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LEONE NIGLIA*

Taking Comparative Law Seriously—Europe's Private Law and the Poverty of the Orthodoxy

The accumulation of comparative legal studies on the Europeanization of private law is characterized by a "knowledge gap." Rather than understanding Europeanization as both law-in-action and law-in-context, in line with classical comparative law teachings, comparatists who specialize in private law Europeanization focus on aspects of lesser importance, such as rule-centered narratives. Writing the conventional way simply broadens this gap. A change of direction in scholarship is required: an engagement with the developments associated with law-in-action and law-in-context that define Europeanization and that have been neglected so far.

*"Considerar a história . . . como um processo produtor de entidades históricas e não, como é habitual, um processo que supõe, como algo prévio, a existência das referidas entidades."****

*"God is in the detail."****

This article proposes to explore the fabric of legal thought on the Europeanization of private law, the body of knowledge that has emerged out of more than two decades of comparative legal work towards the objective of Europeanization. The article argues that the accumulation of these studies is directly proportional to a "knowledge gap." Comparatists fail to trace developments that characterize the

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This article is part of a larger research project that addresses the condition of comparative law, as an intellectual endeavor, in the service of legal unification in Europe. This theme is addressed from the vantage point of the intellectual acquisitions of 20th century classical legal comparative works, on both sides of the Atlantic. The project considers how legal comparative studies that focus on Europe's private law fail to take seriously, and to put into practice, what classical comparative law scholars typically consider to be established knowledge. I am grateful to R. Brownsword, S. Weatherill and T. Weir for commenting on earlier versions of this article. Any errors remain my own.

** EDMUNDO O'GORMAN, *A INVENÇÃO DA AMÉRICA* 18 (1992) (translation of *LA INVENCIÓN DE AMÉRICA* 1958). ("History should be considered as . . . a process that produces historical entities and not, as it is commonly believed, one that presupposes entities." [Translation is my own]).

*** Attributed to architects Le Corbusier and Ludwig Mies van der Rohe.

path of private law towards Europeanization. Rather than understanding Europeanization as both law-in-action and law-in-context, in line with classical comparative law teachings, they focus on aspects of lesser importance, such as rule-centered narratives.¹ Writing the conventional way simply broadens this gap. The chief conclusion is that comparatists who specialize in private law Europeanization (hereinafter referred to as orthodox comparatists or scholars)² should abandon the canonical approach and engage with the important dimensions of Europeanization that have been neglected so far.

The investigations below represent a decoupling of received ideas. I highlight a discrepancy between ongoing processes of “Europeanization” (by which I mean the development and management of a corpus of posited norms around the E.U. institutional structure) and scholarly reconstruction and discernment of such processes. What follows is, primarily, an enumeration of *idola* (the Latin word for false representations of “reality” is more than appropriate here) to which the reader’s attention is drawn: Part I briefly analyzes the orthodox comparatist view of Europe’s private law in order to recall the propositions typically associated with it. In Part II, an argument is advanced towards demonstrating the orthodox propositions as largely fallacious: they fail to embody key dimensions of the development of private law in the context of the Europeanization processes that must be considered for our reconstruction of the phenomenon not to be artificial. In conclusion, in Part III, I argue for a bold renovation of comparative analyses, with a view to restoring consideration of the dimensions that really matter but that have remained largely ignored and altogether removed from the public debate. At this concluding stage, some major implications of the line of enquiry pursued will become clear. First, to unearth facets of artificiality in the literature implies subjecting to scrutiny various “half-truths” that are in vogue, with a view to widening our understanding of Europeanization

1. Typically, pursuant to 20th century comparatist teachings established on both sides of the Atlantic, comparative law scholars have become accustomed to undertake analyses based on rules-in-action (*cf. e.g.* Rodolfo Sacco, *Legal Formants*, 39 AM. J. COMP. L. 1 (1991)), and rules-in-context (broadly understood so as to include a tradition of thought that can be traced back to Montesquieu, and that continues in classical works of the past century such as: Ernst Rabel, *Aufgabe und Notwendigkeit der Rechtsvergleichung*, 13 RHEINISCHE ZEITSCHRIFT FÜR ZIVIL- UND PROZESSRECHT 279 (1924); Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1 (1974); BERNARD GROSSFELD, THE STRENGTH AND WEAKNESS OF COMPARATIVE LAW (Tony Weir trans., 1990), as opposed to being merely rule-centered); for an account of the value of law-in-action and law-in-context analyses in the context of the intellectual history of comparative law, see Mathias W. Reimann, *The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century*, 50 AM. J. COMP. L. 671 (2002).

2. “Orthodoxy” indicates the “European school of thought” on private law Europeanization (as defined in Christian Von Bar, *From Principles to Codification: Prospects for European Private Law*, 8 COL. J. EUR. L. 379 (2002)); *cf.* the writings enumerated *infra*, note 6.

processes of relevance to the major area of public life labeled "private law." Second, it also implies taking up the laborious task of deconstructing and demystifying a powerful legal-cultural venture that, on rather questionable legal comparative grounds, monopolizes the discourse on denationalization processes relevant to private law. Let me start with a description of the orthodox comparative analyses.³

I. THE ORTHODOXY—EUROPEANIZATION AS A RULE-CENTERED DEVELOPMENT

Comparative studies in the area of Europe's private law are difficult to detail comprehensively. However, the task of an all-embracing account would *not* serve my purpose. Let me recall *Wittgenstein's* words: "One keeps forgetting to go right down to the foundations . . . One does not put the question marks deep enough down."⁴ The approach needed here is to dive into the foundations of Europe's legal thought rather than dwelling upon its ephemeral manifestations. On such a fundamental level, my concern in this article pertains to examining legal comparative writings on Europe's private law as a tool of research. In particular, my concern is with identifying the sort of knowledge regarding private law Europeanization that we have today, as a result of about twenty years of substantial writings in the area. Seen in this light, these legal comparative writings, whether essayistic, didactic or partisan,⁵ and whether individual or collective, share a common understanding of private law Europeanization—in their view, it is a phenomenon of accumulation of *common rules*. Specifically, comparatists understand Europeanization in relation to the emergence of common rules that are (a) the product of

3. Three considerations are required. First, any criticism addressed to the dominant juristic script cannot be taken as an indicator of one's negative position vis-à-vis (the ideals of) integration. This should emerge from the remainder and, in any case, it is in line with writings that have shown how a honest representation of critical aspects of the iterations of the Community does not necessarily entail any normative objection to Europeanization: cf. e.g. the account of integration given by George A. Bermann, *Editorial: The European Union as a Constitutional Experiment*, 10 EUR. L. J. 363 (2004). Second, at times I refer to writings that, in various ways and degrees, have gone against the grain. While this may contribute to the rationalization of this specific literature, the (only) focus of the article is to undertake a critique of the orthodoxy. Third, the article chiefly focuses on the core area of the Europeanization of private law, that is, *contract* law, but, generally speaking, its findings apply to other areas of (economic) private law subject to Europeanization, and above all "tort law."

4. *Quoted in* GEORG HEINRIK VON WRIGHT (in collaboration with Heikki Nymon), *CULTURE AND VALUE* (Peter Winch trans., 1980).

5. By which I mean studies whose stated purpose is to propose new rules, rather than stating pre-existing common rules (cf. Ole Lando, *The Common Core of European Private Law and the Principles of European Contract Law*, 21 HAST. INT'L & COMP. L. REV. 809, 814 (1998)); this type of comparative work must be analyzed in relation to its capacity to advance legal comparative knowledge: cf. Sacco, *supra* note 1, at 4 ("[C]omparative law remains a science as long as it acquires knowledge and regardless of whether or not the knowledge is put to any further use": such as, for example, legal unification/harmonization).

rationalizing legal analysis in the pursuit of logical unity, (b) systematized, and (c) developed independently of extra-legal purposes or policies or preferences. Each aspect is indicative of the distinct modalities of legal thought that treatises, casebooks and academic compilations of model rules, explicitly or implicitly, employ almost mechanically on a standardized basis.⁶ For example, I am concerned with the following types of statements, each of which exemplifies the three modalities of thought that I am about to analyze: Lando's statement that "[w]hen cases and illustrations were discussed, it was remarkable to see how often the Members agreed on the result" (an illustration of (a));⁷ "legal harmonization . . . remains imperfect . . . that deficit can only be remedied when the Community legislator has

6. The *creencia* in the common rules is almost everywhere in: a) works of academic networks that put forward *compilations of model rules*, such as PRINCIPLES OF EUROPEAN CONTRACT LAW [Parts I & II, revised and combined] (Hugh Beale & Ole Lando eds., 2000) and *Joint Response of the "Commission on European Contract Law" and of the "Study Group on a European Civil Code" to the Communication*, 2 EUR. REV. PR. L. 185 (2002); b) legal comparative works—whether *treatises* or *casebooks*, and whatever the approach of the writers, whether: "codifiers" (e.g. Giuseppe Gandolfi, *Per un Codice Europeo dei Contratti*, 45 RIVISTA TRIMESTRALE DI DIRITTO E PROCEDURA CIVILE 781 (1991)); "cultivators" (believers that "European legal unity" is to be reached via academic development of synthesizing principles: cf. e.g. Basil Markesinis, *Why a Code is not the Best Way to Advance the Cause of European Legal Unity*, 5 EUR. REV. PR. L. 519 (1998)); or whether writers who approach the theme from a local (cf. the introductory chapter of REGIONAL PRIVATE LAWS AND CODIFICATION IN EUROPE (Hector MacQueen et al., eds., 2004)) or from a supranational perspective (GEMEINSAMES PRIVATRECHT IN DER EUROPÄISCHEN GEMEINSCHAFT (Christian-Peter Müller-Graff ed., 1993)), with an interest in comparative law and legal history (cf. Reinhard Zimmermann, *Savigny's Legacy. Legal History, Comparative Law and the Emergence of a European Legal Science*, 112 L. Q. REV. 576 (1996)), or with a "pure" interest in legal comparatist analyses (cf. e.g. HEIN KÖTZ & AXEL FLESSNER, EUROPEAN CONTRACT LAW (Tony Weir trans., 1997)); CASES, MATERIALS AND TEXT ON NATIONAL, SUPRANATIONAL AND INTERNATIONAL TORT LAW—SCOPE OF PROTECTION [IUS COMMUNE CASEBOOKS FOR THE COMMON LAW OF EUROPE] (Walter van Gerven et al. eds., 1998)).

Even writings that explore unusual trajectories do not resist the temptation to rely on the "common rules" template (cf. e.g. *Manifesto of the Study Group on Social Justice in European Private Law*, 6 EUR. L. J. 653, 653 (2004)): "Agreement on common rules will symbolise more clearly than any Treaty or Constitution the emergence of a post-national form of governance" [emphasis added]. Indeed, as rightly noted by Vivian Grosswald Curran, *On the Shoulders of Schlesinger: The Trento Common Core of European Private Law Project*, 1 EUR. REV. PR. L. 66, 77 (2003), "regardless of the Trento (Common Core) project's motivations and self-perception, those who have a *parti pris*, who do aspire to uniformity of European private law, look to the Trento project as facilitating that purpose," which is confirmed by a leading orthodox scholar: Lando, *supra* note 5, at 809. Finally, courts and administrative officials (as I suggest later) along with businesses, legal practitioners and national academics (all of them having given an opinion vis-à-vis the Commission's action in the field: cf. COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL. A MORE COHERENT CONTRACT LAW. AN ACTION PLAN, COM 29 (2003, 68 final, Brussels, 12.02.2003)) share a similar set of beliefs, as do post-graduates in law schools around Europe, who write dissertations about the (degree of convergence of the) "common rules."

7. Ole Lando, *Comparative Law and Lawmaking*, 75 TUL. L. REV. 1015, 1024 (2000-2001), commenting on the work of the Commission on European Contract Law.

in view (in the background, at least) an overall system, against which setting the legislator can intervene in social focal points without having to suffer a loss of quality or long-term self-limitation" (an illustration of (b));⁸ "[i]t appears to be a natural task of legal science to make inquiries into principles and system and to develop them into a coherent framework and draft Code, but much less so to take extensive policy decisions" (an illustration of (c)).⁹ Of course, I am not suggesting that *all* writings employ all such modalities of thought, but that use of such narratives of this type to account for Europeanization is frequent and widespread, and that writings that do not follow the conventional modalities define themselves in a negative position vis-à-vis the orthodoxy. Mechanisms of exclusion of the critical voices are becoming more and more visible.¹⁰

A. Common "Ideational" Rules

Comparative law scholars have developed sophisticated techniques that have become standardized. They master specialized textual corpuses drawn from the repertoire of traditional private law scholarship developed in the nation-state. They reflect upon certain rules that they single out from within the nation-state's legal scene, abstract them from the national legal context(s) and finally assert their stateless, "European" nature. The overall result is identification of the rules that structure Europe's common private law. One can illustrate these techniques by considering what comparatists do when they work in networks that produce model rules,¹¹ although I believe that the same logic applies when scholars write, individually or collectively, treatises or casebooks on Europe's private law. An exclusively "legal" discussion takes place regarding abstract aspects that each partition of national contract law presents. For example, discussions may focus on whether contracts can be concluded unilaterally or whether contractual liabilities arise during pre-contractual negotiations. What follows, ritually, is an overall "agreement" of a purely legal nature. For example, the *Principles of European Contract Law* are the result of doctrinal investigations about the dogmatic differences and identities between contract law's rules and institutions in

8. Cf. *Joint Response*, *supra* note 6, at 231.

9. Cf. Stefan Grundmann, *The Optional European Code on the Basis of the Acquis Communautaire — Starting Points and Trends*, 10 EUR. L. J. 698, 710 (2004).

10. Stefan Grundmann, *European Contract Law(s) of What Colour?*, 2 EUR. REV. CONTR. L. 184, 210 (2005) ("The development of a Common Frame of Reference implies considerable input from academia, which in fact is the core player. The Directorate General Sanco insisted on having only one network of excellence . . . which seems to have excluded trends which deviate from those represented by the Study Group on a European Civil Code and persons which the existing network did not want to invite" [emphasis added]).

11. Cf. the canonical compilation of model rules, the product of the work of the Commission on a European Contract Law: cf. Beale & Lando, *supra* note 6.

European legal traditions, and of “decisions”¹² that label some rules rather than others as “European.” These “decisions” are based on purely *logical* legal-scientific reflection. Such *ideational* (i.e., purely logical) techniques based on “exchange of ideas” and speculation serve the chief purpose of finding commonalities. The common rules are related to the entrenched idea that, deep inside the law throughout Europe, there are commonalities of legal solutions that, by revelation through rationalizing legal analysis, will and must come to surface.¹³ Legal comparative works are only the transmission belt of this higher, identitarian *qua* European law. Thus, the techniques are abstracted enough to make it easy to identify similar concepts and categories that are then assembled into rules. The rules are just a compilation of bits and pieces of legal words put together for the sake of harmony. This is why “good faith” appears, in the end, to be one such commonality, as, perhaps, “strict liability” in “contract” or “tort.”¹⁴ The structure of the analysis is so formalized that scholars find it possible to borrow the common rules from, or justify them in the light of, past heritages, carefully re-idealized, such as Roman law or pandectistic thinking. These elaborations are related to the present, if at all, only at a highly idealized level of analysis devoid of practical consistency or attention to consequentialist aspects. This backward-looking sketching of the law inflates, and confirms, the imperant abstracting style.

Speculation equally serves the purpose of discarding differences. The formal restlessness that scholars exhibit, their axiomatic certainty that something that they call “commonality” does exist and awaits to be unveiled by alert and vigilant inspection, is, in fact, identical with the identification of rules devoid of consideration of real-life, irredemiable differences and contradictions. Generalizations are in the end made possible by the exclusion of—as the remainder of this article will explain at length—things that “disturb” the idealized search for commonalities: by real-life developments such as fragmentation, localization, conflicts of interpretations and the like.¹⁵ Thus, scholars have succumbed to what the composer *Shostakovich* was profoundly skeptical about, “the desire to avoid, at any cost, everything controversial” (for, he claimed, that attitude “can transform young composers into old young men”).

12. Cf. Lando, *supra* note 7, at 1021.

13. Cf. Lando, *supra* note 5, at p. 814 (arguing for substantial similarities between the work of proposing new rules of the Commission on a European Contract Law and the work of the *Trento Common Core Project*).

14. Cf. *e.g.* and respectively Beale & Lando, *supra* note 6 and 1 CHRISTIAN VON BAR, *THE COMMON EUROPEAN LAW OF TORTS* (1998).

15. For illustrations of real-life developments of this sort, see *infra*, II.A.

B. Common "Systematic" Rules

Another representation of private law Europeanization that orthodox comparatists share is the view of Europeanization as a "systematic" phenomenon.¹⁶ For the ideational rules that come to constitute the body of Europe's private law are envisaged somewhere in the context of an imagined organized scheme of categories and concepts that validate them: Europe's contract law rules are thus said to consist of a "unitary conceptualistic system."¹⁷ Thus, according to one group of scholars: "[T]hinking in terms of a *system which is cohesive and comprehensive* is an *unavoidable undertaking* before setting the course for any binding legislative future";¹⁸ and, criticizing current Community legislation: "One of the characteristics of present Community private law is that it has left the core material of private law untouched. Many instruments of Community private law have therefore remained incomplete. For example, there are practically no rules on the conclusion of contracts as such, on liability of damages for breach of contract . . . [w]ithout such rules, however, the legal harmonization in those areas remains imperfect. On the other hand, *that deficit can only be remedied when the Community legislator has in view (in the background, at least) an overall system, against which setting the legislator can intervene in social focal points without having to suffer a loss of quality or long-term self-limitation.*"¹⁹

Thus, at the core of the quest for common rules lies a highly conceptualistic understanding of law: the chosen rules are "conceptualized" as constituent parts of a sophisticated set of theoretical "concepts" that explain and validate the "words" that each rule contains, and that drive the interpreter in his task of "deriving meaning" from the rules. To give an example of this conceptualistic understanding, and of its powerful capacity to infiltrate social phenomena, let me recount how this "style" has emerged in the way the relevant actors have behaved in one notorious case, *Dietzinger*.²⁰ The issue was whether Directive 85/577/EEC applied to the case of Dietzinger who sought to be relieved of a guarantee he had given to a financial institution. The right of withdrawal that Dietzinger claimed is di-

16. Cf. e.g. VON BAR, *supra* note 2; Markesinis, *supra* note 6 and, for an example of this approach in national circles, see KARL RIESENHUBER, *EUROPAISCHES VERTRAGSRECHT* (2003), reviewed by S. Weatherill, 2 EUR. REV. CONTR. L. 290 (2005).

17. E.g. Von Bar, *supra* note 2, at 387 (who refers to a systematically ordered set of basic rules for European patrimonial law).

18. Cf. e.g. *Joint Response*, *supra* note 6, at 224 [emphasis added] and Ole Lando, *Does the European Union need a Civil Code?*, 49 RECHT DER INTERNATIONALEN WIRTSCHAFT 1 (2003), explaining that "the three parts of the Principles of a European Contract Law cover a fairly comprehensive set of contract law rules" and that "[t]hey have a high degree of generality and internal coherence."

19. Cf. *Joint Response*, *supra* note 6, at 231 [emphasis added].

20. Bayerische Hypotheken- und Wechselbank AG v. Edgar Dietzinger, Case C-45/96, 1998 E.C.R., I-1199.

rectly related to considerations of substantive justice. Dietzinger claimed that Directive 85/577/EEC applied to a contract of guarantee by virtue of the Directive's aim, which was to protect consumers who concluded a contract where, because it involved "door-to-door selling," they were unable to prepare themselves for such negotiation: "*Like a purchaser, a guarantor undertakes to perform obligations and is even more in need of protection since he receives no consideration in exchange for his commitment.*"²¹ However, this argument remains rather isolated in the structure of the case—the "system" is inevitably thrust upon it, with its baggage of concepts and categories that led to a discussion on far less substantive grounds. Indeed, the arguments suggested by various governments, based on the German literature on the point, with a view to negate the application of the right to withdrawal, were highly conceptualistic: namely, the guarantee is not a "synallagmatic" contract, i.e., a bilateral agreement involving mutual and reciprocal obligations and, the cited Directive would not cover unilateral agreements.²² Such systematic considerations no doubt drove the *Bundesgerichtshof* to make recourse to the ECJ,²³ and, in the end, even the ECJ *had to* decide by "playing" on the basis of such "rules of the game." The Court did indeed end up holding that the Directive covers only a guarantee ancillary to a contract in which a consumer assumes an obligation towards the trader so as to obtain goods or services, thus admitting that guarantees fall within the reach of the Directive, on substantive grounds, only insofar as they are ancillary to a consumer contract. Therefore, the ECJ appears to have taken seriously the dogmatic implications of its decision, as it did not adopt a broad interpretation of the Directive that would allow protection for the guarantor of a commercial contract and, by consequence, would put at risk established dogmatic assumptions. Clearly, this is a saga in which the conceptualistic understanding of guarantees as bilateral contracts plays a meaningful role. It is the legal conceptual background against which German scholars and legal comparatists have debated the issue, German courts have decided disputes and, last but not least, the Court of Justice has framed its determinations.

C. Common "Neutral" Rules

The understanding of Europeanization that emerges from orthodox comparative analyses is also characterized by what we can call "neutrality."²⁴ In this view, the ideational and systematic rules must also be "neutral," that is, strictly "legal" in that they are held to be

21. At para. 12 of *Dietzinger*, *supra* note 20 [emphasis added].

22. Advocate General at I-1205 *et seq.*, *Dietzinger*, *supra* note 20.

23. *Cf. infra*, II.B.

24. *Cf. e.g. Joint Response*, *supra* note 6.

conjured up independently of extra-legal purposes or policies or preferences, collective or of the individual interpreter. If one leafs through essays or collections of model rules or didactic writings or casebooks in the area, one normally finds scant reference to extra-legal factors that might shape Europeanization, apart from cursory references to the policies of legal harmonization and unification for the achievement of market integration. In words that testify to the consciousness at work here, “[i]t appears to be a natural task of legal science to make inquiries into principles and system and to develop them into a coherent framework and draft Code, but much less so to take extensive policy decisions.”²⁵ Scholars adopt tools of analysis that do not involve consideration of policy, political, moral, institutional or economic issues, which ultimately enables them to agree upon sets of rules to be placed in each partition of the “system.” The rules are thus: identified in deductive form, rather than elaborated in relation to underlying substantive reasons and policies that might inform the choice of one or another rule;²⁶ caught in a highly abstract and generalized vocabulary (words such as “contractors” and “liabilities” abound) rather than reflecting the complexities of practical conditions of contracting;²⁷ and ultimately contain “fixed” solutions as to how to sort out abstract rather than concrete, legal problems (for example, whether *culpa in contrahendo* should be Europeanized²⁸ or whether guarantees are unilateral or bilateral contracts,²⁹ rather than how contractual risks implicated in negotiations should best be allocated among the parties in situations as various as an investment, insurance, sale or electronic contract, consumer or commercial).

II. THE “KNOWLEDGE GAP”: HOW THE ORTHODOXY FAILS TO DETECT EUROPEANIZATION PROCESSES THAT MATTER—EUROPEANIZATION AS LAW-IN-ACTION AND LAW-IN-CONTEXT

A “knowledge gap” characterizes the state of comparatist studies on private law Europeanization. To persist in analyzing private law Europeanization through the looking glass of rule-centered techniques results in the omission of developments associated with law-in-action and law-in-context³⁰ that define Europeanization, as detailed below. My analysis will consider how each of the aforementioned conventional techniques are responsible for obfuscating a

25. Cf. Grundmann, *supra* note 9, at 710.

26. In the sense explained *infra*, at II.C.

27. An example being the poor consideration given to the practice of standard form contracting: cf. e.g. Beale & Lando, *supra* note 6.

28. Cf. e.g. KÖTZ & FLESSNER, *supra* note 6, at 34 *et seq.*

29. Cf. the German debate on the issue: e.g. Joseph Drexler, *Der Bürge als deutscher und europäischer Verbraucher*, 53 JURISTEN-ZEITUNG 1046, 1048 (1998).

30. Cf. the legal comparative literature indicated *supra* note 1.

particular set of Europeanization developments that really matter. It is beyond the scope of this article to reference *all* relevant developments—my goal, at best, is to bring the reader's attention to the dominance of a "legal comparative methodology" that creates the conditions for the "knowledge gap."

A. *The Belief in Ideational Rules: Missing Important Law-in-Action Developments (I)*

To begin with, it is doubly artificial to account for the emerging European contract law under the umbrella of a set of abstract (or "ideational") "rules." First, the orthodoxy fails to chronicle the fact that the path of contract law towards Europeanization is increasingly characterized by determinations of judges and administrators based on "substantive reasons," as opposed to "formal reasons" that the "rules" typically embody. To focus only on "rules" means to fail to see the broader scenario in which legal actors increasingly frame legal narratives on the basis of substantive reasons irreducible to the logics of the rules. Second, the orthodoxy fails to adequately chronicle important European rules in situations characterized by what I call "rule pluralism."

1. Missing Europeanization That Takes Place via "Non-rules"
(That is, Substantive Decision-makers' Determinations)

The accuracy of the representation of the Europeanization of contract law as a process entirely characterized by the replacement of *national* by *supranational* "rules" is emphatically questionable. This approach fails to consider the impact of Community secondary legislation on national legal systems of contract law. This phenomenon, "communitarization," is vital to the overall Europeanizing of contract law and in this context the law is taking a European turn through legal structures other than the "rules." Specifically, judges increasingly adjudicate disputes on the basis of substantive reasons—that is, moral, economic, political, institutional or other social considerations.³¹ These reasons are very different from the formal ones embodied by the rules—that is, strictly "legal" authoritative reasons on which judges and others are empowered or required to base a decision or action, and that normally exclude from consideration, override, or at least diminish the weight of, any countervailing "substantive reason" arising at the point of decision or action.³² This

31. For the alternative in the abstract between formal and substantive reasoning along these lines, see PATRICK ATIYAH & ROBERT SAMUEL SUMMERS, *FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW. A COMPARATIVE STUDY IN LEGAL REASONING, LEGAL THEORY, AND LEGAL INSTITUTIONS* 1 (1988) and ROGER BROWNSWORD, *CONTRACT LAW* 124 (2000).

32. Adapted from ATIYAH & SUMMERS, *supra* note 31, at 2.

development takes place not at the margins, but at the very core of contract law, in the area of the law of standard form contracts. It is worth briefly recalling this shift from “rules” to “substantive standards” that the orthodoxy fails to acknowledge.

In the tradition of the nation state, judicial decisions on issues of contract law were taken on the basis of “rules” that state in the abstract whether or not terms inserted in standard form contracts are fair or not (i.e., whether they are unfair for being too burdensome for one of the parties). Today, under the pressure of Europeanization, judicial determinations about the (un)fairness of contractual terms are no longer solely based on the rules. The rules are instead treated as additional factors to be weighted or balanced against reasons of substance—such as the fact that a term, “unfair” according to the “rules,” is nevertheless “fair” if considered in the light of substantive reasons such as a lower price or alternative offers available on the market. Let me give three illustrations of this development drawn from the case law of the Court of Justice and, in the United Kingdom, of the House of Lords, and from the work of the (UK) Director General of Fair Trading (DGFT).

a) Let me start with the development of the law in the United Kingdom. Here, there is increasing evidence that judges adjudicate on the basis of substantive standards, a new style of decision-making inaugurated by the EC Directive on Unfair Terms in Consumer Contracts.³³ One illustration is the line of cases where post-judgment interest rates in a banking contract were in dispute.³⁴ In one case, a loan agreement contained provisions which made interest payable at the contractual rate, on the amount of principal outstanding together with unpaid interest accrued up until the date of any judgment, during the period after judgment until finally discharged by payment. The High Court held that the term was not unfair since the consumer would not be surprised when told that interest at the contractual rate would continue to apply after a judgment.³⁵ In line with the trial judge's decision, the House of Lords has equally held that the term in dispute is not “unfair” as no surprise would occur on the part of the borrower.³⁶ A discernible shift away from the “logic of the rules” is evident here. First, both courts downplayed the *County Courts (Interest on Judgments Debt) Order 1991* which commands protection for

33. Cf. LEONE NIGLIA, *THE TRANSFORMATION OF CONTRACT IN EUROPE* (2003), at p. 93 *et seq.* and Leone Niglia, *The Fall of Formalism in English Contract Law*, 20 J. CONTR. L. 193 (2004).

34. For more information see *id.*, *The Fall of Formalism*, *supra* note 33, at 199 *et seq.*

35. Cf. Director General of Fair Trading v. First National Bank plc [2000] 1 WLR 98, at para. 32. This is a decision based on the *Regulations 1994* then in force, implementing Council Directive 93/13/EEC, OJ L 95, 21 April 1993, 29.

36. Cf. Director General of Fair Trading v. First National Bank plc [2001] UKHL 52, at paras. 20 and 24).

the customer, through excluding regulated agreements under Consumer Credit Act 1974 from the imposition of interest on a judgment debt: according to such legislative rules, no payment of post-judicial interests is allowed.³⁷ Second, the House of Lords gave centrality to the substantive reason, that the term contemplates a risk that makes economic sense in the context of what the court considers to be “the essential bargain,” the lending of money in exchange for repayment with interest; and that the borrower was well aware of such a risk, having been informed by the bank about the term at stake. Thus, a term which was “unfair” under the traditional set of rules was held “fair” for substantive reasons peculiar to the case.

Another illustration of a shift away from the “rules” can be seen in the work of the administrative branch responsible for enforcing the *Regulations* implementing the Directive on Unfair Terms, i.e., in its supervision of the entrepreneurs’ drafting of consumer contracts. In particular, penalties inserted in contracts of various kinds have not been considered to be outwardly unlawful and unfair for the consumer but were instead revised and made acceptable in economic terms, having regard to the overall deal. A similar treatment has been reserved for clauses excluding liabilities: rather than eliminating them on the ground that they conflict with various mandatory rules of English law, the officials have simply left them intact for substantive reasons, such as, the fact that the exclusion of liability is balanced by a lower price or other favorable contractual terms, or that the market is competitive enough to allow the customer to shop around for the best deal.³⁸ Again, consideration of the economic convenience of the deal obstructs the enforcement of those “relevant rules” that would otherwise apply.

b) A similar move away from strict rule adherence can be seen by the European Court of Justice in *Freiburger v. Hofstetter*.³⁹ The Court held that the potential unfairness of a term that compels the buyer of a parking space (yet to be built) to pay upon delivery of the guarantee, rather than at the moment of “acceptance” of the parking space free of defects, (as is normal practice), could be overlooked, on either of the following substantive grounds: that the buyers are being given a guarantee that compensates them in case of non-performance of any kind on the part of the seller; and that a payment before performance may be counterbalanced by the reduced market price of the work, as advanced payment lowers the overall financial costs of the builder. The Court is pursuing a judicial agenda that relies on sub-

37. *Supra* note 36, at paras. 31, 32 and 42.

38. For a detailed analysis of the work of the *DGFT* and for further illustrations, see Niglia, *The Fall of Formalism*, *supra* note 33.

39. *Cf.* para. 16, *Freiburger Kommunalbauten GmbH Baugesellschaft and Co. KG v. Ludger Hofstetter and Ulrike Hofstetter*, Case C-237/02, 2004 E.C.R., I-3403, read in combination with para. 24.

stantive issues that arise in each case, rather than on "rules," such as the "fundamental" rule-principle that "mutual obligations must be performed contemporaneously."⁴⁰

2. Missing Europeanization via "Non-conforming" Rules: Ignoring Rule Pluralism

Many scholars' understanding of Europeanization is based on "decisions" that selectively label some rules over others as "European," on the basis of perceived commonalities and consistencies while discarding differences and contradictions. Pursuant to this logic of unity and non-contradiction, they are driven to neglect anything that does not fit their mental picture. Their scholarship is based on the limiting belief that "there must be just one rule."⁴¹ What therefore emerges out of their works is an overview of Europeanization as a set of common rules—each rule regulating a sub-area of (the perceived) Europe's private law and the multitude of specific themes that fall therein—established through a process of avoidance and neglect of any contradictory rules. There are various techniques that scholars adopt pursuant to their strategy of playing down the contradictory rules: I will address only two of those strategies here. The first technique is typically used in works that put forward model rules—the archetype being the *Principles of European Contract Law* of the "Commission on European Contract Law," now followed by the work of the "Study Group on a European Civil Code." Here scholars identify as "European" certain rules and then play down any other rule that deviates on the assumption that the latter is unimportant. For example, non-performance having been identified as a "unitary concept" is then followed by the statement that the unitary concept is found in some but not all legal systems. Further, in relation to exclusion of liability clauses and the principle of good faith it was stated:

In principle clauses excluding or limiting a party's liability are valid in all the Member States. There are, however, restrictions on the validity of such clauses. The techniques of these restrictions differ.

The principle of good faith and fair dealing is recognized or at least appears to be acted as a guideline for contractual behavior in all EC countries. There is, however, a considera-

40. Cf. this principle as relied upon by the defendants in *Freiburger*, *supra* note 39, at para. 17, in the conviction that the disputed term violates said principle in that it is "of the kind referred to at point 1(b) and (o) of the Annex to the Directive" on Unfair Terms in Consumer Contracts—which contains rules that indicate terms that may be regarded as unfair. For a fuller explanation of this point cf. Leone Niglia, *The "Rules" Dilemma - The Court of Justice and the Regulation of Standard Form Consumer Contracts in Europe*, *COL. J. OF EUR. L.* (forthcoming).

41. To quote the critical note contained in a classical legal comparative work: Sacco, *supra* note 1, at 23.

ble difference between the legal systems as to how extensive and how powerful the penetration of the principle has been.⁴²

The second technique is more typical of essays. Here scholars tend to assimilate decisions of cases with similar facts from different countries in order to convince the reader that the courts are in fact adopting similar and ultimately identical rules. For example, English law, in contrast to German law, does not admit *culpa in contrahendo* and hence liability for breaking off negotiations. However, according to one author, *cause célèbre Hedley Byrne & Co. v. Heller & Partners* can be read as achieving an outcome that would have been achieved under the German doctrine of good faith in negotiations. This, the argument goes, should well convince everybody (including the House of Lords which in *Walford v. Miles*, [1992] 2 AC 128, denied that a duty to negotiate in good faith exists under English law) that, as a matter of fact, England and Germany have a similar rule that can be said to be "European."⁴³ Similarly, according to another author, a common rule is emerging in Europe that allows compensation for non-material damage for pain related to bodily injuries, whether occurring in the context of contractual transactions or in a purely tort-law setting, regardless of the German case law that opposes it, on the ground that German courts "wrongly" interpret the constitutional command to protect human dignity as well as Articles 253 and 847 *BGB*.⁴⁴

These techniques therefore operate as tools to rank and assimilate rules. "Chosen" European rules are ranked higher than any other that might contradict them; and rules of one jurisdiction are assimilated to others from different jurisdictions, regardless of any difference, with the aim of arguing that they are "identical" and therefore "European." These techniques share the purpose of rule hierarchization through elimination of any contradictory rule: as there must be one "European rule," one must eliminate any alternative that is inconsistent, and a "good way" to do that is to subordinate, or assimilate, to the "chosen" European rule any other that might contradict them. Note that this approach demotes the contradictory rules to an inferior status. In contrast, if one takes comparative law seriously, *all* rules (that is, the ones "chosen" for their supposedly Europeaness and any other inconsistent with them) are "facts" of equal value. When doing a comparative job, any interpretation by a jurist of the legal system under observation, including the one that we might hurriedly classify as contradictory (to another interpretation of the same or another rule), is a *real interpretation* (a

42. Cf. e.g. Beale & Lando, *supra* note 6, respectively at 122, 150 and 56.

43. Cf. KÖTZ & FLESSNER, *supra* note 6, at 34 *et seq.*

44. Cf. VON BAR, *supra* note 14, at 548 *et seq.*

"fact" that matters). The comparatist must not consecrate one interpretation or another as "exact" as he is not "a good judge on foreign ground."⁴⁵ Thus, a remedy in contract (such as the German *culpa in contrahendo*) and in tort (such as the common law *Hedley Byrne* remedy used to subject the parties to liability for breaking off negotiations) remain, for the comparatist, distinct rules of equal value.

This approach is of particular relevance to our analysis. When it comes to looking at Europeanization developments that take place with respect to rules contained in Community legislation, the "ranking" approach has a significant impact on the way we understand the Europeanization process. For example, in the context of a well-known dispute about whether the right of withdrawal applies to guarantees given in support of commercial or consumer contracts, in the context of the German case law preceding *Dietzinger*, some national courts have held that, under the Directive, a guarantor is entitled to withdraw while others hold that he is not.⁴⁶ Commentators, educated to see the world in the light of techniques of "ranking" and of "assimilation," tend to view one interpretation or another as truly "European" and discuss the issue in terms of which interpretation is "correct." This is a debate caught in the logic of hierarchization. For comparative law, such an approach is misguided: each interpretation is a fact of equal value⁴⁷ and, therefore, each interpretation is a rule of its own that reflects the state of Europeanization. The comparatist is expected to acknowledge that Europe's private law contemplates the right of cancellation in favor of the guarantor *for some* but *not for other* legal actors. It is this type of representation of rule pluralism that is missing in orthodox analyses. I could offer other examples: for instance, scholars tend to interpret the articles of Council Directive 93/13 on Unfair Terms in Consumer Contracts of 21 April 1993⁴⁸ in terms of their "correct meaning," rather than reporting the often conflicting ways in which legal actors that are affected by the integrationist rules "interpret" the articles.⁴⁹ Any such hierarchization deprives us of the knowledge of all the rules that the techniques of "ranking" and of "assimilation" play down: despite the claim of orthodox scholars that their work is comparative, to the extent that they hierarchize they delimit our legal comparative knowledge of Europeanization by representing it in terms of the ideational rules rather

45. Sacco, *supra* note 1, at 25.

46. *Cf. supra*, note 29.

47. This section draws upon the dichotomy of "abstract" versus "real" rules that I have employed elsewhere (*cf. NIGLIA, THE TRANSFORMATION, supra* note 33, at 15 *et seq.*) and that comes from an established tradition of legal comparative writings: *cf. its reformulation in Sacco, supra* note 1.

48. Council Directive 93/13/EEC, *supra* note 35.

49. *Cf. my analysis of the position taken by English, French, German and Italian legal actors (legislators, professors and courts) in NIGLIA, THE TRANSFORMATION, supra* note 33, at 147 *et seq.*

than of the plurality of operational rules that really matter. Thus, just as we have seen that the logic of the “ideational rules” does not capture crucial developments such as decisions based on substantive considerations, we must now acknowledge that that same logic is unable to account for all those rules (that we can call, for the sake of clarity, *non-conforming rules*) that are inconsistent with the rules believed to be “European.” The comparatist should take rule pluralism seriously and thus account for *all* the rules that matter. Rather than speculating about the ideational rules, s/he should acknowledge the (possibility of a) plurality of inconsistent rules because these are the *real-rules* that matter for a true understanding of Europeanization.

B. The Belief in a “System of Rules”: Missing Important Law-in-Action Developments (II)

In this section I address another aspect of the understanding of private law Europeanization: the underlying belief that Europe’s private law rules must be part of an overarching pan-European conceptual “system.” The rules are conceptualized as constituent parts of a sophisticated set of theoretical concepts, whose functionality consists of conferring meaning upon the “words” that each rule contains, and of driving the interpreter in his task of “deriving meaning” from the norms.⁵⁰ Thus, as we have seen in *Dietzinger*, a transaction is framed as either a “bilateral” or “unilateral” contract depending on certain overarching conceptualist characteristics that redescribe transactions. The resultant categorization is said to trigger one set of regulatory consequences or another—in our example, whether a guarantor could enjoy the directive-based right to cancellation or not.

This systematizing, pyramid-like understanding of Europeanization *forces out* of the picture a number of developments that resist systematization but that nevertheless are important sites of denationalization. They are *processes* that fail to materialize into what I have called *real-rules* (or into determinations expressed in what I have called *non-rules*). They cannot fit into the orthodoxy’s horizon of knowledge and are thus marginalized, but nevertheless matter for a realistic understanding of Europeanization. For Europeanization is not just about “outcome” (*qua* determinations of decision-makers that materialize into *real-rules* and *non-rules*) but also about *processes* that deserve to be taken into account.

Before illustrating such *processes*, let me say that systematic thinking reinforces one of the conventional scholarly practices previously mentioned: the obscuration of European *non-rules*. To the extent that Europeanization is increasingly characterized by a loose

50. Related *supra*, at I.B.

combination of decisions taken on the basis of substantive reasons,⁵¹ the scholars who put their faith in a systematic approach are forced to choose between *either* ignoring the emerging patterns of “substantive” decision-making that contribute to the making of Europeanized law *or* abandoning systematization. Indeed, scholars cannot put in orderly fashion case-by-case determinations loosely based on pragmatic, *ad hoc* considerations of substantive justice. The more they hold fast to systematization, the more they are forced to ignore such developments. For example, there is a discrepancy between, on the one hand, the orthodox insistence on the “systematic rules” and, on the other, the need to acknowledge the jurisprudence of the Court of Justice (in cases such as *Freiburger* or *Dietzinger*)⁵² that promotes decision-making based on substantive reasons. *En bref*, considering that Europeanization takes place through an increasing use of substantive reasons, to put one’s own faith in systematization is an important way to neglect one crucial aspect of the process.

Two important sets of processes that cannot be acknowledged at the level of the orthodox narratives must now be noticed: as systematization commands attention to *structured* developments it must fail to detect practices that are *unstructured* by definition. Specifically, Europeanization occurs via (a) contestation and (b) common law-like processes. The orthodoxy fails to detect both as they escape its systematic logic.

1. Missing Europeanization that takes place via Processes (I): Contestation

As noted, Europeanization that takes place through the enactment and enforcement of Community legislation relevant to private law is characterized by conflicting interpretations over the meaning of the rules contained in Community legislation.⁵³ As mentioned, comparatists, obedient to “unitarian logic,” tend to opt for one rule and ignore any contradictory rules—in the sense that they discard the non-conforming rules as having little importance to Europeanization. In this section I offer examples of how scholars, obedient to the systematic logic, tend to ignore situations in which a common rule, institutionalized via Community legislation, is “resisted” by one or another strand of legal actors. Amazingly, one can hardly find any substantial concern for the issue of failed enforcement of European

51. *Cf.* the decision of the House of Lords on post-judgment interest, notably based on U.K. Regulations implementing Community legislation, *supra* note 36, and the decision of the Court of Justice in *Freiburger*, *supra* note 39.

52. I refer also to *Dietzinger*, *supra* note 20, considering that, as we know, here the ECJ did take seriously the substantive argument put by the Commission and Mr Dietzinger concerning the need to protect not only the consumer but also the “guarantor” (albeit only for the case of guaranteees ancillary to a consumer contract).

53. *Cf.* text corresponding to note 46.

rules in celebrated works such as, for example, the *Principles of European Contract Law* or Von Bar's *The Common European Law of Torts*. The reason is obvious: comparatists who specialize in private law Europeanization operate on the implicit assumption that enforcement is not their concern.⁵⁴ It is assumed that once a rule becomes part of the "system," it is validated and therefore must be enforced, for its validity cannot be put in danger by (lack of) enforcement.⁵⁵ Below a number of illustrations point to important resistance patterns that, being characterized by institutional conflicts (for example, national courts *versus* the ECJ), one can call contestation processes.⁵⁶

a) To start with, there are national courts that assert exclusive competence to determine what contract law is in their own countries. Regardless of and indeed in spite of, the procedural and substantive constraints in EU law, they challenge any Community "intervention" from "above." One German court's statement is a good illustration of this point: in a decision addressing the issue whether to exempt from regulatory control contractual terms that concern what Article 4, second alinéa, of the Directive on Unfair Terms in Consumer Contracts brands "the main subject matter," the German Supreme Court states:⁵⁷

[i]t is for the German courts to determine whether the term in question is subject to review in respect of its subject matter, and the European Court of Justice, pursuant to Article 177 of the EC Treaty, has no say in this area.

b) There are then numerous illustrations of crucial *differences* between market integrationist and national rules that have given rise to critical patterns of *rejection*. Let me consider two illustrations of such clashes:

Differences: (I) A Community rule that contracting parties ought to be given a seven-day cancellation period clashes with established Italian and German dogmatic principles: the Italian principle states that contracts properly formed have the force of law between the parties and cannot be revoked except by mutual consent or where the law so provides; the German doctrinal principle states that guaran-

54. By contrast, integration studies typically take enforcement seriously.

55. This attitude is entrenched: for example, in reaction to research findings that give serious consideration to the issue of enforcement and suggest that France and Germany have not correctly implemented Council Directive 13/93 on Unfair Terms in Consumer Contracts (*cf.* NIGLIA, *THE TRANSFORMATION*, *supra* note 33, at 147 *et seq.*), it has been noted that what I suggest is "surprising": *cf.* Edwoud Hondius, *European Private Law - Survey 2003-2004*, 6 EUR. REV. OF PRIV. L. 855 (2004) at 874.

56. For more information, see Leone Niglia, *The Non-Europeanization of Private Law*, 4 EUR. REV. PRIV. L. 575 (2001).

57. *Cf.* BGH, 7 July 1998, 1998 DER BETRIEBS-BERATER 1864 (the decision refers to the old numbering of the EC Treaty, anteceding the Treaty of Amsterdam: Article 177 has now become Article 234).

tees are “unilateral” acts; (II) Another illustration comes from an adjacent field, i.e., tort law, with respect to borderline legal claims of relevance to contract law. The aim of Directive 85/374/EEC is to harmonize the law of product liability under a flat rule of strict liability, that would replace the national rules and interpretative practices anchored to the principle “no liability without fault.”

Rejection: With respect to (I), in two momentous decisions the *Corte di cassazione* rejected the argument that the right of cancellation should be applicable to Italian domestic law.⁵⁸ Further, the Ninth Senate of the *Bundesgerichtshof* held that the relevant directive could not apply to guarantees. Similar to the Italian case, the *Bundesgerichtshof's* rejection of the Directive's rule is a legacy of traditional doctrinal thinking, since it follows from an established dogmatic principle.⁵⁹ For, as considered above, in the Ninth Senate's view guarantees are, under § 765ff. *BGB*, “unilateral” engagements—that is, only one party undertakes to perform an obligation—while the Directive only applies to “contracts,” i.e., “bilateral” engagements (that is, where mutual obligations exist).⁶⁰ With respect to (II), continental laws have experienced a rather slow process of abandonment of the fault principle of liability. To decide under a fault-based law, the case of a person suffering personal injury as the result of a defective product, was soon thought to be unjust by judges (and academic writers) in France, Germany and Italy. It was thought that, while the buyer might have an action against the seller, this action could have been frustrated by the seller not being at fault, in addition to the usual grounds for frustration, on the basis of contractual terms or lack of privity of contract.⁶¹ The Directive on product liability intended to overcome this law in action, in line with scholars and judges who challenged the traditional fault-based legal practice.⁶² A clash between the Directive and national interpretative practices has nevertheless remained to date in at least two respects. First, rather than full-fledged acceptance of strict liability, numerous judges, with the support of scholars, have been favoring a teleological interpretation of fault-based rules that protects consumers even when sellers are not at fault. In doing so they have left intact fault-based rules or principles. Second, while the Directive provided for a liability rule in-

58. *Corte di cassazione*, 28 February 1995, n. 2275, *Giurisprudenza Italiana*, I, I, 99 (1996); *Corte di cassazione*, 15 May 1995, n. 5289, *Giustizia Civile*, I, 2977 (1995); Directive 85/577/EEC (OJ, 372/31, 31.12.1985), should have been implemented by 23 December 1987 but was actually transposed into Italian law in March 1992.

59. See *BGH*, 24 January 1991, 1991 NEUE JURISTISCHE WOCHENSCHRIFT 975; *BGH*, 11 January 1996, 1996 NEUE JURISTISCHE WOCHENSCHRIFT 930, 931.

60. See also *BGH*, 14 May 1998, 1998 JURISTENZEITUNG 1072 and, for an overview of this line of cases, Drexl, *supra* note 29, at 1048.

61. Cf. KONRAD E. ZWIEGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW, 671-672 (Tony Weir trans., 1998).

62. See the account given by ZWIEGERT & KÖTZ, *supra* note 61, at 671 *et seq.*

clusive of product development risks, various States opted out—thus foiling the Euro-project of strict liability and in effect reaffirming a liability for fault. For whenever a development risk defense is admitted, liability will no longer be strict but really fault-based.⁶³ In light of all the above, contestation processes must be taken seriously rather than discarded.

2. Missing Europeanization that takes place via Processes (II): Common Law-like Processes

A second set of developments that the orthodoxy discards can be identified as *common law-like processes*. To describe them a preliminary consideration is required:

Systematization is not a casual development but one that is particularly in vogue in the civil law tradition. To discuss and, indeed, to opt for, a conceptual “system” is an act of faith. It is typically associated with the formalism in the civil law culture, for it is within this type of legal cultures that “systems” are constituted.⁶⁴ Clearly then, the system-belief cannot be taken as obvious and necessary for “Europeanization.”⁶⁵ It is a regulatory option that can only be accepted if it is justified on some substantive, full-merit grounds. But the fact is that scholars do not explain the fundamental reasons why the option for the systematic view is to be preferred. Other Europeanization options are indeed available: the option for a set of provisions based on a discretionary appreciation of the substantive reasons involved in each dispute; common law-like jurisgenerative patterns that rely on “judicial” precedents; a “system” conceptualized as weak, i.e., as being highly flexible and thus adaptable to the circumstances of each case rather than rigid in dictating concepts/categories that apply in any case to any legal dispute, *et cetera*.

If the practice of systematization is thus contingent, then we should look at it in critical terms: in the context of our analysis, it is important to note one important consequence of the option for the systematic approach—that to opt for systematized rules entails to marginalize those Europeanization developments that occur via structures and processes that do not fall under the umbrella of civilian-law systematization. A case in point is the “good faith” clause

63. Cf. John Anthony Jolowicz, *Product Liability in the EEC*, in *COMPARATIVE AND PRIVATE INTERNATIONAL LAW. ESSAYS IN HONOR OF JOHN HENRY MERRYMAN ON HIS SEVENTIETH BIRTHDAY*, 369, 388 (David S. Clark ed., 1990), and, generally, ZWEIFERT & KÖTZ, *supra* note 61, at 676-678. For a comprehensive, unorthodox account of the “weak real-world results” achieved by Directive 85/374/EEC, cf. Mathias W. Reimann, *Product Liability in a Global Context: the Hollow Victory of the European Model*, 2 *EUR. REV. PR. L.* 128 (2003).

64. Cf. e.g. Carol Harlow, *Voices of Difference in a Plural Community*, 50 *AM. J. COMP. L.* 339, 346 (2002).

65. For an approach that adopts this view with respect to European law at large see *id.*

which the Commission inserted into the Directive on Unfair Terms with a view to facilitate the operation of market processes. To achieve this purpose, the Commission employed a common law-like technique that relies on pragmatic consideration of the circumstances that surround the transaction. A number of provisions have been transplanted into the Directive that command protection of the consumer or otherwise *in relation to* a number of factors that the judge is required to assess in his discretion, rather than protection *in any case*.⁶⁶ Such provisions have then been adapted so as to convince decision-makers to relax important rules contained in domestic consumer protection legislation. While the House of Lords has applied "good faith" on the basis of a reading of the Directive that is consistent with the Community legislative strategy,⁶⁷ reflecting the fact that the Directive's provisions fit well with the common-law style of legal reasoning, scholars have failed to take note of both the new type of legislative style employed by Community institutions *and* the important adaptation processes that have taken place in the UK. Both developments are being ignored due to the civilian-law determination to systematize and thus exclude any common law-like development that, however relevant to Europeanization, escapes systematization. In fact, many scholars continue to read the "good faith" clause, as contained in Article 3 of the Directive, as the embodiment of systematic thinking.⁶⁸

C. *The Belief in Neutral Rules: Missing the "Context" of Europeanization*

Let me now address another understanding of Europeanization that emerges from writings in the area: the emergence of strictly "legal" European rules which are held to be neutral vis-à-vis extra-legal purposes, policies or preferences. This view affects not just the content of the rules, understood to be closed off from non-legal factors, but also, if one considers the groups of scholars compiling model rules, the method of selection of the participants to the network. Comparatists emphasize the distinctiveness of their work as entirely founded on legal material when they state:

[W]ith a few exceptions, the members of the Commission of European Contract Law have been academics, but many

66. For the details of this operation, and of how the technique that I refer to has been used in the U.K. (in the context of the UCTA 1977), see NIGLIA, *THE TRANSFORMATION*, *supra* note 33, at 14 *et seq.* Cf. also the saga on post-judgment interest: text corresponding to note 35.

67. Cf. *First National Bank*, *supra* note 36.

68. For an example of how this interpretation of good faith *ex Art. 3* of the Unfair Terms Directive is everywhere, even in writings that go against the grain, see Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergencies*, 61 *MOD. L. REV.* 11 (1998).

of the academics are also practicing lawyers or have been involved in the formulation of legal policy at national or international level. *The members do not see themselves as representatives of specific political or national interests.* Rather they have all pursued a common objective—namely, to draft the most appropriate common rules for Europe” [. . .] “[I]t is of critical significance that the work on a restatement be conducted by independent experts who are not influenced by any particular national or socio-political interest. The authors of the restatement should be bound only by the rigorous intellectual demands of the task.⁶⁹

The representation of Europeanization as a set of lifeless rules that develop according to a legalistic logic—⁷⁰ an approach that is both consistent with and apologetic of ideational and systematic thinking—is deeply at odds with the tenets of classical comparative studies that comparing must be about understanding foreign law in its context.⁷¹ The depth of this chasm between the *orthodox* methodology and *classical* literature is immediately evident in light of what has been said above. The rules that really matter to Europeanization develop out of policy and full-merit judgments (for example, the case of the consumer right of cancellation *and* of the right to impose post-judicial interest on consumers), and the contestation processes that go against legal unification can only be made intelligible from a contextual perspective.⁷² Seen in this light, neutral belief is another way for the orthodoxy consistently to discard the legal structures and processes that really matter. In this section, I would like to go one step further and show that to ignore the reality of the socio-political context(s) that underlie the development of Europeanized rules fundamentally breaks with the way in which the various contract laws of various European legal systems have developed in the past. Such an approach ignores the fact that, traditionally, the evolution of contract law in the continental and English/Scottish legal systems has been deeply characterized by its interaction with surrounding social, economic and political conditions. This is an interaction particular to each country, be it between the country’s “economic constitution” and contract law, between the “political” and contract law, or appearing

69. Cf. *Joint Response*, *supra* note 6, at 228 [emphasis added] and Ole Lando, *Does the European Union need a Civil Code?*, 49 *RECHT DER INTERNATIONALEN WIRTSCHAFT*, 1 (2003) (holding that the members of the Commission on European Contract Law “had no political mandate and were not representatives of specific political or governmental” and that “[t]hey were chosen for their expertise on contract law and comparative law.”)

70. Cf. *e.g.* Beale & Lando, *supra* note 6, and the works KÖTZ & FLESSNER, *supra* note 6, and VON BAR, *supra* note 14.

71. Cf. *supra* note 1.

72. Cf. Niglia, *supra* note 56, and NIGLIA, *THE TRANSFORMATION*, *supra* note 33, at 147 *et seq.*

alongside with specific functional and value requirements that contract law would endorse.⁷³ It is an interaction reflecting the fact that the law is interrelated to economic processes, because it explains the "content" of such interaction as it occurs in historical conditions. In practical terms, it indicates how the law is to be shaped for a certain type of economy to unfold, an argument often considered to indicate how economic law could find its very "identity." For whether characterized by a higher or lower degree of "formality," every private law system embodies politico-cultural meanings that make the law intelligible. Thus, to give an example, it is well known that the French and German systems of contract law during the second half of the 20th century have been embedded in a welfarist regulatory paradigm.⁷⁴ In particular, to take the German case, the politics of the welfare state has developed alongside a sophisticated judicial and legislative apparatus of protectionist rules that have ensured that market power will not endanger the freedom of individuals acting in the "market."⁷⁵ Or, to take the Italian case, the politics of the interventionist state has developed alongside a set of rules that have been instrumental to the protection of state power, as exercised by state-owned economic institutions that constituted the major actors in the "market," in designing economic processes.⁷⁶

Against this background, one must ask how contract law, traditionally in complex interaction with idiosyncratic socio-political contexts,⁷⁷ would acquire such "neutrality" as soon as it becomes "Europeanized." There is also the question, whether such a divorce between "economic law," understood in highly political terms, and (contract) law, can be taken as a credible account of the operative reality of the Europeanization of contract law. I am aware of no argument that satisfactorily explains the reasons why this interaction would no longer take place in the context of Europeanization. The literature does not explain this. Moreover, since this interaction is being played down, the implication is that scholars avoid addressing

73. For this variation of arguments, see e.g. H.E. Brandner and Peter Ulmer, *EG-Richtlinie über missbräuchliche Klauseln in Verbraucherverträgen. Kritische Bemerkungen zum Vorschlag der EG-Kommission*, BETRIEBS BERATER 701 (1991); Ernst-Joachim Mestmäcker, *Über die normative Kraft privatrechtlicher Verträge*, 19 JURISTEN-ZEITUNG 441 (1964) and Ernst-Joachim Mestmäcker, *Über das Verhältnis des Rechts der Wettbewerbsbeschränkungen zum Privatrecht*, 168 ACP 235 (1968); BROWNSWORD, *supra* note 31, at 22 *et seq.* and at 123 *et seq.*; Jacques Ghestin, *Les obligations. Le Contrat: Formation*, in *TRAITÉ DE DROIT CIVIL - Tome 2* (J. Ghestin ed., 2d ed. 1988) at 108 *et seq.*; Luigi Mengoni, *Autonomia privata e Costituzione*, BORSA E TITOLI DI CREDITO 1 (1997).

74. *Cf. e.g.* for the German experience Mestmäcker, *supra* note 73 and, recently, Teubner, *supra* note 68, at 14 *et seq.*

75. *Cf. e.g.* Mestmäcker, *Über die normative Kraft privatrechtlicher Verträge*, *supra* note 73.

76. *Cf.* Niglia, *THE TRANSFORMATION*, *supra* note 33, at 55 *et seq.*

77. This is a complex interaction and not one of supposedly direct causality: see Niglia, *THE TRANSFORMATION*, *supra* note 33, at 15 *et seq.*

it, with the result that comparatist studies tend to pay little attention to the important issue of what sort of economic-political direction contract law is taking in today's Europe.

We thus remain unaware of aspects that should be of concern for the comparatist: the institutional and procedural framework against which denationalization unfolds, considering the poverty of the abstract reference to the Community dynamics behind market integration as a self-sufficient ground for delivering a legal comparative analysis that takes contexts seriously;⁷⁸ the socio-economic, cultural and political environments of relevance; the clusters of interests and ideologies, and the dynamics of power politics that must exist but that escape our knowledge. In celebrated essays and compilations of model rules, one can hardly find anything that seriously describes what happens outside the development of the ideational and neutral rules.⁷⁹ To alert comparatists to this important perspective, one does not need to elevate the importance of one contextual focus over another. It suffices to take examples from important studies conducted in line with *classical* comparative teachings that take context seriously: whether production regimes (*à la* Teubner) or political power *tout court* (*à la* Kahn-Freund) or economic-constitutional dimensions or the interplay between legal culture and contexts (*à la* Ewald or *à la* Legrand) or market practices.⁸⁰ Whatever our opinion about *which context* is really relevant to make the development of Europeanization intelligible, what matters is to overcome a state of the art of the discourse about private law in Europe which abstracts from consideration such contexts altogether. There remains a huge gap between what comparatists typically do elsewhere and what orthodox comparative studies do here and that gap needs to be filled.

Thus, scholars simply miss another important dimension of Europeanization. Teubner has rightly noticed, defending his own legal comparative perspective and critiquing of current understandings, that "European efforts at harmonization have not yet seriously taken into account the . . . difference of production regimes."⁸¹ Indeed, scholars have not taken seriously any of the *contexts* in which private

78. I refer to the fashionable statement that, "If barriers to trade within the European Union are to be overcome, legislation in the form of ratification of international treaties or Regulations and Directives is clearly indispensable in certain areas": ZWEIGERT & KÖTZ, *supra* note 61, at 28.

79. But see my approach to the analysis of these issues in Niglia, *THE TRANSFORMATION*, *supra* note 33.

80. Cf. e.g. respectively Teubner, *supra* note 68; Kahn-Freund, *supra* note 1; NIGLIA, *THE TRANSFORMATION*, *supra* note 33, at 15 *et seq.*; William Bragg Ewald, *Comparative Jurisprudence: What Was it Like to Try a Rat*, 143 U. PA. L. REV. 1889 (1995); Pierre Legrand, *Against a European Civil Code*, 60 MOD. L. REV. 44 (1997); IMPLICIT DIMENSIONS OF CONTRACT: DISCRETE, RELATIONAL AND NETWORK CONTRACTS (David Campbell, Hugh Collins & John Wightman eds., 2003).

81. Cf. Teubner, *supra* note 68.

law develops towards its Europeanization. This has not been an accident but simply the consequence of their faith in "neutrality."

III. CONCLUSION

The gospel of orthodox comparative approaches to Europeanization is a simplistic formula that is not capable of recording and encapsulating the structures, processes and contexts that emerge out of the increasing denationalization of contract law. The three landscapes that have been sketched challenge the orthodox views to recognize that the real world escapes the talk of a system of ideational and neutral rules. This is self-evident if one looks at the understanding of Europeanization that emerges from orthodox works in contrast to the developments that I have traced: the logic underlying ideational rules conflicts with an analysis that acknowledges the important *legal structures* (that is, *real-rules* and *non-rules*); and the logic underlying systematic and neutral narratives conflicts with a serious consideration of the *processes* and *contexts* out of which the legal structures of Europeanization develop.

At the core of these conflicts is the faith of orthodox comparativism in narratives based on speculation, coherence and neutrality (and, of course, on their combined use)⁸² that drives comparatists away from the straightforward observation that is required: the developments that really matter *cannot* be acknowledged at the level of the orthodox narratives *because* of the three techniques that are employed. This *either/or* predicament that positions comparative legal studies into distinct "camps"—a rule-centered *or* a law-in-action and law-in-context approach—calls for a profound change of methodology from speculation to observation. For writings entirely caught in the orthodox narratives this is a call to change their methodology altogether, while for writings that utilize one or more orthodox tools of analysis it means to reflect on their inconsistency with pursuing a strategy of observation. Yet, the work needed for overcoming the dominant juristic script remains particularly demanding. It is not just a matter of "logic," but, more appropriately, one of social responsibility and critical engagement. To advance this claim we need to bring to light a particular aspect of the foregoing analysis. Since the ideational, neutral and systematic techniques add little to our understanding of Europeanization, they are equally unable to do what any valuable legal comparative work would do in order to promote the practical goal of legal unification: for example, to identify artificial differences *or* point to the merits of a foreign institution that could be transplanted from one member state into the other member states to their benefit.⁸³ The orthodox approach *cannot* do this job due to its

82. Cf. e.g. text corresponding to note 51.

83. Cf. Sacco, *supra* note 1.

abstract nature that makes it unable to bring to light the elements at work in Europeanization. The approach, based as it is on the methodology of employing logical tools of analysis that value abstractedness and neglect real-life developments, is more analytical reasoning than legal comparison properly understood. If post-war comparative law has developed out of the desire and commitment to overcome the narrowness of national dogmatic thinking, the orthodox comparative analyses have subtly and determinedly returned to practicing the old techniques: analytical reasoning has hijacked comparative law.⁸⁴ It is at this point that issues of social responsibility come to the fore. Comparatists must resist this. Comparative law is not about analytical reasoning⁸⁵ but about engaging with the world: about acknowledgment of law-in-action and law-in-context;⁸⁶ about intelligence and interest in the myriad forms and possibilities of reality.⁸⁷ From this vantage point, the first step in the right direction would be to recognize that taking seriously the *real* dimensions of Europeanization requires the abandonment of the current orthodoxy. The geography of comparative legal analyses should be redrawn: writings that do not fit the orthodox canon, because they take law-in-action and law-in-context seriously, should no longer define themselves in a negative position vis-à-vis the mainstream accounts. Examples include Teubner's critical note that "European efforts at harmonization have not yet seriously taken into account the . . . difference of production regimes" and Legrand's critical notes "against" a European civil code.⁸⁸ Any study that does not take law-in-context, as well as law-in-action, seriously should be taken lightly; and even studies that do take law-in-context and law-in-action seriously should be praised only if they are really capable of casting light on the developments that truly matter.⁸⁹ Only such a fundamental methodological shift would provide a realistic possibility to obtain true knowledge about

84. If comparative law is about the knowledge of different legal systems and analytical reasoning the preferred methodology used *within* legal systems, then we understand why the adoption of analytical reasoning on a transnational basis must convince some to think of Europe's private law as 'one legal system': cf. VON BAR, *supra* note 14, at xxiii.

85. Cf. Sacco, *supra* note 1.

86. *Supra* note 1.

87. Comparatists from outside Europe remind us of the need to do this job, as two citations at random show: cf. Reimann, *supra* note 1 (skeptical of legal comparative works that are obsessed with rule-centered analyses and do not take seriously law-in-action and law-in-context) and James Gordley, *The Future of European Contract Law on the Basis of Europe's Legal Heritage*, EUR. REV. CONTR. L. 163 (2005) (skeptical of the "positivistic" tendency in European legal scholarship, legal training and the administration of justice to trust abstract formulas contained in rules, and arguing in favor of a less formalized and less nationalistic approach that does not play down the merits of issues in the service of the integrity of the abstract rules).

88. Cf. Teubner, *supra* note 68, and Legrand, *supra* note 80.

89. Rather than for their supposed adherence to the orthodox narratives, as in Lando's reading of the work of the *Trento Common Core* project: see Lando, *supra* note 5, at 814.

private law Europeanization, for it would free us from the narrow focus of the private law purist. We should recall Francis Bacon's intimation: one should resist the temptation to "narrow the world till it will go into the understanding." In order to counteract the orthodoxy that so fatally dissonates with the dynamics of the "real world," and in order to embrace the legal analysis that is required instead, one should do the converse:

[T]he understanding is to be expanded and opened up until it can take in the image of the world.⁹⁰

90. Francis Bacon, *Preparative Towards a Natural and Experimental History*, in *COLLECTIVE WORKS OF FRANCIS BACON, VOLUME IV: TRANSLATIONS FROM THE PHILOSOPHICAL WORKS* 255-256 (J. Spinning et al. eds., 1976, reprint of 1875 ed.) (quotation taken from Grosswald Curran's work, *supra* note 6).

