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## **The National Legal Tradition\***

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There is currently debate in the world about the adequacy of state law, and choice of the subject ‘The National Legal Tradition/La tradition juridique nationale’ as a theme of the XVII<sup>th</sup> International Congress of Comparative Law both highlights this debate and indicates a willingness to approach it from a broad perspective. The National Reports which have been received illustrate the need for such a broad perspective. There are many national legal traditions, and much variation amongst them. Yet they are all national traditions, and all provide evidence of the operation of the general concept. What, if one may revert to a historical conception of the subject, is its present *status*?

Michael Stolleis has written in Germany of the need to examine the ‘endless mass’ of the data of public law in Europe from 1600 to 1800, since questions as to the end of the state raise equally fundamental questions as to its beginnings.<sup>1</sup> It therefore appears appropriate to begin our enquiry with the origins of the national legal tradition, which may provide some clues as to the actual, and even contemporary, manner of its operation.

### 1. The Origins of the National Legal Tradition

The nation-state has become ubiquitous on the land surfaces of the earth, with the exception of Antarctica. It is common to all peoples, at least in some measure. Is there a commonality of origin, however, which would contribute to commonality in operation?

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\* Session IA, La Tradition Juridique Nationale. National Reports received from: Belgium, D. Heirbaut & M. E. Storme; Brazil (reports in both public and private law), V. M. de Jacob Fradera (private law) & A. L. de Lyra Tavares (public law); Canada (reports from both Quebec and the common law provinces), S. Normand (Quebec) & D. J. Guth (common law); Denmark, D. Tamm; Germany, F. Ranieri; Hungary, C. Varga; Italy, R. Caterina; the Netherlands, F. Brandsma; US, M. H. Hoefflich & S. Sheppard.

<sup>1</sup> M. Stolleis (Ed.), *Staatsdenker im 17. und 18. Jahrhundert* (1987) at 12.

### 1.1. A Common Public Law, or Laws?

In the Dutch report, Frits Brandsma states (p. 1) that ‘private law is the only field of law with a common tradition on the continent of Europe ... that goes back beyond a couple of centuries.’ The statement is a very interesting one, both for its apparent admission of a common tradition (in both public and private law) within the last couple of centuries, and for its denial of a common tradition in public law prior to that time. The ‘common constitutional traditions’ to which Article 6 of the Treaty of Amsterdam refers would therefore be of relatively recent origin. There have of course been affirmations, notably by Leibniz, of a ‘*ius publicum commune*’ in Europe,<sup>2</sup> but this may well be within the last couple of centuries, broadly defined, and would be denied, prior to that time, by the absence of any broad corpus of public law rules shared throughout Europe. The origins of the national legal tradition could therefore not be found in any more deeply rooted, and unique, common public law.

I believe, with Frits Brandsma, that this may well be the case, but it may still be possible to continue the enquiry into the origins of the national legal tradition, without conceding that all is local and that each contemporary nation state is the product of entirely indigenous conditions and constructions. How could this be the case given the ubiquitous character of the nation state? Even given the absence of a long-standing and unique common public law, there must be something which explains the commonality of the nation-state, and not simply developments of the last couple of centuries. Where can one find commonality amongst the evident historical diversity?

The answer may come from our understanding of private law, since private law is also a part of national legal tradition, and private law has historically been seen as presenting many common characteristics throughout Europe. There was, moreover, no sharp distinction between public and private law in medieval legal history, so both must be examined together. The historical commonality of private law is often said to be found in the *ius commune*, of Roman origin, such that there would be here a pan-European commonality lacking in what we know today as public law. The pan-European character of the *ius commune* cannot, however, be taken as a given, and recent writing has even portrayed its ‘mythical’ character, a myth which would soon be shattered when the computerization of the historical holdings of regional European law libraries is completed.<sup>3</sup>

An alternative but equally plausible view of European legal history would see not one, but multiple, common laws, each radiating out in influence from major centres of population, commerce and culture, such that there would have been a *ius commune* (of Italian and

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<sup>2</sup> For Leibniz, see H.-P. Schneider, *Gottfried Wilhelm Leibniz*, in Stolleis, *supra* note 1, 197 at 219; and for the influence of Roman public law in France, A. Rigaudière, *Pouvoirs et institutions dans la France médiévale. Des temps féodaux aux temps de l’État* (1998).

<sup>3</sup> D. Osler, *The Myth of European Legal History*, 16 *Rechtshistorisches J.* 393 (1997), notably at 305 on the ‘hidden continent’ of legal literature in national libraries.

German origin), a common law (spreading from London through England, Wales, Ireland, Scotland, and then beyond), a French *droit commun* (eventually in written form in the *Coutume de Paris*), a *derecho común* of Castilian origin, and even a *gemeine Recht* within and beyond Germany (spreading largely to the East).<sup>4</sup> Most of these common laws were of vital importance, since they controlled land, the major source of wealth in medieval society, with the *ius commune* relegated to university teaching and occasional influence in the law of obligations. They shared with the *ius commune*, however, an essential characteristic, in that they yielded to the local laws, the *iura propria*, with which they were in constant, dialogical relations. They were subsidiary, or suppletive, or relational common laws, such that, as the Dutch reporter once again puts it (p. 2) ‘Everywhere on the continent of Europe [and the British Isles can here be added as well] there was a mix of primary local law and subsidiary law.’ It was only a question of which local law, and which subsidiary law.

The local, *iura propria* were of both customary and legislative origins. Where they were legislative in origin, they were frequently the laws of cities, or city-states, and then of regions as particular legislators began to have wider geographical ambitions. That which was to become national law thus had its (common) origin in the *iura propria* of the multiple, and different, common laws of Europe. They drew their legitimacy not from a single, unique common law, but from multiple common laws, yet there was great commonality in their particular status. Ditlev Tamm, in the Danish report (p. 5), thus speaks explicitly of Danish law as a *ius proprium* (here in relation to the *ius commune*). Those engaged in construction of the *iura propria* of Europe were well aware of the process occurring elsewhere, and there was much active comparison in the construction process.<sup>5</sup> In the absence of a single, common, public law, there were therefore multiple common laws, each conferring legitimacy and authority (in some measure) on particular laws which were actively engaged in a common process – the comparison and construction of emergent national laws. Each of the particular, emerging national public laws was thus influenced by the common law within which it developed, bearing the imprint of its own common law. An unwritten common law in England thus gave rise to an unwritten public law, and elsewhere a written common law gave rise to written constitutions. The case for a *ius publicum commune* may not (yet) be made out, but there was much commonality in European legal diversity, perhaps a common core short of a common law.

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<sup>4</sup> See generally H. P. Glenn, *On Common Laws* (2005), ch. 1; H. P. Glenn, *Transnational Common Laws*, 29 *Fordham Int'l. L. J.* 457 (2006).

<sup>5</sup> A. Harding, *Medieval Law and the Foundations of the State* (2002) at 296 ff (‘Comparing and criticizing states of commonwealths’), notably on Jean Bodin; H. Mohnhaupt, “*Europa*” und “*ius publicum*” im 17. und 18. Jahrhundert, in C. Bergfeld *et al.*, *Aspekte europäischer Rechtsgeschichte. Festgabe für Helmut Coing 207* (1982) notably at 223 on 17<sup>th</sup> century, European-wide comparison of different national models; and more generally, H. Mohnhaupt, *Historische Vergleichung im Bereich von Staat und Recht. Gesammelte Aufsätze* (2000).

The importance of the different European common laws became much more important and evident with the movement of those laws offshore, in the colonization process. Each of the European common laws was a subsidiary law for overseas territories as much as it was for European territories, since the mobility of European populations was developing at much the same time within Europe as it was beyond Europe ('The Indian as Irishman').<sup>6</sup> There were even new common laws which emerged from the process, notably the Roman-Dutch law of the province of Holland, which became a subsidiary or relational common law in both south-east Asia and southern Africa. The *iura propria* of the world thus began the construction of their own national laws, each in the cadre of the common laws within which they nested, traditions within traditions, and now sharing many common rules of both public and private law with the other overseas territories of the metropolitan European jurisdiction. This even occurred within Europe, as Belgian law received and continued to apply, after independence, many principles and rules of French origin, and of both public and private law, as the Belgian report of Dirk Heirbaut and Matthias E. Storme makes abundantly clear (pp. 2-5). French public and private law was also received and put to constructive use in New France (now Quebec), and Sylvio Normand refers explicitly (p. 14) to 'le droit commun de la tradition civiliste française' within which Quebec law developed. With the arrival of English authority in 1763 in Quebec, English law became the *droit commun* in matters of public law, as it had already become the common law in the common law provinces, there also yielding to local law where appropriate including, as DeLloyd Guth makes clear in the Canadian common law report (p. 3) ongoing aboriginal *lex non scripta*. In the US, as the rich literature cited by Michael Hoeflich and Steve Shepard demonstrates (p. 13), the common law was seen as a 'transatlantic enterprise' and even as a 'transatlantic constitution' until this particular *ius proprium* achieved its ultimate status. French law also played the role of suppletive law in Brazil, in both private law, where Véra Maria de Jacob Fradera notes also the suppletive role of Pandectist legal thought (p. 2) and in public law, where Ana Lucia de Lyra Tavares reports on the influence of both French and Spanish law on Brazilian constitutional law (p. 6) and on the subsidiary (common law) role of French law in Brazilian administrative law (p. 7).

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<sup>6</sup> J. Muldoon, *The Indian as Irishman*, in J. Muldoon, *Canon Law, the Expansion of Europe, and World Order* 267 (1998) notably also at 267 on the continuity between the Spanish Reconquista and the Spanish conquest of Americas, 'this tradition' forming 'a unifying theme in Spanish history'; D. König, *Colonization and the Common Law in Ireland and Virginia, 1569-1634*, in J. A. Henretta, M. Kammen & S. N. Katz, *The Transformation of Early American History* 70 (1991); R. Bartlett, *The Making of Europe. Conquest, Colonization and Cultural Change 950-1350* (1993) at 313-4 ("The European Christians who sailed to the coasts of the Americas, Asia and Africa in the fifteenth and sixteenth centuries came from a society that was already a colonizing society. Europe, the initiator of one of the world's major processes of conquest, colonization and cultural transformation, was also the product of one."); J. Baschet, *La civilisation féodale. De l'an mil à la colonisation de l'Amérique* (2004), notably at 254-5 ("l'élan qui conduit à la Conquête des Amériques est fondamentalement le même que celui que l'on voit à l'oeuvre depuis le XI<sup>e</sup> siècle ... c'est la société féodale ... qui pousse l'Europe vers le large.")

It is therefore possible to see the origins of a national legal tradition, in diverse forms and with some common features, in the many *iura propria* of the world which nested within the world's common laws. The state as we presently know it was a late arrival. The word 'state' came into widespread use in its present meaning only in the first half of the 17<sup>th</sup> century, an outgrowth of the previous notions of the 'state of the commonwealth' and the 'state of the king' or the various 'états' of the territory now known as France.<sup>7</sup> There was room for theoretical development of the state, and the national legal tradition, but such theoretical development was slow in its arrival.

## 1.2. Late Theory and the Legal System

In a sense, the state just happened. Institutions came to embody and make visible the normative information of the *iura propria*. There were reasons for this to happen in Europe. There were too many wars; slavery was still widespread; corruption and venality were rampant in the enjoyment of offices; religion was providing less social cohesion. There was remarkable writing, such as that of Hobbes, but it was at a very general level. So the institutional development of the state, the embodiment of the national legal tradition, occurred as a result of only 'pre-theoretical understanding'.<sup>8</sup> There were thus good reasons for constructing a state (and reasons for opposing it) but no abstract articulation of what was to be constructed. This came very late, only in the twentieth century with the development of the idea of the legal system. The theory was late, and already appears to be less convincing than the underlying historical reasons for state construction.

The legal system is incapable of abstract justification. Kelsen recognizes this most explicitly in appealing to a presumed Basic Norm; Hart appears more empirically embedded in appealing to a general habit of obedience, but no one is capable of telling us how much obedience is required and how it is to be quantified.<sup>9</sup> This becomes more and more of a problem in contemporary circumstances, where an increasing proportion of 'states' in the world are failing or even failed. Positivist explanations of a legal system are therefore too easily today the object of ridicule.<sup>10</sup> There are also major problems in the operation of legal systems. They would be incompatible with other systems and their relations are therefore seen as fundamentally conflictual in character (19<sup>th</sup>-century ideas of the conflicts of laws as

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<sup>7</sup> For the word and its development, Harding, *supra* note 5, at 2 *et seq.* (word 'nation-state' first used in 1918), 295 ('state of commonwealth' becoming identified with 'state of the king'); and for the institutional emergence, M. van Creveld, *The Rise and Decline of the State* (1999).

<sup>8</sup> Harding, *supra* note 5, at v, citing Taylor.

<sup>9</sup> For discussion and references, H. P. Glenn, *Doin' the Transsystemic: Legal Systems and Legal Traditions*, 50 McGill L. J. 863 (2005), notably at 875 on the 'existence' of a legal system.

<sup>10</sup> See, for example, E. Schockhoff, *Natural Law & Human Dignity* 294 (transl. B. McNeil 2003), at (fundamental norm functions as 'merely imaginary concept'); P. Fitzpatrick, *Modernism and the Grounds of Law* 98, 99 (2001) ('alchemical secondary rules', 'chimerical quality' of law as legal system, making its 'histrionic entry').

a progenitor of today's 'clash of civilisations').<sup>11</sup> And since they would exist as simple 'facts' they provide no normative justification either for their own existence or for the principles and rules which they contain. Dialogue is impossible, as it is with any large, dumb animal. There would be no reasons either for application or non-application of state rules in the face of competing sources of normativity, found to an increasing extent even within state boundaries.

Though the existence of a legal system is fragile, or imaginary, the existence of the state is less so, since it can be rooted in national legal tradition which preceded the concept of a legal system and which now even includes it. Duguit in France said it very well: 'L'élément essentiel de l'unité nationale, il faut le chercher dans la communauté de traditions, de besoins, et d'aspirations.'<sup>12</sup> The state is thus unlikely to disappear, in spite of facile commentary to this effect, since it is not as ephemeral as a presumed system. Its roots are more profound. The national legal tradition thus provides justification for the state that theoretical concepts cannot provide. It also presents advantages in operation. If the state as system must exist as a 'dichotomischer Fixbegriff', which either exists or does not exist (in spite of difficulties of knowing the criteria of existence),<sup>13</sup> the concept of tradition allows for degrees of acceptance. A legal tradition is best thought of not in terms of existence of non-existence (whatever that might be), but in terms of influence and degrees of influence. It is not dichotomous in character and can therefore be seen as functional or operative in a wide variety of circumstances on the ground. And since tradition is composed of normative information, and not simply fact, it can be normatively engaged. It will tell you whether its norms should be applicable in given situations, or not, faced with competing sources of normativity. While a national legal tradition is thus normative in character, as information it is not reified and its relations with other traditions are not necessarily conflictual. It is quite possible to conceive of multiple legal traditions existing within the same geographical space, a reality in much of the world and which the concept of a legal system is incapable of accommodating.

A national legal tradition is also compatible with its own history. If legal systems must be thought of as momentary in character, with each moment yielding a new system and implying the death ('historicisation') of the previous one,<sup>14</sup> the pastness of a legal tradition is one of the main reasons for its normativity. The US report (notably at p. 8, on general histories) is indicative of the importance of (national) legal history in the construction of nation-states.

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<sup>11</sup> S. Huntington, *The Clash of Civilizations and the Remaking of World Order* (1996) at 28, 41, 43 (for civilizations as 'entities') and *see also* at 21 ("We know who we are only when we know who we are not and often only when we know whom we are against") and 42 ("A civilization is a 'totality'"); and *see generally* H. P. Glenn, *La tradition juridique nationale*, 2003 Rev. int. dr. comp. 263.

<sup>12</sup> L. Duguit, *Traité de droit constitutionnel*, vol. II, *La théorie générale de l'État* 7 (2<sup>nd</sup> ed., 1923).

<sup>13</sup> C. Möllers, *Staat als Argument* 432 (2000); and for the tendency of legal philosophers to "cling dogmatically to classificatory ideas", rejecting analysis of legal systems as matters of degree, K. Füsser, *Farewell to 'Legal Positivism': The Separation Thesis Unravelling*, in R. George, *The Autonomy of Law. Essays on Legal Positivism* 119 (1996) at 124, 155, with references.

<sup>14</sup> J. Raz, *The Concept of a Legal System* 34 (1970).

There has unquestionably been an active production of history in this process, but given a national legal tradition extending back through all of the *iura propria* of the world, it is difficult to speak of it as being ‘invented’ (though some of its elements may be cast in a new light, which happens in the life of all traditions).<sup>15</sup> While there may well have been excesses in the production of national history,<sup>16</sup> the historians have been perhaps more successful than the philosophers in explaining and justifying existing legal institutions to the world. The Brazilian public law report notes (p. 2) the importance of Martins Júnior’s *Historia do Direito Nacional*, while the French ‘historical school’ undertook the ‘resurrection’ of French customs in the 19<sup>th</sup> century after the enactment of the French Civil Code.<sup>17</sup> The US report predicts (in its final para.) that in spite of the ‘disorder’ of US legal historical writing, ‘lawyers will come to see almost all questions of US law as questions of legal history.’ In doing so, they would be coming to think of law in terms of a national tradition and not in terms of a national system.

The concept of a legal system is also inadequate as a means of explanation of the dynamic of laws in the world. Conceived as static systems which 19<sup>th</sup> century comparative law sought to group taxonomically into ‘families’ of law, national laws were incapable, in legal terms, of being influenced by, or influencing, other national laws. The dynamic of mutual influence of laws in the world had to be explained in sociological or anthropological terms, or in terms of extra-legal notions of power or prestige. A national legal tradition is, however, normatively open. The *iura propria* of the world thus continued their dialogue with each of their own common laws, and English, French, Spanish, German, Italian and Dutch law continued to exert their influence in the world through the period of national codifications, as law, and seen as such by all of the jurisdictions which continued to draw upon them. National codifications, moreover, did not mean the end of the common laws of the world, since each of them (with the possible exception of the *ius commune* itself, which had no colonizing power) had become transnational in character by the 19<sup>th</sup> century, beyond the power of any nation state to abrogate or appropriate them in their entirety.<sup>18</sup> This is today most evident in the transnational working of the English-derived common law, but it has been the case, in different ways, for the world-wide influence of each of the other European common laws. Each of the *iura propria* moreover, on becoming national laws, retained their traditional normative openness, not only to their respective common laws but to one another. So the national tradition of US law can

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<sup>15</sup> Cf. E. Hobsbawm & T. Ranger (Eds.), *The Invention of Tradition* (1983); but for the tracing of a present notion of ‘English law’ back through the Norman Conquest, P. Wormald, *The Making of English Law: King Alfred to the Twelfth Century* (1999).

<sup>16</sup> See, for example, the splendid polemic of M. Detienne, *Comparer l’incomparable* (2000), notably at 10 (‘l’Incommensurable: la Nation, la leur’), 30 (‘la Nation est l’Incomparable’) and 59 (‘élevés, nourris et blanchis dans le sein de l’Incommensurable, de la très sainte Incomparable, cette Nation dont ils sont, sitôt choisis, les gardiens’).

<sup>17</sup> D. R. Kelley, *Ancient Verses on New Ideas: Legal Tradition and the French Historical School*, 26 *History and Theory* 319 (1987) at 321-322 (‘a long intellectual tradition’).

<sup>18</sup> Glenn (2005) and (2006), *supra* note 4.

influence, in law, other national traditions which remain normatively open, and even those which have historically played the role of ‘exporting’ jurisdictions (originating common laws) rather than ‘importing’ jurisdictions (*iura propria*).<sup>19</sup> In his Italian report, Raffaele Caterina thus cites (p. 5) the explicit language of the Corte di Cassazione, which itself has declared Italian law to be ‘no longer characterized by nationalistic closures.’

This raises the question of the actual operation of national legal traditions, which has been remarkable over time, a phenomenon which can perhaps be best described as the cunning of the national tradition.

## 2. The Cunning of the National Tradition

Over the long development of the national legal tradition, distinct periods can be seen. These may be qualified as successive periods of restraint, affirmation, and again, in very recent times, restraint.

### 2.1. Restraint

The *iura propria* of the world became identifiable as such only because of their coexistence with a common law. The common laws of Europe emerged with the mobility of European populations, first within, then beyond, the territory of Europe.<sup>20</sup> The law which moved with a mobile population became a common law, common in some measure – real, presumed or prospective – to the existing and the arriving populations. It had to have its own designation – ‘common’ – to distinguish it from the other laws with which it coexisted and which, since they were not common, had to be particular. There was here much room for dispute, and many claims for priority. The *iura propria* in general, however, took a position of restraint, or lying low. Little could by this point be done about the arrival of new settlers, within Europe or beyond, and there were initial claims of absolutism on the part of proponents of the common laws. The idea of a *ius unum* of imperial origin was raised as early as 817 by Agobard of Lyon, to expire definitively only in the 12<sup>th</sup> century.<sup>21</sup> In the colonies, there was both imperial enthusiasm and a notion of *terra nullius* to encourage unilateral application of metropolitan law. In both Europe and beyond, however, reality eventually prevailed. The impossibility of dislodging existing law soon became evident, both because of hostile reaction and because of the inadequacy of the arriving law to deal with local circumstance. The *ius commune* said little of use in the regulation of the new, late medieval, cities.

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<sup>19</sup> W. Wiegand, *The Reception of American Law in Europe*, 39 Am J. Comp. L. 229 (1991).

<sup>20</sup> Glenn (2005), *supra* note 4, ch’s 1 and 2.

<sup>21</sup> G. Ermini, *Corso di diritto commune* 20 (1989).

So the *iura propria* were tenacious and useful, though necessarily restrained. They emerged, from the perspective of the common laws, as private or particular laws – *privatae leges* (from whence our word ‘privilege’) – and their necessary recognition brought about the primary characteristic of the common laws, that they yielded to local forms of imperativity and were not to be considered as ‘binding’ in character. It is paradoxical that the common laws, and most notably the *ius commune*, have been cast as the major partners in the relations between *iura communia* and *iura propria*, since it was the *iura propria* which were recognized as having the ultimate authority. This allowed them to become the national laws of today.

In the initial and earlier centuries of the *iura propria*, however, prior to their emergence as national laws in the 19<sup>th</sup> and 20<sup>th</sup> centuries, they claimed only a portion of the world of law as their own. Local need appears to have been the major criterion for affirmation of local authority. Some needs were met by the relevant common law, and there was some measure of religious unity which counterbalanced particularist claims.<sup>22</sup> So restraint was the order of the day, given the uncertain boundaries of authority which then prevailed.

## 2.2. Affirmation

It may be the case that authority once recognized comes to be exercised, but there would be no reason for such a general affirmation in the case of the *iura propria*. There were clear and contextual reasons for the growth in exercise of local authority, to the detriment of the common laws or *iura communia*. One may doubt causal explanations, but there is at least some truth in the statement that ‘wars of religion bred a conviction in some jurists that the one essential requirement for the stability of a commonwealth was rule by a sovereign, [who] must have absolute power to make and unmake law.’<sup>23</sup> Other reasons for the growth of definitive authority have been referred to above (Part I.B). By the late 16<sup>th</sup> century Bodin is defining a state in terms of the existence of sovereign authority within it and this idea, once unleashed, has inevitable consequences. National boundaries, fixed on the ground, become essential, since sovereignty can only exist if a precise space is defined for its exercise.<sup>24</sup> National law becomes thought of as ‘binding’ law (though what this means is never adequately explained), since only ‘binding’ law can displace other forms of normativity and give rise to the uniform legal order which is the mark of sovereign authority. The state itself becomes reified as a legal person and this idea, combined with that of the legal system, yields a purported law of the inter-national, which would somehow control mutually exclusive, even competing, sovereign authorities. The ‘conflict’ of laws becomes seen as a natural phenomenon. Gratian’s

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<sup>22</sup> M. Bellomo, *The Common Legal Past of Europe, 1000-1800* (transl. L. G. Cochrane, 1995).

<sup>23</sup> Harding, *supra* note 5, at 294.

<sup>24</sup> H. Krüger, *Allgemeine Staatslehre* (1966) at 22 (concept of *Herrschaft* only possible if spatially delimited).

fundamental idea of ‘concordance’ of different law is largely forgotten, while the idea of national unification of laws, through codification and the development of a notion of *stare decisis*, yields a world of apparently fundamental legal disunity.

While comparison of laws was actively engaged in for purposes of construction of national laws,<sup>25</sup> there was often a deliberate effort of closure which followed the process of construction. Non-state sources of law were in some cases prohibited, and if legal writing cannot be effectively prohibited it could be denied a place in formally recognized sources of law.<sup>26</sup> Even in the absence of formal state prohibition the practice often developed of exclusive citation and use of state sources of law, complemented by a notion of the necessarily ‘complete’ (systematic) character of national law. Opposition to the process was most conspicuously led by Savigny in Germany, but as Filippo Ranieri points out in the German report (p. 2), Savigny’s own work did not contribute to an opening of sources of law and was characterized by its ‘dogmatic and systematic’ style. The traditional character of law, a mark of its legitimacy, becomes replaced in some measure by its modernity or, in the language of formal sources of state law, by the question of whether it is ‘in force’.

It is often said that this affirmative period of the *iura propria* or national laws had the effect of eliminating the *ius commune*. It is certainly the case that many states, particularly those of the European continent, did all they could to bring this about. Whether this can be done, however, is best evidenced by considering the other common laws of European origin. As has been seen above (Part II.B), English, French, Spanish or Roman-Dutch common laws could not somehow be abrogated or appropriated in their entirety by the state of their origin once they had achieved transnational status, accepted as common law in many jurisdictions of the world. A common law floats free of particular, national authority. In spite of its lack of a colonial footing elsewhere in the world, the *ius commune* can scarcely be said to have entirely lost its status of a non-binding, common law simply because its main authorities could no longer be cited in some, particular, jurisdictions. The authorities lived on, used in varying manner and frequency in different places in the world. It is in the nature of a common law that it is self-effacing when confronted with local affirmations of binding authority. The fact that it is no longer in active use in a particular jurisdiction is not an indication of its demise, but simply of a particular, localized instance of self-effacement. A common law may thus be re-invigorated, in a particular place, using ancient authority or more modern variants of ancient

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<sup>25</sup> H. P. Glenn, *The Nationalist Heritage*, in R. Munday & P. Legrand (Eds.), *Comparative Legal Studies: Traditions and Transitions* 76 (2003).

<sup>26</sup> For examples, notably the banning of opinions of law professors in the Prussian General Code of 1794, B. Grossfeld, *The Strength and Weakness of Comparative Law* 4 (1990); E. Bucher, *Rechtsüberlieferung und heutiges Recht*, 2000 ZEuP 394, at 428; E. Huber, *System und Geschichte des schweizerischen Privatrechts* vol. I (1886) at 65 (on 19<sup>th</sup> century Swiss cantonal prohibition of foreign sources).

authority, developed elsewhere. Modern Roman-Dutch law, articulated in South Africa, may therefore illuminate the contours of the *ius commune* for whatever current purposes may appear necessary in Europe.<sup>27</sup>

The pervasive character of common laws suggests inherent limits to affirmation of local authority. This was already suggested within Europe by the reaction to national codifications. Could their simple enactment eliminate other sources of law? Can a national legislator, like Baron Münchhausen, pull itself out of the swamp by its own hair? In France, Belgium, Germany, Holland and Austria there was no immediate abandonment of existing sources of law following codification, and the emprise of new national sources often took decades to come into effect.<sup>28</sup> The effect of national sources of law is thus dependent on reception in the particular milieu, and existing loyalties. These may be favourable to state sources of law, unfavourable to them, or mixed. Attitudes towards state sources of law have been much less favourable outside of Europe than within it, so the national legal tradition has had less influence in the world at large than it has had within Europe. This may provide some explanation for the failure of the taxonomic project in 19<sup>th</sup> and 20<sup>th</sup> century comparative law, that of classifying national legal systems into given legal families. National legal systems simply do not exist with uniform, classifiable characteristics across the world. The dynamic between state and non-state sources of law is too vigorous in many places in the world for any process of categorisation. Put differently, the affirmation of the national legal tradition has been of different levels of success in the world. Its success is therefore dependent on place, which raises the equally important question of the extent to which it is dependent on time. Is the period of affirmation of national legal tradition now already giving way to a renewed period of restraint?

### 2.3. Restraint

The affirmative period of the national legal tradition thus occurred from the 17<sup>th</sup> through much of the 20<sup>th</sup> century, and the main instrument of this affirmation was the concept of sovereignty. The concept of sovereignty was latent, however, in the non-binding character of the common

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<sup>27</sup> See, for example, R. Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1996); R. Zimmermann, *Roman-Dutch Jurisprudence and its Contribution to European Private Law*, 66 *Tul. L. Rev.* 1685 (1992).

<sup>28</sup> For France, J. Carbonnier, *Usus hodiernus pandectarum*, in R. Graveson, *et al.* (Eds.), *Festschrift für Imre Zajtay* 107 (1982) at 109-110, citing Troplong in 1838; for Belgium, R. Beauthier, *Le véritable sens de l'article 2 du Code civil. L'ambition du Code civil de remplacer l'ancien droit à la lumière de la jurisprudence "belge" de la première moitié du 19e siècle*, in R. Beauthier & I. Rorive (Eds.), *Le Code Napoléon, un ancêtre vénéré? Mélanges offerts à Jacques Vanderlinden* 217 (2004); for Germany, R. Zimmermann, *Modernizing the German Law of Obligations*, in P. Birks & A. Pretto, *Themes in Comparative Law. In Honour of Bernard Rudden* 265 (2002) at 270-271, for ongoing application of the *ius commune*; for Holland and Austria, R. Zimmermann, *Roman Law, Contemporary Law, European Law. The Civilian Tradition Today* 3, 5 (2001).

laws within which the *iura propria* and national traditions nested. The *iura propria* historically prevailed over the common laws, whenever the *iura propria* asserted competence. Sovereignty was therefore always present, though in the initial period of restraint of the *iura propria* it was not fully exercised. Sovereignty simply became more visible when it was decided to exercise it in a more radical way over larger territories, which may well have been justifiable in the circumstances. It may also come to be not fully exercised, once again, as restraint is indicated in the face of possibilities of collaboration, alternative sources of law, and mixed loyalties of populations. There are already indications of a new period of restraint in the exercise of national legal tradition. These may be seen in general areas of law, and from the perspective of particular nation-states, as reflected in the national reports.

Restraint in the exercise of national authority is evident in many fields of contemporary law. In the states of the European Union ‘positive sovereignty’ is exercised through transfer of elements of national authority to pan-European institutions, and the European phenomenon of renunciation of sovereignty is replicated in some measure in the process of ‘internationalization’ evident in matters of international trade and international criminal justice. In both instances there has been a corresponding opening of national tradition to transnational sources of law.<sup>29</sup> Arbitration was seen as contrary to national public order through the 19<sup>th</sup> century; it flourishes at the beginning of the 21<sup>st</sup>, and may take place, as the United States Supreme Court has decided, even in matters where national law is considered to be of public order.<sup>30</sup> The *Centros* jurisprudence in Europe has allowed parties to establish corporations in the jurisdiction of their choice, not necessarily that of their centre of operations.<sup>31</sup> This emergence of party choice is part of a larger movement of ‘contractualization’, the discovery that much of state law is not ‘binding’ after all but is tolerant of party initiative, and this not only in matters of substantive law but also in matters even of civil procedure.<sup>32</sup> Religious laws are playing a larger role in state courts, obviously in matters of family law but even, at least in some measure and with respect to questions of

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<sup>29</sup> Within Europe, *see notably* F. Lichère, L. Potvin-Solis & A. Raynouard (Eds.), *Le dialogue entre les juges européens et nationaux: incantation ou réalité* (2004), notably at 13 (‘le dialogue s’impose de lui-même, non comme une obligation juridique mais comme une nécessité pratique’); for internationalization, D. Trubek, *et al.*, *Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas*, 44 *Case W. Res. L. Rev.* 407 (1994).

<sup>30</sup> *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U. S. 614 (1985) (competition law).

<sup>31</sup> *Case C-212/97 – Centros Ltd. v. Erhvervs- og Selskabsstyrelsen*, [1999] ECR I-1459; [1999] 2 C.M.L.R. 551.

<sup>32</sup> *See generally*, H. P. Glenn, *A Transnational Concept of Law*, in P. Cane & M. Tushnet, *The Oxford Handbook of Legal Studies* 839 (2003); and for procedure, L. Cadiet, *Remarks*, in Ph. Fouchard (Ed.), *Vers un procès civil universel? Les règles transnationales de procédure civile de l’American Law Institute* (2000) at 124 (“on ne peut pas dire que toutes les règles du nouveau Code de procédure civile français présentent un caractère d’ordre public qui rendrait impossible toute contractualisation de l’administration judiciaire de la preuve. Il y a donc une marge pour cette contractualisation ...”); S. Guillemard, *La réforme du Code de procédure civile du Québec: quelques réflexions sur le contrat judiciaire*, 45 *C. de D.* 133 (2004).

criminal intent, as a so-called ‘cultural defence’ in criminal matters.<sup>33</sup> State institutions may also now turn to religious law to facilitate financing, as where the German Land of Sachsen-Anhalt recently issued an Islamic bond or sukuk.<sup>34</sup> International treaties may be recognized by state courts even where they have not been implemented by legislation, as normally required,<sup>35</sup> and there is everywhere a major new interest in comparative constitutional law, in spite of the strictures of Otto Kahn-Freund in the 1970s.<sup>36</sup>

In all of these situations we appear to see responses to specific situations and needs, driven by what might again be considered ‘pre-theoretical understanding.’ The national reports indicate a clear tendency, however, in the direction of a restrained sense of national law. The Belgian state would be so open to international law as to constitute it, in the view of some Belgian lawyers, as a ‘truly post-national country’, and while the authors of the Belgian report (p. 5) are sceptical of this claim, they also are of the view that ‘a national legal tradition as such does not exist in Belgium’ (p. 11), given existing loyalties to French and Dutch languages and legal traditions. The Italian report also (pp. 8, 9) expresses doubts, given historical reliance in Italy on French codification and German scholarship, about the notion of a national tradition, seeing originality only in the particular ‘mix’ of solutions prevailing at a given time. Italian law would thus be best seen as a ‘bundle of traditions of different origin,’ the notion of tradition being best applied to ‘the fragments, and not the mosaic’ (p. 9). The Dutch report is also sceptical of an ‘independent Dutch Legal Tradition’ though there would be a ‘common Dutch tradition’ itself part of a ‘larger European common law tradition’ (p. 1), the report still acknowledging that ‘tradition, like possession, is nine-tenths of the law’ (p. 1). Other reports are less sceptical of national legal identities but present national law as an operative, and open, legal tradition. Brazilian law, in its private law dimensions, would thus be best seen as an ‘ensemble’ and not a system, given the open character of the 2002 Civil Code and its many general clauses (p. 17, of private law report), while in public law it would never have constituted a system but rather a tradition in need of reinforcement, given the pressures of globalization (p. 11, of public law report).

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<sup>33</sup> See, for example, A. Estin, *Embracing Tradition: Pluralism in American Family Law*, 63 Maryland L. Rev. 541 (2004); C. Cieslak-Landherr, *La religion devant le juge de droit civil en France et au Québec* (thesis, Paris I, 2005, forthcoming); and A. D. Renteln, *The Cultural Defense* (2003).

<sup>34</sup> Frankfurter Allgemeine Zeitung, 6 Nov. 2003 at 31 (bond issued by Land government, which now leases its public buildings from a designated public trustee, which in turn receives the proceeds of the bond and passes on the rent to Islamic investors).

<sup>35</sup> *Baker v. Canada* [1999] 2 S.C.R. 817 (Supreme Court of Canada).

<sup>36</sup> See generally I.CON, the International Journal of Constitutional Law (‘devoted to transnational constitutional law’); R. Teitel, *Comparative Constitutional Law in a Global Age*, 8 Harv. L. Rev. 2570 (2004); and for administrative law, R. Errera, *The Use of Comparative Law Before the French Administrative Law Courts*, in G. Canivet, M. Andenas & D. Fairgrieve, *Comparative Law Before the Courts* 153 (2004); and for earlier misgivings, O. Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 Modern L. Rev. 1 (1974).

Other reports concentrate on specific characteristics of national law conceived as a tradition. The Danish report (p. 1) emphasizes the phenomenon of collaboration amongst the Scandinavian countries in the formulation and enactment of legislation. The German report at p. 8 indicates the reticence of German courts in citing foreign models but insists on the importance of foreign law in the formulation of German doctrine and in the movement of German law generally towards a case-law model (p. 8, 10-11, 13-4). The Quebec report (pp. 7-10) speaks of the ‘coexistence des traditions’ in Quebec law, where efforts towards autonomy are in constant interaction with active processes of comparison, notably at the level of the Supreme Court of Canada. From its inception, moreover, Quebec law would never have been considered complete unto itself (p. 14). The Canadian common law report indicates the importance of immigration and official multiculturalism in contributing to the law of the common law provinces *Natio* (Birth-Culture Law) and *Locatio* (Residence Culture Law), this recalling the original movement of European populations and the *iura communia/iura propria* distinction in the development of legal traditions. Csaba Varga, in the Hungarian report (p. 1), speaks simply of the normative perspective of legal positivism being ‘replaced’ by a wider comprehension of law in the context of both culture and tradition. In view of the equanimity of these reports concerning the obvious relations amongst legal traditions, it is perhaps appropriate to refer to the recent debate in the US Supreme Court concerning the citation of foreign sources as a ‘storm in a teacup.’<sup>37</sup>

### 3. Conclusion

Two brief, concluding remarks seem appropriate if national law and the state are best conceived as present manifestations of an ongoing national legal tradition.

First, if all national legal traditions remain nested within one of the world’s common laws, and if the fundamental characteristic of common laws is that they both nurture and yield to local authority, the difficulties in operation are not those of the common laws, which always yield, but of the national laws, which must always choose between restraint and affirmation. Officers of national laws have decisions to make, and the decisions today are obviously not simple ones of constant affirmation of state law. Choices must be more informed and in many cases restraint of state law is indicated, before solutions which in particular cases appear more apt.

Second, the choice between state and other solutions is one which necessarily implies comparison. The comparison is no longer the static one of the physical sciences, or of 19<sup>th</sup> century comparative law, of simple determination or constatation of similarities and

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<sup>37</sup> A. Parrish, *Storm in a Teacup: The US Supreme Court’s Use of Foreign Law*, available at <http://ssrn.com/abstract=891269>, with references.

differences, but comparison in the sense of the original meaning of the word compare. 'Com' is from the Latin 'cum' or 'with' and 'pare' is the Latin for 'equal' or 'peer', so to compare is to exist with another who, though different, is to be treated as an equal (in German also Vergleichung). Comparison is thus a *process* of peaceful coexistence of those who are taken as equals, in spite of even major difference in belief, circumstance or tradition. Comparative lawyers are those who contribute to this process.

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