requirements laid down in numerous individual regulations, which are formally and substantively correct according to the official German accounting principles (GoB),[36] nevertheless do not necessarily reflect the actual financial position of a corporation. Undisclosed secret reserves are an example, which give the investor a misleading picture of the actual development of a business concern.[37] This can in no way be called modern European accounting law.[38]

Deficiencies on the National Level:

Deficiencies arise in the *implementation of European law* as well as in its creation by the European legislature. Germany, former model pupil of the EC, increasingly fails to implement European Directives properly.[39] Most prominent are the cases where Directives are not implemented within the relevant time, but even more disturbing are the cases where they are not implemented at all. Not infrequently, the national legislature is of the view that appropriate existing law makes further action unnecessary. As an example, the Directive on misleading advertising[40] was not transferred into the German Unfair Competition Code (Gesetz gegen den Unlauteren Wettbewerb – UWG), as the general clauses of §§ 1 and 3 UWG were considered adequate for the purpose.[41] According to the Federal Supreme Court judge *Joachim Bornkamm*, the 1997 *Directive on comparative advertising*[42] required no implementing legislation as in several judgments the Federal Supreme Court had already deemed comparative advertising permissible.[43]

Such a view is problematic if only because it runs the risk that the applier of national law may fail entirely to perceive the European dimension of the „earlier" norm. To the extent that the Directive creates individual rights and obligations, the ECJ requires the legal position to be sufficiently clarified so as to enable the beneficiary to be informed of his rights and to enforce them when necessary before national courts.[44] Court rulings are incapable of such clarification where they accommodate new European law in a modification of the earlier legal position. This is because the judiciary rule not on the basis of the complete normative text of Directives, but rather on the limited basis of the actual matter in dispute. Secondly, such a ruling is delivered only *inter partes* and, thirdly, in contrast to the Anglo-American stare-decisis-rule, continental decisions by judges lack a binding force and therefore can be changed by subsequent rulings.[45] The view expressed by the Supreme Court Judge therefore should be rejected. Consequently, in September 2000 the German lawmaker has insert a new § 2 into the Unfair Competition Code to implement the complete normative text of the directive.[46]

II. Common Tasks, Paths and Goals of the Peoples of Europe

This is a sobering picture. Is Europe about to fall into ruins and should steps towards further integration be refused?[47]

Certainly there is much to criticise, but we should be wary of painting too black a picture. Nonetheless Europe needs a clear vision of itself, as *Ernst-Wolfgang Bockenförde* recently stated.[48] But besides this integrative vision, the continued unification of Europe requires the recreation and regeneration of an intellectual and spiritual agreement[49] regarding common tasks, paths and goals; it must be borne along by a consensus of the European citizens.

1. Common Tasks of Europe

Nation States Powerless in the Face of Globalisation

Nowadays common tasks arise less out of those necessities, as those 50 years ago, than out of the challenges with which the present generation sees itself confronted. Such challenges for the 21st century are manifold: globalization and internationalization leave in their wake numerous economic problems to be solved; the collapse of the *Hedge fund* disturbed the confidence of the capital markets;[50] the almost daily fusion of major undertakings results in conglomerates impervious to governmental control,[51] trade wars loom. Environmental destruction extends across national frontiers, as the nuclear catastrophe of *Chernobyl* so graphically demonstrated. Equally grave are the problems posed by crime, by migration, or by populations displaced in war.

Subsidiarity in a Positive Sense

Nation states generally lack an appropriate range of policy instruments to overcome these irreversible supranational challenges. In some policy areas, such as that of environmental destruction, events render them relatively powerless. In others, such as employment law, with wages and the tax system, they seem to have no option but to engage in a ruinous downwards spiral. In yet other policy areas, such as the fight against crime, combating the causes gives way inexorably to an attempt merely to mitigate the consequences. In the face of such problems, some calls for a return to the nations irresistibly conjure the image of a small boy on a fairground carousel, furiously spinning the steering wheel of a colourful wooden car to make it turn. Europe is only called upon to act when the powers of Member States no longer are adequate to overcome the problems which they face.[52] Here the positive side of the subsidiarity principle justifies action on the European level. Instead of the negative,[53] we should emphasize the positive aspects of subsidiarity. Instead of bemoaning a creeping loss of competence by nation states to European institutions, the progressive material loss of nation state competence due to globalization should be foregrounded. Regaining the power to act, although now on the European level, therefore constitutes, rather a growth of competence, albeit one available to us as a community.

2. A Common Path - European Legal Principles

Now that the tasks have been identified, the routes to further integration can be mapped out. As many of the mentioned tasks can only be solved by concerted action, Europe can be rede-fined as a *community of interests.*

A Shared Past – Community of Interests

Numerous shared features derive from the firm foundation of a common legal tradition developed over the centuries. An essential element of the occidental legal tradition, for example, is the emancipation of the individual, his prominence as a focus of intellectual concern and of judicial theory. The tension between theories of individual freedom and altruistic duties is contained in all judicial thinking.[54] This development was achieved through the liberation of the individual from status by the contract.[55] A further legal field of considerable European consensus resides in the relationship of the individual to the State, the fundamental freedoms which, from origins in the Constitution of the United States[56] and the French Declaration of the Rights of Man,[57] went on to conquer the entire world.[58]

Ultimately, the European legal tradition is characterized by legalism; that is a monopoly of power by the State for purposes of formulation and development of law, which prevails over social regulatory systems such as religion, morality, custom and usage.[59] Under enlightened absolutism, the absolutist monarch tried to bind the judiciary by framing laws as precisely as possible. However, these laws bound not only the judge but also the ruler, protecting the citizen from an arbitrary abuse of power.[60] From this developed principles of *Rechtstaatlichkeit*, equivalent to the *rule of law*,[61] such as subjection to and the pre-eminence of law, the right to a trial and due process of law.

A Shared Future – Europe as a Community of Assimilated Interests

Common interests derive from shared tasks and often they are rooted in historic consensus. Nevertheless the common interests must be further developed, adapted and modernized to meet to the challenges of the time. Here Europe develops from a community of interests to a community of assimilating interests.[62] Such assimilation of interests forms a set of common values based on fundamental rights as well as social and environmental elements of a European market economy.

• The Fundamental Community Rights as a Common Set of Values

The common values of fundamental rights were derived by the ECJ from the „general principles" of the common constitutional traditions of the Member States.[63] It is interesting to note that the ECJ has in the meantime further developed fundamental European rights to the point where they often afford the citizen greater legal protection than his basic rights within the individual Member State.[64] The European Court of Human Rights has also imposed stricter requirements for the timely provision of legal protection than the national courts, thus declaring legal procedures drawn out over years to be unlawful.[65] In procedural law, the ECJ repeatedly has emphasized that access to national courts must be guaranteed, thus limiting the procedural autonomy of Member States by means of this principle of effective legal protection.[66]

In November 2000 the Member States have adopted a European Charter of Fundamental Rights.[67] These charter summarizes and reinforces the common set of values. Consequently, the fundamental rights should be incorporated in the EC Treaty in the near future.[68]

• The Social and Environmentally Benign Market Economy

Common interests include social elements of an environmentally benign market economy. Environmental pollution demands supranational and international regulation. The EC Treaty rightly demands a high level of protection[69] and happily the EC has issued numerous Directives and Regulations on environmental protection.[70] A free market economy only can legitimate the European Community if it increases the prosperity of all. This idea has its roots in the occidental view of mankind marked by the Christian ideal of love for one's neighbor. The comfort and prosperity of the citizen is the ultimate guarantee of democracy. The merging of large undertakings means that European competition law is increasingly resorted to.[71] If national rulers distort competition through grants and subsidies in support of business concerns, only competition law on the European level will be effective.[72] As the intervention in the Boeing/McDonnell Merger dramatically made clear recently, instead of a national cartel authority, only the EC Commission acting at the supranational level can exercise a corrective influence.[73]

Consumer protection must be seen as a success in terms of the common assimilation of interests which the Commission has advanced in the last 20 years.[74] In this, European law is characterized by the „informed consumer"[75] who accepts responsibility for his own actions. Social elements of the EC Treaty are found in health protection[76] and most recently also in the title on employment.[77]

The Creation of Identity through the Exclusion of Others

Aspects of a European identity are also revealed in the exclusion of others. This is true of fundamental rights as well as of our understanding of a market economy.

– All Member States are democratic and observe the fundamental rights. The Amsterdam Treaty called for the observance of democratic principles and fundamental rights for the Union and all Member States.[78] Thus, democracy and fundamental freedoms form a considerable common pillar of European law and European identity.[79] Consequently, a state applying for membership, as the EU Treaty states, can only join the European Union if it ob-

serves the fundamental rights.[80] Precisely this point distinguishes the Member States from numerous neighbor states of the European Union, which may not join the EU even if they wish to. The death penalty, expressly forbidden in the EU,[81] also reveals a system of values distinct from that of other nations or states such as Turkey, Oklahoma or Texas.

– Attitudes towards environmental protection also vary. This became clear when the EU assumed a pioneering role at international conferences in Rio, Berlin and Kyoto, while the USA and Japan were among the more conservative „go slowers".[82] In the USA, competition law is dominated by the *Chicago School* which sanctifies the free play of market forces, while consumer protection in the USA is markedly weaker than in Europe, and *Clinton* administration proposals for a rational health system ultimately were halted in their tracks.

3. A Common Goal

From tasks and shared paths, we turn to the purpose of Europe; here I mean not a future state structure,[83] but rather the future European perception of itself.

Supposed Alternatives – the USA as Superpower

Since the collapse of the *Warsaw Pact*, the division of the world into two blocs has become obsolete, and the USA remains the sole world power.[84] Europe stands at a parting of the ways and has to decide; it could subside comfortably into continued dependency on the USA. This would exact a high price, however, in one of three hardly attractive outcomes.

Either the USA dictates the direction and Europe willingly follows, surrendering itself increasingly to political, economic, cultural and legal dependence. Indeed twenty or thirty legal fields can easily be named in which German and European law has been Americanized in the last decades.[85]

Alternatively, the USA imposes its interests against European resistance. The extent of US political and legal dominance becomes clear when, for example, judgments of the International Court are ignored, pilots are freed and trade wars provoked in disputes over hormones.[86] Lastly, there is the possibility that the USA relinquishes the role of opinion leader on the supranational level in environmental affairs or competition law, for example, so that a legal vacuum persists on the national and international levels. None of these outcomes is satisfactory. Then „survival of the fittest" is the prevailing law, as indicated by the lack of control over global undertakings.

None of these alternatives is satisfactory.

Europe as Opinion Leader – a Strong and Self-Confident Europe

Here the alternative presents itself! Following the collapse of the *Berlin Wall*, the Americans withdrew their troops on a large scale, demanding that Europe take more responsibility for its own security. Rather than lapsing into dependency, Europe should itself accept the challenge of addressing the urgent tasks of the future and of moulding the future. The first step has been taken with the EU Treaty and its modification by the Treaty of Amsterdam: The Common Foreign and Security Policy (CFSP) and the police and judical cooperation in criminal matters (PJC) reengage the founding vision of peace[87] and constitute it anew, in that solutions are to be found for problems of tackling international crime and migration questions. But this extension can only be a *very first* step,[88] as the unsatisfactory role of the European Union in the Yugoslavian conflict demonstrated, whereby the European states effectively rendered to being superior satellites of the USA.[89] Supporting the democratisation process of the EU-neighbour states may be the most important future task of the EG.[90] The role model function undertaken by the Member States over the last 50 years should not be underestimated. Europe provides its own solution to „ethnic cleansing" and the partition of states, namely the mutual tolerance of widely varied peoples,

groups and origins in one union of states, as well as a reconciliation process which makes another war seem unlikely, if not actually impossible.

The aim must be a strong and self-confident Europe, able to go its own way without following outside dictates. Europe must recognise its own abilities and assume opinion leadership, or accept a secondary role. The 20th century was dominated by America; the 21st century has been assigned to Asia. Europe must actively structure the future if is not to be counted among the losers of the 21st century. The expansion of competence can be used as a corresponding power to innovate in economic questions as well as in foreign policy.[91] The future of Europe requires the self-confidence and perception on the part of citizens and decision-makers that people are dependent upon each other: Just as the EC cannot exist without the Member States, so the Member States cannot structure the future and Europe without the EU.

III. Elements of a European Legislative Theory and Legal Methods

In terms of the role of law in European integration, the inferior law mentioned above must be countered. German legal methods dates from the 60's and is founded in purely national law. A European legislative theory and legal methods is lacking to date. Here we can identify only selected aspects of of a European legal method. In this way law will assume its guiding role.[92]

In this we may distinguish the European level (III.1.) and that of the nation (III.2.).

1. Tasks on the European Level

Over 50% of all national laws, and some 80% of economic law now are derived from European law.[93] Three elements on the European level may be identified where there is scope for improvement.

European Legislative Procedures

• Active Participation of Member States in Legislative Procedures

Until the recent past, the attitude was prevalent in Germany that Directives should only be actively engaged with once they were issued.[94] German participation often was purely defensive, because German administrative officials in Europe are obliged by a Federal decree to apply the subsidiarity principle; that is, to enquire whether European legislative provisions are not indispensable.[95] Contrast this with the French *étude d'impact juridique*,[96] which compels its administrative officials to prepare actively as a preliminary to a Directive, compiling lists of national norms to be amended and problematic aspects to be raised from a national perspective.[97] Such preparation at least creates a timely understanding of new European law, but often additionaly forewarns of surprises in Council deliberations, making it possible for national representatives to promote their own law. Thus, the active participation of Member States in European legislative procedures is necessary.

• Overall Concepts Rather than Compromise Solutions

At the outset it was shown that many legal areas were harmonized but not comprehensively, and that this minimum harmonization leads to conflicts with national law. The aim must be to create better and simpler law.[98] This requires avoiding conflicts with national law by means of the comprehensive harmonization of a legal field.

That the Commission generally prepares legislative plans on a comparative law basis is not in doubt. But further to this comparative law work in the narrow sense, effective creation of legislation requires the development of a *theoretical optimal conflict resolution model*, as the ECJ had already practiced in the creation of Community fundamental rights.[99] Here economic considerations would be sensible,[100] which *inter alia* address the question of which competition disadvantages could be eliminated by means

of Europe-wide regulation.[101] Thus, in general, the comprehensive harmonization of a legal area is preferable to mere minimum harmonization, since it avoids conflicts with the national law.

Actual practice makes clear that the horse trading with its numerous compromises should not necessarily govern European legislative procedures. Several examples demonstrate that optimal law can also be achieved by elevating the *law of a single jurisdiction to be the European standard.* The Product Liability Directive of 1985 is based on the US-American model;[102] European competition law[103] or the Commercial Agents Directive[104] were largely influenced by *German* law. European legal institutions look to *French* law with the *Advocates General*[105] or the Environmental Information Directive[106] while the Environmental Audit Regulation[107] or parts of the Investment Services Directive[108] follow *English* law.[109]

• Transparency of European Legislation for Citizens

Preliminary work at the *European University Institute*,[110] *green papers*[111] and *white papers*,[112] and *action programs*[113] or also the deliberations of the *Lando Commission*[114] are often known only to the specialist. The European Parliament should intervene in legislative procedures earlier and more actively than hitherto, and should *publicise* them so as to create more transparency and understanding of such plans.[115] Here, considerations of the principle of subsidiarity already mentioned should be used positively to demonstrate to citizens why the European level is more suited to achieving the purpose of a Directive in view of its scope or effects.[116]

Finally transparency during negotiations should also be maximized to prevent Council deliberations from degenerating into secret proceedings.[117] Openness is a fundamental common European legal principle[118] functioning together with legitimacy, rationality and information to promote acceptance among the people through participation and control.[119]

Legal methods for European Courts

The ECJ can also make a contribution to the task of creating better law, when it applies and interprets European law. The President of the European Court of Justice, *Rodríguez Iglesias*, recently emphasized the extensive comparative law work which is undertaken before a court judgment is delivered.[120] We have seen, for example how the ECJ referred to the common legal tradition of Member States in the introduction of the fundamental community rights.[121] Normally such comparative law exercises are undertaken but not included in the text of a judgment. This is a pity: for if important substantive legal questions are to be consistently solved between Member States, *discourse on comparative law aspects* would not only decide the legal problem in the individual Member State, but would also provide a future aid to interpretation for other Member States. Future proceedings would thereby to a degree be rendered obsolete. The ECJ could emphasize common aspects and link the decisive legal problem with the legal traditions of Member States. With such analysis of comparative law, the European Courts could enhance the *acceptance* of European law and also provide a role-model for national courts.[122]

2. The Role of Member States in the Implementation and Application of European Law

National legislatures and courts can also contribute to the creation of good quality European law.

European Legislative Theory of National Legislatures

• Harmonization of Non-existent National Law

While German legal reasoning and legal methods is still seen too much as a theory of legal application for the judiciary; what is needed is a legislative theory which benefits the legislature in the enactment of laws.[123] The aim must be to so combine new law with previous national law that better new law results. The national legislatures should also see clear and simple law as yielding a com-

petitive advantage, while European law should be an opportunity to overhaul accumulations of old law. For this a readiness to concern oneself with unfamiliar or foreign established enactments is needed. This requires an intensive consideration of the purposes of a Directive and thereby the normative aims of individual regulations. Only after such analysis can the legislature address the questions of the extent and point in the national law at which the European Directive can be introduced.

Harmonization of law is relatively straightforward when original European law is to be implemented and *corresponding national law does not yet exist.* Interestingly, in these cases the new European law is frequently expressly welcomed, perhaps because the main work no longer falls to the national legislature. The constitutions of Spain, Portugal and Greece, for example, recently were aligned with the fundamental rights of the EC and neighboring countries.[124]

• Harmonization of Developed National Legal Structures

– The introduction of newly enacted European Directives which clash with developed national legal structures normally involves more work. Harmonization now has to be effected in two opposite directions: a first step is to implement the Directive into national law. This alone often seems somewhat problematic as, e.g., the German legislature seldom can resist the temptation to improve the wording of the Directive, as, for example, where only remunerated services fall under the Haustürwiderrufsgesetz (HaustürWG),[125] in contrast to the EC Directive[126] which is seen to be implemented by this law. Problems of interpretation which then arise are of our own making.[127]

In a second step, and this often is overlooked, the legislature has to check the extent to which the law *not corresponding to the Directive* may be adapted to the Directive. The coexistence of national and European law, and i.e., largely identical law, is harmful, as the current juxtaposition of national and European product liability law makes clear.[128] With the introduction of § 611a BGB, it

was necessary to consider § 253 BGB. Thus, a right to compensation for non-econonomic damage was rejected as alien to the system[129] and resort was had three times to the ECJ for a clarification of the legal position. There still has been no adequate discussion of whether consumer law directives implemented into German law should be integrated into the BGB or not.[130] At present the consumer directives have been implemented by special laws and are quite separate from the BGB. Why this is so or has to be so is not revealed to the applier of the law. In civil law, the directive on consumer goods will massively change the articles of the German Civil Code, and there is a similar position with the directive on delayed payment in commercial trading.[132]

Ultimately, wide-ranging discussion will be needed on how to integrate the Directive into German civil law. Harmonization of laws, which complicates the legal position and renation-alises European law, leads to dissatisfaction with the system and is not worthy of the term harmonization. The need for action is thus evident. The opportunity to modernise antiquated laws should remain open and vigorous new law should be created. The view that a pluralistic industrial society of opposing interests is no longer amenable to extensive codification strikes me as too pessimistic[133]. Italy[134], the Netherlands[135] and Switzerland[136] have shown with their „*Gesetzbüchern*" that civil codes with consumer law elements are possible even in de-mocracies. That this is possible in Germany too, is indicated by the recent „Europeanisation" of the cartel law[137] and the transport law[138] in harmonization with European law. If one recognizes that the Sale of Goods Directive is in many areas almost identical to the results of the reformed law of obligations,[139] there is every hope that the German legislature will summon the necessary reforming zeal for an overhaul of the BGB. In the meantime, the German Federal Government has started to make plans for a complete review of German contract law.[140] In principle, these proposals are to be welcomed. The draft bill is supposed to be adopted by the end of 2001.[141]

Judicial reasoning serves to integrate a decision plausibly into the existing system of laws. Such theoretical justification should enhance the persuasiveness of the particular decision. It should not, however, become an obstacle or a burden to those applying the law. Courts in France[142] and England[143] are prepared to examine and modify their theoretical understanding of law and its application. German legal reasoning must also take account of the need to adapt to the requirements of European law. The aim should be a harmonization of methods and techniques of the individual legal system.[144]

• The Obligation to Justify National Judgments

Jurists have to persuade. Just as the legislature has to justify norms in laying down law, so the courts should exercise persuasion in their judgments so as to achieve higher public acceptance. In the past French court decisions often consisted of one cryptic sentence expressing an abstract proposition, and were hardly suited to persuading the parties to an action.[145] In the meantime current French decisions are expressed more precisely. Moreover, in England judges have begun to interpret statutes „teleologically" rather than adhering to the judicial „literal rule".[146] German constitutional decisions can be as long as 100 pages and not infrequently confuse as much as they clarify. In civil law too, there is a tendency to hide behind verbosity rather than openly expressing the economic interests of the parties.[148] Here one can certainly learn from the Anglo-American style of judgement, which often addresses problems and interests in plain language.[149]

•Interpretation of Laws

The *Savignian* interpretive canon is widespread in continental Europe, whereas Anglo-American jurisdictions traditionally are characterized by a case oriented approach. However, the difference between techniques of legal application and judicial theory in Anglo-American and continental law is becoming less marked.[150]

– Only too often judges are unaware where national law derives from European law.[151] The German jurist is still relatively unfamiliar with „Directive-conform" methods of interpretation;[152] the extent to which development of law in conformity with a Directive is permissible and necessary remains an open question, and one which arises in connection with compensation claims under § 611a BGB[153] or the remuneration of guarantors of a surety under § 1 HaustürWG.[154]

– Up to the present day, discussions of comparative law are rare in German federal court decisions, because the judges generally lack the requisite knowledge of foreign law.[155] In substantive terms, the willingness to adopt foreign law is only seen at Supreme Court level only where precedents in German law have not yet been developed; that is, where judge-made law leads into unfamiliar territory.[156] This *corresponds* to an astounding degree with the readiness of national legislatures only to adopt European law unreservedly where it does not collide with established enactments and practices.[157]

Former Federal Supreme Court President, *Walter Odersky*, has long called for more emphasiz on *interpretation informed by comparative law* in the courts.[158] Here too there is scope for further development of German theoretical judgments.[159] Over and above present verdict delivery, there is a need for a substantive examination of foreign law when construing EC directives. This is especially so when the courts of other Member States issue decisions which interpret already implemented law.[160] A comparative approach would also seem to be appropriate when a jurisdiction wishes to deviate from its preconceptions and previous legal outlook, thereby developing law.[161] In practice, courts should be empowered by the legislature to consult outside comparative law experts, as is already permissible under § 293 Civil Procedure Code (Zivilprozessordnung = ZPO) for international private law matters.

When one considers that a comparative approach to interpretation is an everyday practice of Swiss and Austrian judges[162] and that

comparative law is also utilized in England, then the persuasive power gained from the common values of several Member States should be used as a source of legal perception in judgments, thereby enhancing the acceptance of law.

IV. Arguably the Most Important Component – Language as a Means of Understanding

1. Precondition for an Integrated Europe – Language as a Means of Understanding

The Mother Tongue as an Expression of Identity

Communication still has to be improved. Language is the means of communication; language supports culture; the identity of a Member State is defined not least by the spoken language of its citizens. The languages of Europe are the expression of its cultural plurality. There is no such entity as the European people,[164] so it is understandable that the EU-[165] and EC[166]- Treaties emphasize the national identities of the Member States. This multiplicity is thor-oughly positive; indeed, pluralism is an essential component of the whole European identity[167] and thus perhaps the first guarantee of a stable democracy, comparable to the Swiss or US-American models.[168]

Understanding, Identity and Homeland

On the other hand, those who attempt to make themselves understood as Europeans in Japan immediately see how helpless they are; without language, they revert to gesticulating helplessness. Communication within Europe requires dialogue in one language. Communication creates mutual comprehension, because we understand each other. Language can transcend national frontiers. The reconciliation process between German, French, Austrian, Italian or Spanish people may be seen as largely complete[169] perhaps because of the many warm, informal contacts between private individuals. In this situation the people(s) of Europe are growing together, and when German retirees settle permanently

in *Tuscany* or on *Majorca*, then „home" no longer necessarily is associated with the town or country of one's birth. Through such understanding, the official dialogue over the future path of Europe could be conducted by the peoples of Europe, an indispensable development for its further democratization. A European historical consciousness is needed which emphasizes a higher order of commonality besides the national histories.[170] From this collective consciousness the long-awaited discussion on the integration of Europe can commence,[171] so that the broadly European, *political public life* is made reality.[172] If this were achieved, European identity will take on form; an exchange of ideas would bear fruit, and the future path of Europe become more certain.

Babylon – Foreign and Second Languages

However, the welter of languages in Brussels, which resembles a present-day Babylon[173] is in need of reform. It is best to concentrate on a few official languages; thus, in practice French and English have become the working languages of Brussels. Foreign languages are increasingly taken as a given among the young. In Member States like the Netherlands or in Scandinavia films have long been screened unsynchronized with the original soundtrack and subtitles. As a rule Swedes or the Dutch have a much better command of English than the German, who can usually manage only small talk. A unified European language cannot and should not replace the spoken languages of Europe, but a stronger presence of English or French in the media is to be desired[174] to make it a language of communication, thus more than merely a „foreign" language.[175]

2. The Legal System and Language

Europeanization of Legal Education

Only when the linguistic preconditions are met will it be time for European law schools and a thorough Europeanization of legal education, as called for by leading scholars[176] and the European Parliament.[177]

In the natural sciences, such as medicine or physics, English is used in research almost to the exclusion of other languages. Congresses in Germany are conducted in English as a matter of course; the most important journals are published in English and are read world-wide. Not to publish in English is to be outside the world-wide *community* and therefore overlooked. For German jurists this is unfamiliar territory, and the widespread use of English is often expressly rejected.[178] This has disadvantages which have not yet been adequately recognized. Thus the exchange of ideas between jurists in different Members States is limited. In *teaching*, Dutch and Swedish universities are also ahead of the field. Although English is not a mother tongue in Sweden or the Netherlands, legal instruction in several subjects is conducted in English,[179] undoubtedly an advantage in the face of international competition to establish the best academic institutions and attract the best students. In Germany, substantive instruction conducted in English is also now feasible, in that English is advantageous in subsequent professional work.[180] Not infrequently, German jurists working on the European level in the Parliament, the Commission and in the courts complain of the marked lack of persuasiveness of a translated contribution to proceedings compared to an original speech. There is a comparable situation in the legal departments of large business concerns or international legal firms.[181] As English acquired in German schools is insufficient for the demands of everyday international work, competent interactive language skills have to be developed at university. Thus apart from the period spent abroad, the foreign language training of German jurists should be sup-plemented with English-language lectures. Most important are lectures in *Comparative law*, in *International law* and *European law*.[182] English lectures on international economic law, including company, cartel, or capital market law would also seem to be sensible.[183]

Language as a Means of Harmonizing Judicial Styles of Thought

Established European legal concepts have to be uniformly understood and applied.[184] This creates the opportunity for intellectual legal unity.[185] The *mere harmonization of text is futile*.[186] The renationalization of European or international law can only be prevented[187] by the harmonization of starkly different judicial styles of thought. If English were to be more commonly used, the readiness would increase to engage with foreign styles of thought rather than clinging to the familiar national thought style.[188] The necessary European methodology could become a reality.

V. Summary

1. This contribution was intended to show that concepts of peace, the economy and law are no longer of themselves an adequate basis for a process of European unification. The legislative process in particular is no easy matter on the European level,[189] indeed poor quality European law, but also differing legal styles militate against a single European legal culture.

2. No mention has been made of a European federal state, a European constitution or the European millennium dream, but rather the conscious focus has been on the next steps towards European integration to be taken in the coming decades, and on the numerous urgent problems facing us in the future. Globalization increasingly limits the unilateral sphere of action of individual Member States. It is already apparent that Member States can only solve urgent tasks in the future through concerted action on the European level. In the face of globalization, such a *positive reversal of the Subsidiarity principle* leads to a strengthening of the individual Member State competence. It is important to emphasize that the increased competence can only be exercized collectively.

Europe has numerous common interests which have been developed between the nations over the centuries. Examples for these interests are the *common constitutional principles* which help form a European identity[190] beyond the level of legal technicality.[191] It is even more important, however, for the Member States to adopt a common approach to future tasks on the European level. This is especially true for *environmental and social aspects* of a European market economy. This consensus on values within

Europe is not found in the USA. Foreign and security policies must be addressed more energetically. Europe must assume opinion leadership if it is to structure the tasks of the future.

3. Political tasks will implemented through law. Here a *European legislative theory and methodology is needed*, which not only regulates the many questions of cooperation in European legislation, but also provides clarity in the implementation and application of European law at the national level. Here more attention should be paid to the quality of implementing legislation at the national level; courts should interpret legislation in line with Directives and employ a comparative approach. Common European law must be improved so as to increase acceptance by the citizen.

4. All this requires inter-personal communication and understanding. Only through understanding can public dialogue on the future path of Europe, so necessary for a greater democratization of Europe, take place between European peoples. The confusion of languages should be reduced; a second language should be chosen which promotes understanding. The aim should be to combine the advantages of varied judicial styles, such as case law technique and the continental-European methodology so as to further develop a distinctively European leg-islative theory and methodology.

When the various German states combined economically under the *Zollverein*, it did not lead to the German state. This came about when *Otto von Bismarck* enthused the population with the idea of a German empire.[192] Until today we have doubted the existence of a European identity because the national states of Europe have demarcated themselves from each other, defining themselves exclusively in terms of their own pasts, their own memories, aspirations and experience.[193]

However, this is not the only way to create an identity. The integration of Member States in Europe requires a vision,[194] an inspiring idea which will lead Europe into the new millennium. In the latest version of the EU Treaty the Preamble speaks of „... reinforcing the European *identity* and its independence in order to promote peace, security and progress in Europe and the world".[195] This sentence encapsulates the entire programme for a unified Europe. The European identity which builds upon commonality is future oriented. What is required is a desire for understanding and the common determination to accept the challenges.[196]

Europe has to decide whether it will continue in dependence on America or whether it is to solve the problems of the future with its own ideas, which are often more original than those of Asia or the USA. Europe should assume opinion leadership with confidence, so as to contribute on the supranational level to politics and the creation of law concerning fundamental freedoms, environmental protection, the social market economy or consumer protection. Europe has to recognise these future tasks, which are to be tackled and resolved in the final analysis because of a common interest in the future – this is the *European identity*.[197]

5. Certainly, South Africa cannot afford to have eleven different official languages in the future. An intercultural dialogue will only be possible on the basis of one or two languages. The English language as second language is more widespread than in the Member States of the European Union – in this respect, South Africa has progressed further than the European Union.

Notes

An earlier version of this text is published in the Amercian Journal of Comparative Law (2000).

[1] See very recently Essay-Competition in 4 COLUMBIA J.EUR.L. 491 (1998); Cappelletti/Seccombe/ Weiler, *Forces and Potential for a European Identity* (1986); Ward, In Search of a European Identity, 57 MOD.L.REV. 315 (1994).

[2] The turnout for the European Parliament elections was 50 % in Germany and only some 25 % in Great Britain, *Frankfurter Allgemeine Zeitung* (FAZ), June 16, 1999, p. 1.

[3] For a critical view of Agenda 2000 s. *FAZ*, March 27, 1999, p. 1; Weidenfeld, *FAZ*, May 12, 1999, p. 11, Hausmann, *FAZ* January 16, 2001.

[4] von Simson, 'Was heißt in einer europäischen Verfassung „Das Volk"?' EUR 3 (1995), also Böckenförde, '*Welchen Weg geht Europa?*' Speech hold at CARL FRIEDRICH VON SIEMENS STIFTUNG, (1997), pp. 39.

[5] Weidenfeld, 'Die Bedrohung Europas' *FAZ*, May 12, 1999, p. 11.

[6] See recently Oppermann, 'Der europäische Traum zur Jahrhundertwende' JZ 317 (1999).

[7] See „We must build a kind of United States of Europe.", Churchill, 'The Sinews of Peace' *Post War Speeches,* (ed. W.S. Churchill), 198(1949).

[8] Judgment of the Bundesverfassungsgericht, the German Federal Constitutional Court, (BVerfG), dec. of 12.10.1993, to be found in the reports (= BVerfGE) BVERFGE 89, 155 [185], CMLR 57 (1994) = NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 1993, p. 3047 = JURISTENZEITUNG (JZ); 1110 (1993) = *Maastricht*, on this, Di Fabio, 'Was der Staatenverbund leisten kann', *FAZ*, April 6, 1999, p. 11.

[9] Also Schwarze, 'Das schwierige Geschäft mit Europa und seinem Recht' JZ 1097 (1998): „Europa leidet mit anderen Worten auch daran, dass es uns zu selbstverständlich geworden ist"; also Kohl, 'Europa auf dem Weg zur politischen Union' in Konrad-Adenauer-Stiftung (ed.), *Europa auf dem Weg zur politischen Union*, 18 (1993), „Es geht jetzt, wenn wir über die politische Einigung Europas reden, um viele wichtige Dinge, aber es geht vor allem um die Frage von Krieg und Frieden, um eine dauerhafte Friedens- und Freiheitsordnung für ganz Europa."

[10] Art. 14 (ex-Art. 7a) TEC (Treaty of the European Community).

[11] Witness deregulation in utility sectors; See Issing, *Europa: Politische Union durch gemeinsames Geld?* 7 (1995).

[12] As desired by the Member States, see Hirsch, 'Europäischer Gerichtshof und Bundesverfassungsgericht - Kooperation oder Konfrontation?' NJW 2463 (1996).

[13] Even though he neither was calling for a blind automatism, see Hallstein, 'Angleichung des Privat- und Prozeßrechts in der EWG', RABELSZ 28, 228 (1964); See also Haas, *The Uniting of Europe* 301 (1968).

[14] Already calling for European law to further a common identity: Kramer, 'Europäische Privatrechtsvereinheitlichung' JBL. 487 (1988); Drobnig, 'Ein Vertragsrecht für Europa' in *Festschrift Steindorff* 1141 et seq. (1990).

[15] See Coing, *Europäisches Privatrecht*, 2nd vol. (1985/89); Zimmermann, *Law of Obligations* (1990); Zimmermann, 'Civil Code and Civil Law' 63 COLUMBIA J.EUR.L 91 (1994); Knütel, 'Rechtseinheit in Europa und römisches Recht', ZEUP 248 (1994).

[16] Zimmermann, „Heard melodies are sweet, but those unheard are sweeter.", ACP 193 171, 173 (1993); in agreement Baldus/Wacke, 'Frankfurt locuta, Europa finita' ZNR 283 (1995).

[17] Critical of Zimmermann/Wiegand, 'Back to the future' 12 RJ 277(1993); Kübler, 'Traumpfad oder Holzweg eines gemeinsamen Europas' 12 RJ 307 (1993); Caroni, 'Der Schiffbruch der Geschichtlichkeit' ZNR 85 (1994).

[18] Wiegand, 12 RJ 281 (1993), at p. 281 emphasizes traffic law; dealt with in more detail in Chap. III below.

[19] Lando/Beale, *Principles of European Contract Law,* Part 1 (1995); Basedow, 'A common contract law for the common market' 33 CML REV. 1169 (1996); Bussani/Mattei, 'The Common Core Approach to European Private Law' COLUMBIA J.EUR.L. 339 (1997).

[20] European Parliament resolution of 26 May 1989, OJ 1989 C 158, 400 = RABELSZ 56 (1992), pp. 320 = ZEUP 1993, pp. 613; also European Parliament resolution of 6 May 1994, OJ 1994 C 205, 518 = ZEUP 1995, pp. 669 = EUZW 1994, pp. 612.

[21] Haager Symposium of February 28, 1997, „*Towards a European Civil Code*"; see also Tilmann, 'Towards a European Civil Code' ZEUP 595 (1997); Hartkamp/Hesselink/Hondius/Joustra/Perron (eds.), *Towards a European Civil Code*, 2nd ed. (1998).

[22] Oppermann, *Europarecht* 2nd ed. (1999), para. 1200 et seq.

[23] Also termed *minimum harmonization.*

[24] Mertens, 'Nichtlegislaturische Rechtsvereinheitlichung durch transnationales Wirtschaftsrecht und Rechtsbegriff' 56 RABELSZ 222 (1992).

[25] So Kötz, 'Gemeineuropäisches Zivilrecht' in Festschrift Zweigert (1981), pp. 481; also 'Rechtsvereinheitlichung – Nutzen, Kosten, Methoden, Ziele' 50 RABELSZ 1 (1986); similarly, Coing NJW 937 (1990); Hommelhoff, 'Zivilrecht unter dem Einfluß der Rechtsangleichung' 192 ACP 102 (1992); Taupitz *Europäische Privatrechtsvereinheitlichung heute und morgen* 45 (1992); Blaurock, 'Europäisches Privatrecht' JZ 270 (1994).

[26] Council Directive 76/207/ECC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions. OJ 1976, L 39, 40. In Germany implemented by § 611a of the German Civil Code (Bürgerliches Gesetzbuch - BGB).

[27] Kötz, 'Gemeineuropäisches Zivilrecht' in *Festschrift Zweigert* (1981); Remien, 'Ansätze für ein Europäisches Vertragsrecht 87 ZVGLRWISS 105(1988); *also* 'Über den Stil des europäischen Privatrechts – Versuch einer Analyse und Prognose' 60 RABELSZ 1(1996).

[28] The opening clause is contained in Art. 13 Council Directive 85/374/ECC of 25.7.1985 on the approximation of the laws, regulations and administrative Provisions of the Member States concerning liability for defective products, OJ 1985 L 210, 29. Council Directives you find under http://www.europa.eu.int. A list of important directives of civil law one can find in Englisch, French and German under http://www.jura.uni-augsburg.de/moellers.

[29] Thus, *e.g.*, restitution of „Weiterfresserschaden" according to § 1 ProdHaftG (Produkthaftungsgesetz) is highly debated, see on this Cahn, in *Münchner Kommentar*, 3rd ed. (1997), § 1 ProdHaftG para. 10.

[30] BGH 19.11.1991, BGHZ 116, 104 = NJW 1039 (1992); BGH 9.5.1995, BGHZ 129, 353, 364 = NJW 2162 (1995); BGH 26.5.1998, BGHZ 139, 43, 46 = JZ 50 (1999). S. for more details *Möllers*, JZ 24 ff. (1999); *Möllers*, VersR 1177 ff. (2000). In contrast a.A. *Foerste*, in: Produkthaftungshandbuch, 2. Aufl. 1999, § 91.

[31] Federal Supreme Court (Bundesgerichtshof = BGH), dec. of 26.11.1968, BGHZ 51, 91 = NJW 1969, p. 269 with annotations by Diederichsen = JZ (1969), p. 387 with annotations by Deutsch - *Hühnerpest.*

[32] In the meantime non-economic claims has been called for at the 62nd Deutsche Juristen Tag (DJT); see individual decisions in NJW 117 (1999); see also *Referententwurf eines Zweiten Gesetzes zur Änderung schadensersatzrechtlicher Vorschriften*, BT-Dr. 13/10435; also Deutsch, 'Über die Zukunft des Schmerzensgel-des' ZRP 291 (1998).

[33] Fourth Council Directive 78/660/EEC of 25.7.1978 based on Article 54 (3) (g) of the Treaty on the annual accounts of certain types of companies, OJ 1978 L 222, 11; also Seventh Council Directive 83/349/EEC of 13.6.1983 based on Article 54 (3) (g) of the Treaty on consolidated accounts, OJ 1983 L 193, 1; implemented in Germany by means of the *Bilanzrichtliniengesetz* v. 19.12.1985, BGBl. I 2355, in §§ 242, 264 *et seq.* Handelsgesetzbuch (HGB); on this Assmann/Buck, 'Europäisches Kapitalmarktrecht' EWS 120 (1990).

[34] § 264 (2)(1) BGB; See Baumbach/Hopt, *HGB*, 29th ed. (1995), § 264 para. 9; Morck, in Koller/Roth/Morck (eds.), *HGB* (1996), § 264 para. 6; on its origins in s. 149 ss. 1 Companies Act 1948 see Alsheimer, 'Das den

tatsächlichen Verhältnissen entsprechende Bild der Vermögens-, Finanz- und Ertragslage. Angelsächsische Rechtstradition und deutsches Bilanzrecht' RIW 645 (1992).

[35] Grund, 'Internationale Entwicklung und Bilanzrecht – Reform oder Resignation?' DB 1293(1996); the care principle in Art. 31 (1) lit. c Consolidated Accounts Regulation *supra* n. 33.

[36] Baumbach/Hopt *supra* n. 34, § 243 para. 5.

[37] Critically Baumbach/Hopt, *supra* n. 34, § 253 para. 28; Moxter, *Bilanzlehre*, vol. 2 (1986), pp. 75; Budde, 'Bilanzrecht und Kapitalmarkt', in *Festschrift Moxter* 48 (1994); Kübler, 'Institutioneller Gläubigerschutz oder Kapitalmarkttransparenz?, Rechtsvergleichende Überlegungen zu den „stillen Reserven"' 159 ZHR 560 (1995).

[38] On the attempt of the International Accounting Standards Committee (IASC), to supplement the fourth and seventh EC-Directive, see Claussen, 'Glosse: So mußte es kommen: Über die Situation des deutschen Rechnunslegungsrechts' AG 278 (1993); Havermann, 'Bilanzrecht und Kapitalmarkt', in *Festschrift Moxter*, 656 at 668 *et seq* (1994).

[39] The FRG was prosecuted before the ECJ in 19 cases in 1997; also 35 reasoned statements and 121 warnings, see also the evidence given by Schwarze JZ 1998, pp. 1077; France failed to implement the *Product Liability Directive* (s. n. 28), and was sanctioned by the ECJ, C-291/91, dec. of 13.1.1993, (1993) ECR I-1 – *Commission v. France.*

[40] Council Directive 84/450/EEC of 10.9.1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States on misleading advertising, OJ 1984 L 250, 17.

[41] Pointing at the opening clause of Art. 7 of the Directive, Baumbach/Hefermehl, *UWG*, 19th ed. (1996), Einl., para 25; Schricker, 'Die europäische Angleichung des Rechts des unlauteren Wettbewerbs' GRUR Int. 771 (1990); Lindacher, in *Großkommentar UWG*, 5th supplement (1992), § 3 para. 13; more careful on this, Köhler, 'Irreführungsrichtlinie und deutsches Wettbewerbsrecht' GRUR Int. 396 (1994); emphasizing the conformity of § 1 UWG (Gesetz gegen den unlauteren Wettbewerb) with the Directive.

[42] Directive 97/55/EC of European Parliament and of the Council of 6.10.1997 amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising, OJ 1997 L 290, 18.

[43] BGH, dec. of 5.2.1998, BGHZ 138, 55 = NJW (1998), p. 2208 = EuZW (1998), p. 474 -*Testpreisangebot*; BGH, dec. of 23.4.1998, NJW (1998), p. 3561 – *Preisvergleichsliste II*; on the correction of the ruling, Leible/Sosnitza, 'Richtlinienkonforme Auslegung vor Ablauf der Umsetzungsfrist und vergleichende Werbung' NJW 2507 (1998); see also the previous Austrian ruling OGH 26.6.1990, GRUR Int. 225 (1991).

[44] ECJ, 29/84, dec. of 23.5.1985, (1985) ECR 1661 – German hospital personell; s. also ECJ, 217/97, dec. of 9.9.1999, (1999), – Commission/Germany, (1999) ECR I 5087 (34) = NVwZ (1999) 1209.
[45] Larenz, *Methodenlehre der Rechtswissenschaft*, 6th ed. 431 (1991); Köhler, 'Gesetzesauslegung und 'gefestigte höchstrichterliche Rechtsprechung'' JR 45 (1984).
[46] § 2 UWG in the version of 1.9.2000, BGBl. I 1374.
[47] Among numerous politicians Cass, 'The word that saves Maastricht?, The principle of subsidiarity and the division of powers within the EC' 29, CMLREV. 1079 *et seq.* (1992).
[48] Böckenförde *supra* n. 4, at 48; similarly Adam, 'Wo eine Wille, gibt es viele Wege. Die Diskussion über die künftige Gestalt Europas muß konkreter werden' *FAZ*, December 5, 1995, p. 16/17; also Shonfield, *Europe: Journey to an Unknown Destination* (1973).
[49] Meyer-Cording, 'Die europäische Union als geistiger Entwicklungsprozeß' in *Festschrift Müller-Armack* 307 (1961).
[50] See for example British government demands for global bank supervision by a committee or G-10 Secretariate to extension of the committee of Basel, *FAZ*, October 2, 1998, p. 16; also Wolgast, 'Die Finanzkrise verlangt nach einer globalen Bankenaufsicht', *FAZ* October 3, 1998, p. 18.
[51] See the Daimler-Chrysler merger.
[52] Similarly Art. 5 (2) (ex-Art. 3b para. 2) TEC, „ ...insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of scale or effects of the proposed action, be better achieved by the Community".
[53] On negative aspects of the subsidiarity principle and further reading see Armin von Bogdandy/Martin Nettesheim in Grabitz/Hilf; *Kommentar zur Europäischen Union*, Looseleaf Collection (updated in 1998), Art. 3b para. 19 *et seq.*; A.G. Toth,' The Principle of Subsidiarity in the Maastricht Treaty' 29 CMLREV. 1079 *et sec.* (1992).
[54] Wieacker, in Behrends/Diesselhorst/Voss, *Römisches Recht in der europäischen Tradition*, 358; also Coing, *Europäisches Privatrecht*, vol. 1 (1985), pp. 7; also, 'Die Bedeutung der Europäischen Rechtsgeschichte für die Rechtsvergleichung', 32 RabelsZ 32, 11 (1968).
[55] Sir Henry Maine, *Ancient Law* (1864), p. 165.
[56] The *Constitution of the United States of America* of July 4, 1776.
[57] *Déclaration des Droits de l'Homme et du Citoyen* of August 26, 1789.
[58] On the historical development see Oestreich, *Geschichte der Menschenrechte und Grundfreiheiten im Umriß*, 2nd ed. (1978); it is unnecessary to distinguish between Americanisation or an independently European basic rights based in the French Enlightenment, *cf.* Schnur (ed.), *Zur Geschichte der Erklärung der Menschenrechte* (1994).

[59] Wieacker, *supra* n. 52, *ibid.* at 360; Schulze, 'Gemeinsames Privatrecht und Rechtsgeschichte', in Müller-Graff (ed.) *Gemeinsames Privatrecht in der europäischen Gemeinschaft* 73 (1993).
[60] For an overview see Roxin, *Strafrecht, Allgemeiner Teil*, vol. 1, 2nd ed. (1994), § 5.III para. 14 - 16.
[61] Cf. Art. 6 (1) TEU.
[62] Börner, in *Festschrift Kegel* 381 (1977).
[63] ECJ, 4/73, dec. of 14.5.1974, (1974) ECR 491 = NJW (1975), p. 518 – *Nold*; see also ECJ, 29/69, dec. of 12 November 1969, (1969) ECR 419 – *Stauder in an obiter dictum*. See also Rengeling, *Grundrechtsschutz in der Europäischen Gemeinschaft* 223 and n. 172 (1993).
[64] Oppermann, *supra* n. 22, para. 483; ECJ, 120/73, dec. of 11.12.1973, (1973) ECR 1481 – *two months' notice.*
[65] Frowein/Peukert, *EMRK-Kommentar* (1985), Art. 6 para. 98 *et sec.* for further reading; Schmidt-Aßmann, 'Verfahrensgarantien im Bereich des öffentlichen Rechts' EuGRZ (1988), pp. 577, at p. 583. On legal protection as element of common constitutional tradition, ECJ, 222/86, dec. of 15.10.1987, (1987) ECR 4097 – *Heylens.*
[66] Iglesias, 'Zu den Grenzen der verfahrensrechtlichen Autonomie der Mitgliedstaaten bei der Anwendung des Gemeinschaftsrechts' EuGRZ 289 (1997); also, NJW 1 (1999); Kakouris, 'Do Member States Possess Judicial Procedural 'Autonomy'?' 34 CMLREV. 1389 (1997).
[67] http://www.jura.uni-augsburg.de/moellers.
[68] Weber, 'Die Europäische Grundrechtscharta – auf dem Wege zu einer europäischen Verfassung', NJW 537 (2000); Lenaerts, 'Respect For Fundamental Rights as a Constitutional Principle for the European Union', 6 COLUMBIA J.EUR.L. 1 (2000); Kay, 'The European Human Rights System as a System of Law', 6 COLUMBIA J.EUR.L. 55 (2000).
[69] Art. 6 und Art. 174 (2) (1) (ex-Art. 130r) TEC.
[70] For an overview Krämer, *Focus on European Environmental Law* (1992); Epiney, *Umweltrecht in der Europäischen Union* (1997); Epiney/Möllers, *Freier Warenverkehr und nationaler Umweltschutz* (1992); recent-ly Rengeling (ed.), *Handbuch zum europäischen und deutschen Umweltrecht*, 2 vol. (1998).
[71] Recent cases for example the Decision of European Commission of 28.1.1998, OJ 1998 L 124, 60 – *Volkswagen*; Creutzig, 'Zum Fortbestand des selektiven und exklusiven Vertriebssystem der VW AG nach der Kartellentscheidung der Kommission' EuZW 293 (1998).
[72] Successfully corrected by the earlier Competition Commissioner *Van Miert*. However, competition law on the European level must to an ex-

tent be made more effective, see Wessling, 'Subsidiarity in Community Antitrust Law: Setting the Right Agenda' 22 ELR 35 (1997); Ehlermann, 'Reflections on a European Cartel Office' 32 CMLREV. 471, 478 (1995).

[73] See the Commission report on the application of competition law between EC and US- government in the time of January 1 until December 31, 1997, DAJV-Newsletter 1998, p. 104; Fiebig, 'The Extraterritorial Application of the European Merger Control Regulation' 5 COLUMBIA J.EUR.L. 79 *et sec.* (1999); as European law is not always sufficient to counteract the disadvantageous consequences of dominant market position abuse, consideration has been given to a global cartel law, Fikentscher/Heinemann, 'Der „Draft International Antitrust Code" - Initative für ein Weltkartellrecht im Rahmen des GATT' WuW 97 (1994); Fikentscher/Drexl, 'Der Draft International Antitrust Code - Zur institutionellen Struktur eines künftigen Weltkartellrechts' RIW 93 (1994); Basedow, *Weltkartellrecht* (1998).

[74] See Art. 153 (ex-Art. 129a) TEC.

[75] For example ECJ, C-373/90, dec. of 16.1.1992, (1992) ECR I-131 = EuZW (1993), 544 – *Nissan*; see also the opinion of General Advocate Giuseppe Tesauro, p. 145. Recently Niemöller, *Das Verbraucherleitbild in der Rechtsprechung des BGH und des EuGH*, Diss. Augsburg (1999).

[76] Art. 152 (ex-Art. 129) TEC.

[77] Title VIII (ex- Title VIa) = Arts. 125 TEC.

[78] Art. 7 TEU.

[79] The members of the Council of Europe acceded to the European Convention on Human Rights as early as 1950, see Oppermann, *supra* n. 22, para. 15.

[80] Art. 49 TEU.

[81] Art. 6 (ex -Art. F) (2) and the Protocol No. 6 (Abolishment of the Death Penalty) to the European Con-vention for the Protection of Human Rights and Fundamental Freedoms, about the Abolishment of the Death Penalty, 28 April, 1983, implementation for Germany is to be found in BGBl. 1983 II, p. 662, amended by protocol No. 11, 5 November 1994, as for Germany: BGBl. 1995 II, p. 578. On US-American law see Rasnic, 'The U.S. Constitution: Supreme Court Decisions and Capital Punishment' DAJV-Newsletters 101 (1999).

[82] The FRG and EU called for stricter reduction of CO^2-emissions than the USA and Japan, see on that Bail, 'Das Klimaschutzregime nach Kyoto' EuZW 457 (1998).
On the previous conferences in Rio de Janeiro and Berlin see Bundesministerium für Umwelt (BMU) (ed.), *Konferenz der Vereinten Nationen für Umwelt und Entwicklung im Juni 1992 in Rio de Janeiro - Dokumente, Agenda 21*; Findley/Farber, *Cases and Materials on Environmental Law* 4th ed., 1995, p. 22; Müller Kraenner, 'Wie geht's weiter nach der Berliner Klimakonferenz?' in *Jahrbuch Ökologie* 1996 at 43 (1995); An overview of international agreements is to be found in the Internet at http://www.law.ecel.uwa.edu.au/intlaw/environment.html.

[83] See *supra* n. 6 *et seq.*

[84] Brzeinski, *Die einzige Weltmacht* (1997).

[85] For example product liability, insolvency, capital market and company laws; see Wiegand, 'The Recep-tion of the American Law in Europe' 39 AM.J.COMP.L. 229 (1991).

[86] Eggers, 'Die Entscheidung des WTO Appelate Bodys im Hormonfall', EuZW 147 (1998). Further ex-amples are to be found in Czempiel, 'Die USA und Westeuropa: Asymmetrie, Interdependenz, Kooperation' in Knapp/Krell (eds.) *Einführung in die internationale Politik*, 3rd ed. (1993), p. 85; *FAZ*, May 5, 1999, p. 13.

[87] Earlier called: co-operation in the fields of justice and home affairs (CJHA)

[88] See Böckenförde, *supra* n. 4, 27, for further discussion, *ibid.* n. 29.

[89] Oppermann, JZ 325 (1999).

[90] For the Near and Middle East see Steinbach/Hacke, 'Auf ewig der Juniorpartner Amerikas?' *FAZ*, May 15, 1999, p. 11, for the Balkans see Vollmer, 'Der Tag danach' *FAZ*, May 11, 12 (1999).

[91] Oppermann, JZ 325 (1999).

[92] Concerning Thon's *Imperativentheorie cf.* Thon, *Rechtsnorm und subjektives Recht* (1878); Fikentscher, *Methoden des Rechts*, vol. 4 (1977), 150; Engisch, *Einführung in die Rechtswissenschaft*, 8th ed. 200 (1983); Llewellyn, 'The Normative, the Legal, and the Law-Jobs' 49 Yale L.F. 1355 (1939/40); Möllers, 'Die Rolle der Verhaltensforschung für das Umweltrecht - Ein Beitrag zur Berücksichtigung menschlicher Verhaltensweisen bei der Steuerung umweltgerechten Verhaltens durch Aufklärung und Rechtszwang' in *Festschrift Wolfgang Fikentscher* 144 (1998).

[93] According to statistics of BVerfG, dec. of. 12.10.1993, BVERFGE 89, 155, at p. 172 = NJW (1993), p. 3047 – Maastricht; Odersky, 'Rechtsfragen zur Anwendung von Recht der Europäischen Gemeinschft im Mitgliedstaat' ZEuP 485 (1998); cited by the BVerfG, Jacques Delors, in a speech hold before the European Parliament on July 4, 1988, Bull. EC 1988 No. 7/8, p. 124, said that in ten years 80% of economic, tax and social laws would be Community law.

[94] See Remien, 60 RabelsZ 13 (1996). In the meantime the readiness to discuss directive drafts in legal journals is increasing.

[95] Negative aspects of subsidiarity emphasized in *Handbuch zur Vorbereitung von Rechts- und Verwaltungsvorschriften* 20.12.1991, BAnz. 1992, Beilage 52, 14.3.1992.

[96] Besides that French elite institutions such as ENA and École polytechnique produce excellent administrative officials for EC institutions each year; See Remien, 60 RabelsZ 12 (1996).
[97] 'Circulaire relative aux relations entre les administrations françaises et les institutions de l'Union européenne', OJ (21/03/1994) p. 4783 Annex IV: *Aspects juridiques*.
[98] The Commission has now recogniced this goal and produced guidelines, see the inititiative „Better Lawmaking," Bull. E.U. 1/2-1996, 1.10.11. also Bull. E.U. 11-1995, 1.9.2; Entschließung zur Transparenz des Gemeinschaftsrechts und der Notwendigkeit seiner Kodifizierung OJ 1994 C 205, 514; on this Enriquez, 'The Policymaker's Perspective on Administrative and Regulatory Reform in Europe' 4 COLUMBIA J.EUR.L. 617, 624 (1998); Timmersmann, 'How Can One Improve the Quality of Community Legislation', 34 CMLREV. 1229 *et sec.* (1997); Bieber/Amrarelle, 'Simplification of European Law', 5 COLUMBIA J.EUR.L. 15 *et sec.* (1999).
[99] See above Chap. II.2.b.
[100] Eidenmüller, *Effizienz als Rechtsprinzip* (1995).
[101] See copyright for artists under draft directive OJ 1996 C 178, 16, Schmidtchen/Kobolt/Kirstein, 'Rechtsvereinheitlichung beim „droit de suite"?" in *Festschrift Fikentscher* 774 (1998).
[102] Pfeifer, *Produktfehler oder Fehlverhalten des Produzenten, Das neue Produkthaftungsrecht in Deutschland, den USA und nach der EG-Richtlinie* (1987), pp. 118; criticism of the directive is to be found in Schwartz, 'Product Liability and Medical Malpractice in Comparative Context' in Huber/Litan (eds.), *The Liability Maze, The Impact of Liability Law on Safety and Innovation* (1995), pp. 28; s. also *supra* n. 28.
[103] Gerber, 'Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the „New" Europe' 41 AM.J.COMP.L. 25 (1994).
[104] Council Directive 86/653/ECC of 18.12.1986 on the coordination of the laws of the Member States relating to self-employed commercial agents, OJ 1986 L 382, 17. A number of states had already followed Ger-man law, see Baumbach/Hopt, supra n. 34, § 84 para. 2.
[105] Borgsmidt, 'The Advocate General at the European Court: A Comparative Study' 13 Eur.L.Rev. 106 (1988).
[106] Council Directive 90/313/ECC of 7.6.1990 on the freedom of access to information on the environ-ment, OJ 1990 L 158, 56; cf. Burmeister/Winter, 'Akteneinsicht in der Bundesrepublik' in Gerd Winter (ed.) *Öffentlichkeit von Umweltinformationen, Europäische und nordamerikanische Rechte und Erfahrungen* (1990).
[107] Cf. Council Regulation 1836/93/ECC of 29.6.1993, allowing voluntary participation by companies in the industrial sector in a community eco-

management and audit Scheme, OJ 1993 L 168, 1.
[108] Council Directive 93/22/EEC of 10.5.1993 on investment services in the securities field, OJ 1993 L 141, 27.
[109] Koller, in Assmann/Schneider (eds.), *WpHG*, 2nd ed. (1999), § 31 para. 81. Further examples in Hopt, 'Company law in the European Union: Harmonization and/or Subsidiarity, 1 INTERNATIONAL & COMP.CORPORATE L.J., 41 (1999); Remien, 60 RABELSZ 7 (1996).
[110] See for example Buxbaum/Hopt, *Legal Harmonization and the Business Enterprise – Corporate and Capital Market Law Harmonization Policy in Europe and the USA* (1988); Eckard Rehbinder/Richard Stewart, *Environmental Protection Policy* (1985).
[111] Green Papers are communications published by the Commission on a specific policy area. In some cases they provide an impetus for subsequent legislation. White Papers are documents containing proposals for Community action in a specific area. They often follow a Green Paper published to launch a consultation process at European level. While Green Papers set out a range of ideas presented for public discussion and debate, White Papers contain an official set of porposals in specific policy areas and are used as vehicles for their development; see, *e.g.*, Green Paper on remedying environmental damage COM (93) 47 = OJ 1993 C 149, 12.
[112] See, *e.g.*, 'Completing the Internal Market', White Paper from the Commission to the European Council of 28-29 June 1985, COM (85) 310.
[113] On Environment Protection see 5th Action program, OJ 1993 C 328, 1 = COM (95) 647.
[114] See above note 19.
[115] Critical of previous procedures Oppetit, 'Droit commun et droit européen' in *L'internationalisation du droit, Mélanges en l'honneur de Yvon Loussouarn* 313 (1994), 'le droit europeén apparaît essentiellement non pas comme un mode des pensée, mais comme un ensemble de normes, qui traduit parfaitement l'esprit despotisme élairé et qui révèle une volonté d'organisation de la vie des peuples européens en termes purement quantitatifs et en fonction de critères exclusivement matériels'.
[116] In this context the harmonization requirement must be detailed. For consumer law 'Editorial Comments' 34 CML Rev. 207, 211 (1996).
[117] Thus Everling, 'Rechtsvereinheitlichung durch Richterrecht in der Europäischen Gemeinschaft' 50 RabelsZ 194 (1986); Taupitz, *Europäische Privatrechtsvereinheitlichung heute und morgen* 60 (1992); von Bogdandy/Ehlermann, 'Consolidation of the European Treaties: feasilbility, costs, and benefits' 33 CMLRev. pp. 1107 (1996); Gormley (ed.), *Introduction to the Law of the European Communities*, 3rd ed. 1380 (1998).
[118] CFI, T-194/94, dec. of 19.10.1995, (1995) ECR II-2765 = EuZW (1996), pp. 152 with annotations by Christoph Sobotta – *John Carvel*; ECJ, C-

58/94, dec. of 30.4.1996, (1996) ECR I-2169 = EuZW (1996), pp. 499, 501 – *Access to Council documents*; Kahl, 'Das Transparenzdefizit im Rechtsetzungsprozeß der EU' ZG 227 (1996).

[119] Recently on these individual principles Kahl, *supra* n.118 at 233; Dreher, 'Transparenz und Publizität bei Ratsentscheidungen' EuZW 491 (1996).

[120] Iglesias, NJW 1 (1999).

[121] See above note 63 *et sec.*

[122] For the comparative law aspects see Bochardt, in Lenz (ed.) *EG-Vertrag, Kommentar* (1994), Art. 164 para. 24; Remien, 60 RabelsZ 28 (1996); For the lack of comparative law considerations Daig, 'Zur Rechtsvergleichung und Methodenlehre im Europäischen Gemeinschaftsrechts' in *Festschrift Zweigert* 395, 412 (1981).

[123] Dale, *Legislative Drafting. A New Approach. A Comparative Study of Methods in France, Germany, Sweden, United Kingdom* (1977); Karpen/Delnoy (eds.), *Contribrutations to the Methodology of the Creation of Written Law* (1996); Karpen/Wenz (eds.), *National Legislation in the European Framework* (1998).

[124] Bieber, 'Die Europäisierung des Verfassungsrechts', in Kreuzer/Scheuing/Sieber (ed.), *Die Europäisie-rung der mitgliedstaatlichen Rechtsordnungen in der Europäischen Union* 81 et seq. (1997).

[125] See BGBl. I, p. 122.

[126] Council Directive 85/577/EEC of 20.12.1985 to protect the consumer in respect of contracts negotiated away from business premisses, OJ 1985 L 372, 31. Or on the Concepts „Informations" and „Fact" in Council Directive 89/592/EEC of 13.11.1989 coordinating regulations on insider dealing, OJ 1989 L 1,403 and in § 15 Wertpapierhandelsgesetz (WpHG) see Grundmann, 'EG-Richtlinien und nationales Recht' JZ (1996), pp. 274 at p. 284; also Möllers, 'Anlegerschutz durch Aktien- und Kapitalmarktrecht, Harmonisierungsmöglichkeiten nach geltendem und künftigem Recht', ZGR 334, 347 (1997).

[127] See BGH, dec. of 11.1.1996, IX.Senat, C-45/96, OJ 1996 C 96, 13 = NJW 930 (1996); with annotations Pfeiffer *ibid.*, p. 3297 = EuZW 220 (1996), - *request for preliminary ruling:* HaustürWG und Bürgschaft; EuGH, C-45/96, dec. of 17.3.1998, (1998) ECR I-1199, NJW 1298 (1998) = EuZW 252 (1998), w. ann. Micklitz - *Dietzinger (HaustürWG für Bürgschaften).*

[128] See above Chap. I.2.c); in contrast Hommelhoff, 'Teilkodifikation im Privatrecht - Bemerkung zum Produkthaftungsgesetz' in *Festschrift Rittner* (1991), pp. 165 at 183; Drexl, *Die wirtschaftliche Selbstbestimmung des Verbrauchers*, 76 (1999), that it made sense to enact the product liability law outside the BGB because the legislative process was not complete. Möllers, 'Nationale Produzentenhaftung oder Europäische Produkthaftung?, Zur Bindung der Rechtsprechung im Rahmen der deliktsrechtlichen Generalklausel an die Vorgaben des ProdHaftG und des ProdSG, VersR 1177 (2000).

[129] So the former prevailing opinion, see Wiese, 'Verbot der Benachteiligung wegen des Geschlechts bei der Begründung eines Arbeitsverhältnisses' JuS 357 (1990); Ehmann, in Erman, *BGB*, 9th ed. (1993), Anh. zu § 12 para. 372; Hanau, *ibid.*, § 611a Rdn. 16; Herrmann, 'Die Abschlußfreiheit - ein gefährdetes Prinzip', ZfA 19, 44 (1996); for a non-economic claim under § 823 para. 1, 847 BGB see Bundesarbeitsgericht (BAG) 14.3.1989, BAGE 61, 209 = NJW 67 (1990) = JZ 43 (1991) - *§ 611a and personal injury* as a result of ECJ, 14/83, dec. of 10.4.1984, (1984) ECR 1891 – *von Colson und Kamann*; supporting the BAG judgment Beyer/Möllers, 'Europäisierung des Arbeitsrechts', JZ 24, 28 (1991); Iglesias/Riechenberg, 'On a directive conform construction of national law' in *Festschrift Everling* 1213, 1217 (1995), in support Hommelhoff, 192 AcP 71, 97 (1992).

[130] See Tonner, 'Die Rolle des Verbraucherrechts bei der Entwicklung eines europäischen Zivilrechts', JZ 533, 536 (1996); recently Ebel, 'Kodifikationsidee und zivilrechtliche Nebengesetze' ZRP 46 (1999).

[131] Directive 1999/44/EC of the European Parliament and of the Council of 25.5.1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ 1999 L 171, 12; for the draft see Hondius, 'Kaufen ohne Risiko: Der europäische Richtlinienentwurf zum Verbraucherkauf und zur Verbrauchergarantie' ZEuP 130 (1997); Schlechtriem, 'Verbraucherkaufverträge - ein neuer Richtlinienentwurf' JZ 441 (1997).

[132] Schmidt-Kessel, 'Zahlungsverzug im Handelsverkehr – ein neuer Richtlinienentwurf', JZ 1135 (1998), and Möllers, 'Das Gesetz zur Beschleunigung fälliger Zahlungen und die Richtlinie zur Bekämpfung des Zahlungsverzugs im Geschäftsverkehr - Zugleich ein Beitrag zur Sinnhaftigkeit des Vorpreschens des deutschen Gesetzgebers', WM 2284 (2000).

[133] Kübler, 'Kodifikation und Demokratie', JZ 645-48 (1969); following this thought Hommelhoff, in *Festschrift Rittner* 165, 182 (1991); Drexl, *supra* n. 128, at 75.

[134] For the implementation of Council Directive 93/13/EEC of 5.4.1993 on unfair terms in consumer contracts, OJ 1993 L 95, 29 through Art. 1469 codice civile see, *e.g.*, Micklitz/Brunetta d'Usseaux, 'Die Umsetzung der Richtlinie 93/13 in das italienische Recht', ZEuP 104 (1998); before a control could be based on Art. 1341 *et sec.* codice civile.

[135] For a survey see Drobnig, 'Das neue niederländische bürgerliche Gesetzbuch aus vergleichender und deutscher Sicht', Eur.Rev.P.L. 1, 171 (1993); Hartkamp, 'Einführung in das neue Niederländische Schuldrecht', 191 AcP 396 (1991).

[136] For the integration of credit sales and employment law into the law of obligations, see Art. 319 - 362 OR and Art. 226a - 228 OR.
[137] Sechstes Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen 8.5.1998, Bundesrat-Drucksache 418/98; Bechtold, 'Das neue Kartellgesetz', NJW 2769 (1998).
[138] Now its for the most part following the *Übereinkommen über den Beförderungsvertrag im internationalen Straßengüterverkehr* (CMR) 19.5.1956, BGBl. II 1961, S. 1119; see Basedow, 'Hundert Jahre Transportrecht: Vom Scheitern der Kodifikationsidee und ihrer Renaissance, 161 ZHR 186 (1997).
[139] On reform of the law of obligations (*Schuldrecht*) see Bundesministerium der Justiz (BMJ) (ed.), *Abschlußbericht der Kommission zur Überarbeitung des Schuldrechts* (1992); Rolland, Medicus, Haas, Rabe in NJW 2377-2400 (1992); see also Resolutions of DJT, NJW 3083 (1994).
[140] The different draft bills of the Contract Law Mondernization Act (Schuldrechtsmodernisierungsgesetzes) can be found under „http://www.bmj.bund.de" and „http://jura.uni-augsburg.de/moellers".
[141] Obviously, the time pressure arising from this schedule has led to numerous technical defects of the draft. Critical insofar Ernst/Zimmermann (ed.), *Zivilrechtswissenschaft und Schuldrechtsreform*, (2001); for an overview to the delayed payment see Möllers, WM 2284 (2000).
[142] Conseil d'Etat v. 28.2.1992, *Société Anonyme Rothmanns International v. Société Anonyme Philip Morris France; Société Arizona Tobacco Products v. Société Anonyme Philip Morris France* 30 CMLRev. 187 (1993); Tomlinson, 'Reception of community Law in France' 1 Columbia J.Eur.L. 183 (1995).
[143] Levitsky, 'The Europeanization of the British Legal Style' 42 Am.J.Com.L. 347, 351 (1994) for construction principles: „literal, contextual, historical and teleological or purposive"; Lewis, 'A Common Law Fortress Under attack: Is English Law Being Europeanized?' 2 Columbia J.Eur.L. 1 et sec. (1996); previously English law had no general principle of „good faith". It is expected that such a principle will be developed in implementing the Unfair Terms Directive (n. 134).
[144] Thus Zweigert/Kötz, *Einführung in die Rechtsvergleichung*, 3rd ed. 265 (1996).
[145] Beginning with the wording „Attendu que", examples are to be found in Everling, EuR 127, 132 (1994); Zweigert/Kötz, *supra* n. 144, at 121; Kötz, *Über den Stil höchstrichterlicher Entscheidungen* 7 (1973).
[146] S. § 1-102 Abs. 1 UCC; Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg (1975) AC 591, 613; Bankowski/MacCormick, 'Statutory Interpreting in the United Kingdom' in MacCormick/Summers (eds.), Interpreting Statutes. A Comparative Study (1991) pp. 359 at 384. Still further *Calabresi*, A Common Law For The Age Of Statutes, 1982, pp. 32 *et seq.*: Courts have the power to update statutes. For a fuller exposition see Zweigert/Kötz *supra* n. 144, p. 265 and *supra* n. 143.
[147] Hattenhauer, *Die Kritik des Zivilurteils* (1970), pp. 30, 62, 120; this applies for example to some passages of the Maastricht judgment; see BVerfG, dec. of 12.10.1993, BVerfGE 89, 155, at 188, 210 – *Maastricht.*
[148] See on the concept of „consumer expectations" in tort law Möllers, *Rechtsgüterschutz im Umwelt- und Haftungsrecht* 255 (1996).
[149] Mimin, *Le style de jugements*, 4th ed. 255 (1978); Zweigert/Kötz *supra* n. 144, p. 121; see also Kötz, *supra* n. 145. In contrast to the anglo-american legal systems there is no comparable plain Englisch movement in Germany.
[150] Even though differences in judicial understanding of the application of law should not be concealed, see Llewellyn, *The Bramble Bush* (1930); Dawson *The Oracles of the Law* (1968); Eser, *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts*, 4th ed. (1990); Gordley, 'Common law and civil law: eine über-holte Unterscheidung' ZEuP 498 (1993).
[151] Basedow, 33 CMLRev. 1169, 1171 (1996).
[152] Also called principle of interpretation, cf. ECJ, 14/83, dec. of 10.4.1994, ECR 1984, 1891 (28) = NJW (1984) 2021 (23, 28) - von Colson u. Kamann; BVerfG, dec. of 8.4.1987, BVerfGE 75, 223, at 237f; Lutter, 'Die Auslegung angeglichenen Rechts', JZ 1992, pp. 593; Ehricke, 'Die richtlinienkonforme Auslegung und gemeinschaftsrechtskonforme Auslegung nationalen Rechts' 59 RabelsZ 598 (1995); Brechmann, *Die richtlinienkonforme Auslegung* (1994).
[153] On the scope of development of law see Möllers, EuR (1998), pp. 20, 44; as here Hergenröder, JZ 1172, 1176 (1997). The legislature has now incorporated the principles of the *Draehmpaehl-decision* of the ECJ, C-180/95, dec. of 22.4.1997, (1997) ECR I-2195, NJW 1839 (1997), JZ 1172 (1997), into a revised § 611a BGB, § 611a BGB amended 29.6.1998, BGBl. I. 1694.
[154] See *supra* n. 120. For further detail on that topic, see Möllers, 'Doppelte Rechtsfortbildung contra legem? Zur Umgestaltung des Bürgerlichen Gesetzbuches durch den EuGH und nationale Gerichte', EuR 20 (1998).
[155] On comparative law as a taught subject, see below IV.2.a).
[156] For example BVerfG, dec. of 14.5.1985, BVerfGE 69, 315, 343 – interpretation of the demonstration code; BGH, dec. of 5.3.1963, BGHZ 39, 124, 132 - non-economic claim after an abuise article; further cases BGH, dec. of 18.1.1983, BGHZ 86, 240 = NJW (1983), 1371 - wrongful life.
[157] See above III.2..
[158] Odersky, 'Harmonisierende Auslegung und europäische Rechtskultur'

ZEuP 1 (1994); in agreement von Bar, 'Vereinheitlichung und Angleichung von Deliktsrecht in der Europäischen Union' 35 ZfRV 221, 231 (1994).

[159] As on directive conform construction and development of law, German textbooks are silent on method-ology. According to Großfeld comparative law has no direct relevance, see Großfeld, 'Vom Beitrag der Rechtsvergleichung zum deutschen Recht' 184 AcP 289, 295 (1984).

[160] Lutter, JZ 593, 604 (1992).

[161] See for example BGH, dec. of 27.2.1992, BGHSt 38, 214 = NJW (1992), p. 1463 - unterlassene Beschuldigtenbelehrung entgegen § 136 (1) (2) StPO.

[162] For the comparative method see the Swiss example; Kramer, *Juristische Methodenlehre* 191 (1998); on Austrian law Bydlinski, *Juristische Methodenlehre und Rechtsbegriff*, 2nd ed. 461 (1991); Posch, ZEuP 521 (1998).

[163] *Smith v. Littlewoods Organisation Ltd.* (1987) 1 All E.R. 710, 735f; *White v. Jones* (1995) 2 W.L.R. 187 with comparative law comments Lorenz, JZ 317 (1995); *Moore v. Piretta Ltd* (1999) 1 All ER 174.

[164] The TEU and the TEC speak of „peoples" rather than „the people of Europe" in both Preambles para. 5; von Simson, 'Was heißt in einer europäischen Verfassung „Das Volk"?' EuR 1,3 (1995); in agreement Böckenförde *supra* n. 4 at 39; Rittner, 'Das Gemeinschaftsprivatrecht und die europäische Integration' JZ 849, 856 (1995).

[165] Art. 6 para. 3 (ex-Art. F) TEU.

[166] According to Art. 151 (ex-128) TEU the Community shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore.

[167] Legrand, 'Comparer' 48 Revue Internationale de Droit Comparé, 279, 307 (1996).

[168] Thus Stürner, 'Der hundertste Geburtstag des BGB', JZ 741, 752 (1996).

[169] Weiler, 'Journey to an Unknown Destination' 31 Journal of Common Market Studies 417 *et sec.* (1993).

[170] This means identifying historical differences such as varying perspectives on the „nation" in France, „society" in Britain, and the „Staat" in Germany, see Allott, 'The crisis of European constitutionalism: Reflections on the Revolution in Europe' 34 CMLRev. 439, 444, 449 *et sec.* (1997).

[171] Allott, *ibid.* at 488; Weiler, 'Bread and Circus: The State of European Union', 4 Columbia J.Eur.L. 225 (1998).

[172] Pernice in Dreier (ed.) *Grundgesetz Kommentar* vol. 1 (1996), Art. 23 Rdn. 54. It would be helpful to initiate discussion on European basic rights with the aim of further developing the basic rights canon and incorporating a catalogue of community basic rights in the next EC Treaty revision; see Declaraton of the European Parliament about fundamental rights and basis freedoms of 12 April 1989, OJ 1989 C 120, 51; Toth ' The European Union and Human Rights: The Way Forward, 34 CMLRev. 491 (1997); Editoral comments, 'Union without constitution', 34 CMLRev. 1105, 1110 (1997).

[173] Bertellot, 'Babylone à Luxembourg, Jurilinguistique à la Cour de justice' in Ress/Will (ed.), *Vorträge und Berichte aus dem Europa Institut* 3 (1988).

[174] It would be helpful were English or American films to be screened with the original unsynchronized soundtrack and german subtitles. Up to now it is only possible to see them occasionally on a second sound channel; this does not mean neglecting European films contrary to the Television Directive.

[175] Language instruction in schools would be improved by an earlier start, see recently the proposal of Bavarian Culture Minister to teach English from the third grade.

[176] See, *e.g.*, Kötz, 'Zehn Thesen zum Elend der deutschen Juristenausbildung' ZEuP 565 (1996); Stürner, 'Der hundertste Geburtstag des BGB', JZ 741 (1996); also 62nd DJT 1998 concerned with legal training, see von Münch, 'Juristenausbildung' NJW (1998), pp. 2324; also Böckenförde, 'Juristenausbildung – auf dem Weg ins Abseits', JZ 317 (1997); Schermers, 'Legal Education in Europe', 30 CMLRev. 9 *et sec.* (1990).

[177] European Parliament, resolution of 20 January 1995, 11th annual report No. 9, OJ 1995 C 43, 122, 124.

[178] Against English as a European legal language see Flessner, 'Rechtsvereinheitlichung durch Rechtswissenschaft und Juristenausbildung' 56 RABELSZ 243, 257 (1992); Remien, 'Illusion und Realität eines europäischen Privatrechts', JZ 277, 282 (1992), which do not consider the cultural embedding of the second language.

[179] For the Swedish University in Lund as partner university of Augsburg University see for example lec-tures on EC-Competition Law Procedure, EC-Court Procedure – Enforcement of Community Law; Free Movement of Goods and Environmental Law; these courses are also attended by Erasmus/Sokrates students.

[180] Thus the first private Law College aims at offering lectures in english, see *Hamburger Abendblatt*, June 19, 1999.

[181] The vacancy columns of the national newspapers reveal the demand for good, internationally minded lawyers; German law faculties have not reacted to this need, see Basedow, 'Juristen für den Binnenmarkt - Die Ausbildungsdiskussion im Lichte einer Arbeitsmarktanalyse' NJW 959 (1989).

[182] Already attended by foreign post-graduate students. The factory of law has started at the University of Augsbsurg with such courses.
[183] English can also be used on the level of legal reasoning in the context of directive conform or compara-tive law deliberations, see above Chap. III.2.b).
[184] See recently Pernice, ZEuP 1 (1998); also Martiny, 'Babylon in Brüssel?', ZEuP 227 (1998).
[185] Puttfarken, 'Droit commun législatif und die Einheit der Profession, Eine ketzerische Reflexion zur Rechtsvereinheitlichung', 45 RabelsZ 91 (1981); Flessner, 56 RABELSZ 243, 250 (1992).
[186] On sheer text harmonization on „law in the books" Dreher, 'Kartellrechtsvielfalt oder Kartellrechtseinheit in Europa?', AG 437, 439 (1993); also, 'Wettbewerb oder Vereinheitlichung der Rechtsordnungen in Europa', JZ 105, 111 (1999); Rittner, 'Ein Gesetzbuch für Europa?' in *Festschrift Mestmäcker* 449, 453 (1996).
[187] On guarantors as unremunerated transaction, see *supra* n. 127.
[188] See *supra* n. 150, and Rittner, JZ 849, 853 (1995).
[189] Warning against this fact: Rittner, JZ (1995), pp. 849, 856 v. Walter Hallstein, 28 RABELSZ 228 (1964).
[190] Supra Chap. II.2.b)aa. See also Häberle, *Europäische Rechtskultur*, 37 (1994); agreeing with him also Iglesias, NJW 1, 9 (1999); see also Hirsch, 'Gemeinschaftsgrundrechte als Gestaltungsaufgabe', in: Kreutzer/Scheuing/Sieber (Hrsg.), *Europäischer Grundrechtsschutz*, 9 (1998).
[191] Kramer, JBl. 477, 487 (1988); Remien, 87 ZVglRwiss 117 (1988); Drobnig, in *Festschrift Steindorff*, 1141, 1148 (1990).
[192] Allott, 'The Crisis of European Constitutionalism: Reflections on the Revolution in Europe', 34 CMLRev. 439, 444, 468f (1997).
[193] For the concept of people see *supra* n. 164.
[194] Thus Pescatore, 'The Doctrine of Direct Effect: An Infant Diesease of Community Law' 8 Eur.L.Rev. 155, 157 (1983): „une certaine idée de l'Europe" as an allusion to, De Gaules: „une certaine idée de la France".
[195] Preamble para. 10 TEU.
[196] Thus Flessner, 56 RABELSZ 243, 255 (1992).
[197] Cappelletti/Seccombe/Weiler, *Forces and Potential for a European Identity* (1986); Ward, 'In Search of a European Identity' 57 Mod. L.Rev. 315 et sec. (1994); see also Taylor, *Multiculturalism and „The Politics of Recognition"* 33 (1992).

The modernization of modern society[1]

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In international sociology there is a general consensus that we are living in a period of change which might be compared with the industrial revolution. We are living in a network-society, an age of fluid, flexible capitalism. Old institutions, as the nation state and the nuclear family seem to dissolve. New information technologies enable the empowerment of financial market and economic and cultural globalism. Simultaneously uncertainties and ecological dangers increase and demonstrate the limits of technical control and safety.

There are several different interpretations of this rapid and fundamental change ranging from postmodern positions to postcolonialism and a radical neoliberalism. Our Research Group in Munich and Augsburg, including Ulrich Beck and other colleagues from different disciplines, is studying these processes from the perspective of reflexive modernization. In the following I will not refer to these empirical research projects but to our theoretical frame concept.

Reflexive modernization refers to a distinct phase of modernization: the modernization of modern society. When modernization reaches a certain stage it radicalizes itself. It begins to transform, for a second time, not only the key institutions but the very principles of society. To understand this social transformation requires a transformation of social theory.

The social structure of postwar order in western industrial societies should not be absolutized as if it were the end of social history. On the contrary, much of what they once presumed as ne-