



**QUO VADIS EUROPEAN TORT LAW?
WHY CONCEIVING AND MANAGING NATIONAL TORT LAWS
WITH POLITICAL INSTRUMENTS FOR DEVELOPING
THE EUROPEAN INTEGRATION PROCESS IS WRONG**

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*“Est modus in rebus, sunt certi denique fines
quos ultra citraque nequit consistere rectum.”*

Quintus Horatius Flaccus (Horace)
Satires (1, I, 106)

*“Consider what you think
justice requires, and decide accordingly.
But never give your reasons;
for your judgment will probably be right,
but your reasons will certainly be wrong.”*

William Murray, 1st Earl of Mansfield
British Barrister, Politician and Judge

Introduction

The contemporary political concept of a united Europe was born from the ruins of World War II by the visionary European leaders¹. In this context, the history of European integration (and expansion) necessarily includes the history of the integration (and expansion) of concepts and principles of European Law and, of course, of **European Tort Law**. Indeed, the different values and ideas that this kind of process expresses have, so far, deeply influenced societies, institutions and governments in making the well-known “**Europe of rights**” starting from the “**Europe of markets**”. This, in particular, means that to reach our goals in studying the European integration process from a comparative point of view we have to understand the extremely delicate and intense interaction between

¹ W. van Gerven, *The European Union. A Polity of States and Peoples*, Oxford Univ. Press, 2005.



European and local concepts of law and, at the same time, that we need to concentrate our efforts on the beginning of the “**Europeanization**” of **Private Law** and on its evolution.

The desire to make this paper was born from what I have heard and analyzed during the **10th Annual Conference on European Tort Law** at the **Institute for European Tort Law - Austrian Academy of Sciences** and at the **European Centre of Tort and Insurance Law** in Vienna, on April 2011². Over there I have started to discuss about the fact that for the last forty years, no body of law within the civil justice system has experienced greater ferment than the law of torts³. Considering this dynamism, the kind of process that interests me is the European legal harmonization and, in particular, the emergence of the **European Private Tort Law as an independent legal discipline** that, in my opinion, is one of the most significant developments in European legal scholarship in recent times. This process, that has been taking place for a decade or more, today has arrived to a new phase which began with the accession negotiations for the entry of Central and Eastern European countries, along with Cyprus, Malta and Turkey, and which coincide with the debate on the “desirability” of a renewal of the **European *Ius Commune***⁴. It, in short, consists of a slow and continuing affirmation of common legal rules, principles and **judicial solutions** for the legal systems which already form part of the European institutions and context. Besides, it is very important for understanding the European legal integration as provoked by European Court of Justice (ECJ) and sustained by private litigants and national judges (that has gradually but inexorably transformed the European Community - EC)⁵. A truly European *Ius Commune* (at least on obligations’ field) came into existence only in the sixteenth century when the humanist school of law generally promoted the study of antiquity and, in law, this did not so much mean the study of Roman Law.

² More on <http://www.ectil.org/>

³ M. Stuart Madden, *Exploring Tort Law*, Cambridge Univ. Press., 2005.

⁴ P.G. Monateri, *Pensare il Diritto civile*, Turin, 2006; P.G. Monateri – A. Somma – T. Giaro, *Le radici comuni del diritto europeo. Un cambiamento di prospettiva*, Rome, 2005; P.G. Monateri, *Black Gains. A Quest for the Multicultural Origins of the “Western Legal Tradition”*, in *51 Hastings Law Journal*, 2000, 479 ss.; R. Zimmermann, *The Law of Obligations. The Roman Foundations of the Civilian Tradition*, Cape Town, 1991; Id., *Roman Law, Contemporary Law, European Law*, Oxford, 2001; Id. *An Introduction to German Legal Culture*, in Wener F. Ebke and Matthew Finkin (eds), *Introduction to German Law*, The Hague, London: Kluwer International; München: Beck, 1996; Id., *Savigny’s Legacy, Legal History, Comparative Law and the Emergence of a European Legal Science*, *LQR*, 112, 1996, 557 ff.A. Watson, *Legal Origins and Legal Change*, London, 1991; Id., *Roman Law and Comparative Law*, Athens-London, 1991; M. Lupoi, *Alle radici del mondo giuridico europeo*, Rome, 1984; R. Schulze – G. Ajani (eds.), *Gemeinsame Prinzipien des Europäischen Privatrechts Common Principles of European Private Law*, Baden-Baden, 2003; W. Wurmnest, *Common Core, Grundregeln. Kodifikationsentwürfe, Acquis-Grundsätze*, in *Europa ZeuP*, 714, 4, 2003; R. Sefton-Green, *Le défi d’un droit commun des obligations*, in *Variations autour d’un droit commun. Premières rencontres de l’UMR de droit compare de Paris*, in *Société de législation compare*, 2002, 443; L. Basedow, *Codification of Private Law in the European Union: the making of a Hybrid*, *9 Eur. Priv. Law*, 35, 2001; W. van Gerven, *A Common Law for Europe: The Future Meeting the Past?*, *9, Eur. Rev. Priv. Law*, 485, 2001.

⁵ H.H.J. Weiler, *The Transformation of Europe*, *Yale Law Journal*, 1991, 100:2403.



Humanists took *Corpus Iuris* apart, did not venerate it and the result was the liberation of legal scholarship from old ropes.

As we will see further, a consistent number of differences between legal systems deserve attention in order to put harmonization into the right and useful historical perspective. Nowadays, indeed, although the traditional *Ius Commune* disintegrated in the 18th century with the rise of rationalism and nationalism when the new rulers wanted the identity of the nation to be supported by a national codification, the increasing European cooperation endorsed the idea of a revival of a European *Ius Commune*. And this idea received a firm backing in the framework of European integration in the second half of 20th century when its concepts has gone back to the *Ius Commune* that was applied throughout Europe from 12th century onward, and which was mainly based on Roman Law.

The reader already knows that **modern European Tort Law** is mentioned at many occasions and discussed at various levels by a number of jurists everyday bigger. However, the concept of as such is not strictly defined and European Tort Law has become the “umbrella-term” for a number of various features concerning Tort Law in Europe. This is the reason why this paper is focused on **European Tort Law in shape of national tort laws in Europe** and its aim is to understand its “soul”, also analyzing the nature of the **judicial activism showed by the European Courts** (the various “*case law*”). I will demonstrate that even though many argue about (and dream of) the “manipulation” of the European Tort Law with “**political methods**” at a supranational level, this may **violate the preferences of citizens** and is a wrong point of view to start from because, first of all, internal market does not need any kind of “Europeanization” in the field of Tort Law and, secondly, those who blindly follow an unbalanced harmonization concept should also be aware (and they are not) of the fact that in some cases they may be instruments in the hands of powerful lobby groups.

This paper will be also focused on other aspects concerning the soul of European Tort Law by: (i) **illustrating that similar factual problems arise throughout the tort law systems**; (ii) **demonstrating that in many cases the solution for these problems are not so different** (but without forget the many striking differences in the way the problems are being solved); (iii) **digging the various historical and cultural backgrounds and the various policy views used or not in liability’s systems** (for instance, the “**Law and Economics**” movement which will be analyzed in Chapter 1.2.).

I will conduct my work from a **Comparative Private Law point of view** introducing the reader to the main features of European Tort Law and I will do that knowing that although the comparative study of law has very old origins⁶, the modern discipline of Comparative Law finds its origin in the nineteenth century and that today it is seen as a vital tool along the unification process. The reason of its importance is that **a uniform law**

⁶ Already in the fourth century BC Aristotle compared the existing constitutions to establish which one was the best. See *Politics*, Book II.



cannot be achieved by simply conjuring up an ideal law on any topic⁷. Indeed, there are many examples of how harmonization efforts were preceded by a comparative survey⁸.

The **primary aim of Comparative Law** is to improve knowledge as a critical capacity to find in another legal system the better “*solution*” offered for the time and space every time considered⁹. Besides, a comparative glance may dissolve unconsidered national prejudices and help us to fathom the different societies and cultures of the world furthering international understanding. Then, considering that one of its important functions is to improve legal education, the comparative approach is also useful for developing law reforms because it is about to find in a foreign system the rules which are “*functionally*” equivalent to those which interest our research. So, Comparative Law can be used to look at the structure of foreign rules and decisions, but it makes more sense to start from the nature of the various legislative approaches to then look at the nature of the outcome made by politics, by the legislator and by the Courts. This will be the kind of my approach during my analysis.

To do this, in the following pages I will discuss about the term “*diffusion*” (also referred to circulation or transplant) and, in particular, of the diffusion of legal models and rules which occur within European countries. And I will do that knowing, from one side, that this term usually designates the phenomenon by which a collection of technical rules, of general principles and of judicial solutions (which constitute a defined legal model), is transferred from one legal system to another one with a very fragile process, and, from the other side, that the European legal science during the twentieth century could, for a long time, be best described as uncritical and authority-oriented¹⁰.

Besides, I will focus my efforts on the famous concept of “*Acquis Communautaire*” that, conventionally, is an expression with a delicate meaning and that is one of the principal requirements that the candidate countries must satisfy according to the requirements of the European Union to achieve the status of a Member State. It means the collection of decisions from the European Union, which are of a standardizing, political and legal nature, adopted during the various phases during the European integration, which new Members are obliged to accept at the moment of joining¹¹. It evolves constantly and, in short, consists of: (i) principles, political objectives, and provisions of the Treaties; (ii) of legislation adopted in applying them; (iii) of the judicial precedents of the ECJ; (iv) of acts which are

⁷ K. Zweigert – H. Kötz, *An Introduction to Comparative Law*, Oxford Univ. Press, 1998, 24-25.

⁸ 1980 *United Nations Conventions on Contract for the International Sales of Goods (CISG)*.

⁹ K. Zweigert – H. Kötz, *An Introduction to Comparative Law*, Oxford Univ. Press, 1998, 15; H.P. Glenn, *Aims of Comparative Law*, in J.M. Smith (edn.), *Elgar Encyclopaedia of Comparative Law* (Cheltenham: Edward Elgar, 2006), 57 ss.; Id., *Legal Traditions of the World*, Oxford Univ. Press., 2000.

¹⁰ Cf. D. Heirbaut – M.E. Storme, *The historical evolution of European Private Law*, in *European Union Private Law*, Cambridge Univ. Press, 2010, 30-32.

¹¹ Cf. “*Community Acquis*”, in *Glossary: Institutions, policies and enlargement of the European Union*, at <http://europa.eu.int/scadplus/leg/en/cig/g4000.htm>



part of foreign policy and common security; (v) of acts which are part of justice and home affairs; (vi) of international agreements made by Community and, finally, of agreements made by Member States with one another in the sector of competence of the Union¹².

Now, this is the main question: why a model, and in particular a **legal model, should circulate abroad?** Well, I think that a model, in general, could circulate **by imposition or due to its prestige** (or to the prestige of the system it derives from). But, knowing that in the political context of the European Union the diffusion and circulation of the various legal models and rules have particular features, we cannot hide that there are problems also with the meaning of the term “*circulation*” according to whether it concerns an activity brought into being by legislators, or by judges, or by legal scholars.

This is the reason why, in my opinion, the **circulation of legal models, rules and judicial solutions** ceases to be the expression of a simple incorporation of foreign models and, at least in our times, becomes instead an instrument aimed at creating new law for the European Union legal system¹³ and, of course, “*soul*”. Considering that means, to me, also analyze the impact of the judicial approach (and of the many intentions of its reforms) in the European integration process. Indeed, as everybody knows, projects of judicial reforms are aimed at assisting judges, not only from the point of view of legal expertise, but also from the point of view of management and organizational know-how. In this sense, judicial independence was only a part of the focus of the second generation of “*rule of law*” promotion policies within Europe, because accountability and efficiency were also attentively addressed¹⁴.

For all these reasons, the **normative indeterminacy** and the **judicial law-making** will both play a very important role in this paper because indeterminacy constitutes a rationale for delegating to judges, it motivates litigation and it serves to justify judicial discretion and law-making (to the extent that both may serve to reduce indeterminacy). So, the well-known locution “**the law is fundamentally indeterminate**”, at least from the perspective of those who litigate, pervades the Courts’ job everyday. In other words¹⁵.

Finally, knowing that the aim of Comparative Law is not to force any kind of “**legal transplant**”, passing through the analysis of the concept of “**law**”, of “**legality**” and of the nature of the judicial process also considering why judges are occasional law-makers, I will demonstrate that, as I have said earlier, there is no need to “push” with political methods an unification of national tort laws. I am aware of the fact that the need for harmonization seemed to be self-evident to a great extent because the idea has been (and still is) that the various differences in the area of Tort Law between Member States were an obstacle to the achievement of the internal market, but, in my opinion, is extremely evident that internal

¹² Cf. G. A. Benacchio – B. Pasa, *A Common Law for Europe*, 20.

¹³ Distinct and totally different from the States of which it is formed by.

¹⁴ Cf. D. Piana, *Judicial Accountabilities in New Europe*, Farnham, 2010, 14.

¹⁵ Cf. A. Stone Sweet, *The Judicial Construction of Europe*, Oxford Univ. Press., 2004, 9.



market does not need it at all (and the various examples of economic market integration with differentiated legal systems, as the U.S., are a precise witness of that).

It is not only a matter of substantive justification. I know that since the late 1980s the discourse on a common European Private Law has grown intensively and extensively, but a real harmonization of tort laws will require not only to take in consideration other compensation systems, such as private insurance and social security systems, but will also require the harmonization of **criminal and administrative law**. Moreover, from one side, every harmonizing measure entails compliance costs and, from the other one, at first new rules are usually unclear and may be applied differently throughout the internal market. So, knowing that the essence of judicial independence is strictly related to the aim of political centralization, it is not only a matter of “money”, it is a matter of good sense¹⁶.

1. Does a “*European*” Tort Law exist?

1.1. Bernard de Mandeville’s *Fable of the Bees* is a very interesting book. In *The Grumbling Hive or Knaves Turn’d Honest* (its first name, published in 1705) Mandeville describes a bee community thriving until many of the bees decide to seek honesty and virtue. Without their desire for personal gain the colony loses the hive, thus implying that without private vices there exists no public benefit. The book was primarily written as a political satire on the state of England in 1705, when the Tories were accusing John Churchill, 1st Duke of Marlborough, and the ministry of advocating the War of the Spanish Succession for personal reasons. Mandeville concluded that vice, at variance with the “Christian virtues” of his time, is a necessary condition for economic prosperity (so for getting public benefits). It is simple to get how his viewpoint is more severe when juxtaposed to **Adam Smith’s**.

Well, considering that Mandeville argues that the basest and vilest behaviors produce positive economic effects, it is surprising how his thought is related to the concept of “tort”. This is because Tort law is a (fundamental) part of economic progress which is, as everybody knows, strictly related with natural resource scarcity¹⁷.

For what concerning my analysis, it is important to underline that there are three different fields about European Tort Law: *(i)* **the case law on the European Convention on Human Rights** (ECHR); *(ii)* **the European Law**; *(iii)* the one that interests us, “*alias*” **the various national tort law systems in Europe**. These three different levels of the concept of European Tort Law are totally different but at the same time they are increasingly influenced by other national features (as culture and social sensibility) and of

¹⁶ C. van Daam, *European Tort Law*, Oxford Univ. Press, 2006, 135 ; Id., *European tort law: features of a diverse landscape*, in *European Union Private Law*, Cambridge Univ. Press, 2010, 171.

¹⁷ See V. Kerry Smith, *Natural Resource Scarcity: A Statistical Analysis*, *The Review of Economics and Statistics*, 61, 3 (Aug., 1979), pp. 423-427 .



course by supranational law. In general, as Cees van Dam has recently written, “*Tort Law deals with the question of whether someone can be held liable for damage he or she has caused [...]; the terminology of Tort Law is not self-evident, as Tort Law is a common law concept that does not have a parallel in continental Europe*”¹⁸.

In the debate concerning the Europeanization of Private Law (so, not only of national tort laws) there are many references to terms such as “**unification**”, “**harmonization**”, “**approximation**” and “**convergence**”. Well, the first one suggests that legal systems of two or more jurisdictions cease to be distinct and are replaced by a single legal text. The concepts of “harmonization” and “approximation” are synonymous with one another in the European context, and refer to the introduction of common rules on particular aspects in Member State. Finally, it is important to underline that the notion of “convergence” denotes similarity on particular aspects between different jurisdictions¹⁹.

Knowing that the trend towards a Europeanization of Private Law has a lot of support in Europe nowadays (despite its obvious flaws), the **generic question** posed by this paper is **how a model of governance** (that is the mechanism through which the rule structures in place in any community are adapted), and in particular **the judicial one** (“*alias*”, the rule of European Tort Law), could become consolidated as a stable set of practices.

In other words, seeking the answer to the question that I have posed in the Introduction of this paper means, first of all, underline that in the European context there are many categories of liability in base of which interests are protected or not. Indeed, the “*mare magnum*” of the European Tort Law is plenty of different fishes which show different cultural approaches taken on this topic from the Member States. Just as an example, it is possible to list: (i) **intention and negligence torts**; (ii) **violation of statutory rules**; (iii) **strict liability**. Then we also should face the different souls behind the various concepts of “**causation**” and of “**definition of damage**” that is, just like the former, a general requirement for liability in damages not only for contractual liability but also for non-contractual one and which it is based on negligence or on strict rules²⁰. Moreover, there are liabilities for **movable objects**, for **immovable ones**, for **other persons**, **liability in emergency cases** and, finally, **for public authorities**.

¹⁸ C. van Dam, *European tort law: features of a diverse landscape*, in *European Union Private Law*, 160.

¹⁹ See C. Twigg-Flesner, *The Europeanisation of Contract Law*, London – New York, 2008, 9.

²⁰ Liability rules can only be effective if the law provides a remedy. Besides, about the remedy of damages, many legal systems provide the possibility of an injunction, which is particular effective in order to prevent or stop ongoing infringement of the claimant’s right (for example nuisance by causing noise or smell). For example, consider that Courts in certain circumstances also have the power to impose a mandatory injunction by virtue of which the defendant is ordered to take positive action to rectify the consequences of what already has been done. Cf. C. van Daam, *European Tort Law*, 2006, 301; H. Stoll, *Consequences of Liability*, in A. Tunc (edn.), *International Encyclopaedia of Comparative Law*, XI/8, Tübingen: Mohr, 1986; H. Mc Gregor, *Personal Injury and Death, in*; C. von Bar, *The Common European Law of Torts*, I – II, Oxford Univ. Press, 2000.



So, European Tort Law shows many different pictures and all of them need to be properly studied and correctly interpreted. Think for example to the many categories of liability which are mainly related to someone's quality as a **supervisor over persons or things**. My mind runs to supervisors of movable objects, of premises, of ground and roads and, why not, of other persons. Well, from a comparative point of view negligence and strict liability rules are at stake in each of these various categories. This is why during my analysis I will make a comparison of the various rules and cases in different legal systems in comparable situations. The reader will see that in some area of Tort Law rules of strict liability can be compared whereas in other ones rules of negligence liability have a most deep impact.

Taxonomy is a non-visible challenge for comparatists because categories are often taken for granted and believed to be more or less the same from one legal system to another as, for example, people believe that words and meanings coincide when translating from one language to another²¹.

Well, I think that taxonomy is a very important factor to discuss about during a comparative approach and I would like to explain my point of view starting from **Thomas Reed Powell's** thought. He was a constitutional lawyer and political scientist used to say that if you think about something that is related to something else without thinking about the thing to which it is related, then you have the legal mind. Categories always shape the substance of the law and always have a significant impact on its development and on the understanding that we may have of it. Moreover, categories deal with the structure of legal system²².

So, this is why this paper uses the terminology of "**tort**" rather than "delict" or "extra-contractual liability": "tort" is a typical **common law term** which does not have a proper parallel in the continental legal systems. Also the word "European" in the locution "European Tort Law" needs further clarifications although it is not intended to be a very clearly defined concept²³. However, many Comparative Law books on extra-contractual liability currently use all the "tort" terminology and nowadays that methodology has become common parlance. It is also true that general concepts such as "contract" or "damage" do not have a common definition and this means that they are understood at national level in the national tradition. However, those traditions are rightly different and these concepts differ from country to country. Secondly, a comparative lawyer or, in a bigger sense, jurist, have to face the impact of "**national coherence**" to understand that many times comparable cases are all of sudden dealt with in a completely different way.

²¹ This is obviously wrong. See M. Grimaldi, *The Circulation of Legal Thought Outside of Linguistic Borders*, speech to the *European Affairs Commission of U.I.N.L.* ("C.A.E."), October 2010, Valencia, Spain; A. Sen, *Rights, Laws and Language*, *Oxford Journal of Legal Studies*, 2011, 437-453.

²² E. Descheemaeker, *The Division of Wrongs: A Historical Comparative Study*, Oxford Univ. Press, 2009.

²³ See C. van Daam, *European Tort Law*, 5.



Well, in my opinion, after have considered all these matters, we should ask ourselves another question, that is: what is the meaning of the “**conflict of laws**”? The concept of “conflict of laws” will be used here with a specific area of interest because traditional European conceptions of its functions are currently undergoing considerable changes. It is also quite true that the specifically European brand of conflicts thinking (focused on such familiar private law during the second half of the past century) and the quest for decisional harmony about international trade has to a large extent been dissolved under the pressure of both institutional and economic factors relating to the transformation of the nature and content of European Private Law and of adjudication.

Everybody knows that the **European Commission** notes very wide divergences among national legal systems which, it states, constitute an impediment to the smooth functioning of the common market. In short, the European Commission has relieved “the problem” of unification. But, once noticed this, for what interests our analysis, I have to say that a considerable number of differences between the various European legal systems deserve to being studied with the right attention and the right approach in order to put the quest for harmonization into the right perspective.

First of all, **tort law systems may be compared on the level of rules** (fault and strict liability) as well as the differences between codification and common law may be taken into account with the **pivotal role of the Courts in developing tort law itself**. Secondly, a comparison may be carried out on the level of the **differences behind the rules**, (e.g., legal-cultural differences, differences in policy approach and in the role of rights) and this approach will conduct the lawyer to understand that, at least in certain areas, it is possible to find enough **common ground** between the various legal systems **to discuss further about harmonization**.

For instance, talking about **fault liability**, one could assume, at least at first glance, that a **French victim** is better off than a German one since the latter has to prove two more requirements than the first one (see arts 1382 -that is one of the most general tort provisions ever drafted- 1383, 1384 al 1 *Code civil* Vs. § 823 I and II, 826 BGB²⁴). That is

²⁴ In Germany, the three general rules with restricted fields of applications are called *Grundtatbestände* and can be easily found in the Sections quoted. Each of these provisions contains five requirements for liability: *Tatbestand* (the violation of a codified normative rule), *Rechtswidrigkeit* (unlawfulness), *Verschulden* (intention of negligence), *Kausalität* (causation) and *Schaden* (damage). Moreover, the BGB contains not only three general rules but also three specific rules which are called *Einzeltatbestände*: § 824 about financial and economic trustworthiness, § 825 about the infringement of sexual integrity and § 839 about the breach of an official duty. Finally, in addition to causation and damage, both general and specific rules require a *Tatbestand*, *Rechtswidrigkeit* and *Verschulden* and all together are the core of German fault liability (*Verschuldenshaftung*). The concept of unlawfulness has also gained some foothold in the French doctrine (*fait illicite*), but in English law it does not play an explicit role in establishing liability because it is just at the foundation of it. Cf. Roger, in Koziol (edn.), *Unification of Tort Law: Wrongfulness*, 198, 39; D. Howarth, *The General Conditions of Unlawfulness*, in *Towards A European Civil Code*, 2004, 607-644.



because there is a **striking variety** in the **number of requirements for liability based on negligent conduct**²⁵ in each country: only one in France (fault), two in **England** (duty of care and breach of duty), three in **Germany** (*Tatbestand*, *Rechtswidrigkeit* and *Verschulden*). Besides, we should never forget that all legal systems provide **strict liability rules** in addition to the basic negligence liability rule when they are unable to lead to satisfactory results (although, for example, the well-known English reluctance towards this kind of rules, related to the concern for unfathomed economic consequences for society, as properly criticized by **Basil S. Markesinis** and **Simon Deakin**²⁶).

Furthermore, always in the area of **fault liability**, at least two systems can be discovered and distinguished easily: (i) the **casuistic systems**, like the ones of Germany and England, which limit the scope of application of fault liability beforehand by specific requirements established by tradition or designed by the legislator and capture the necessary restrictions in specific requirements, and (ii) the **conceptualist systems**, like the French one, that departs from a general rule and leave it to the Courts to set the limit of application, for instance by using the requirement of causation²⁷. Indeed, the Tort Law provisions of the French *Code civil* are very general (as the Italian ones, see arts. 2043-2059 *Codice civile*) and are supposed to be interpreted by the Courts in the spirit of the ideas of the French Revolution. But a closer look and analysis reveals that **to a certain extent the total of formal requirements in the different systems is the same**: the French *faute* is comparable to the English combined concepts of duty of care and breach of contract and to German combination of the three concepts quoted.

So, in all national tort law systems **the basic requirements for fault liability** is **intentional** or **negligent conduct** and the main difference lies in the circumstance that **English** and **German tort laws** contain additional requirements which imply that not every kind of misconduct is sufficient for liability (also if they are not playing an important role). This, in fact, means that a **French claimant** has a much higher chance of obtaining compensation than an English or, in some cases, a German one, because he can effectively rely more often in rules of strict liability.

If a comparatist would like to explain the structure of **strict liability** he (or she) must remember the distinction between conceptualistic and casuistic systems that I have written about earlier. **French Tort Law** uses a very general approach to this matter (indeed it is considered an exception all over the European context) with two general rules of it and Courts usually use art. 1384, s. 1, *Code civil* for discover an effective strict liability rule for things and persons (although this “*modus procedendi*” is clearly against to the legislator’s will), whereas **England** only has few general rules (for example about damage caused by defective products, by animals and by employees) because, as I have pointed out, over there

²⁵ For a new analysis of the concept of “negligence”, see J. Raz, *Responsibility and the Negligence Standard*, in *Oxford Journal of Legal Studies*, 2010, 30, I, 1-18.

²⁶ See *Markesinis and Deakin’s Tort Law*, Oxford, Clarendon, 2003.

²⁷ Cf. C. van Daam, *European Tort Law*, 113.



this matter is treated as an outcast which one should rely in exceptional circumstances²⁸. **German Tort Law**, instead, is very different because liability for persons is not considered “strict”: it is just established with a rebuttable presumption of negligence²⁹ and, in general, it doesn’t have a general strict liability for defective goods of or dangerous substances and many specific rules are written in special Acts.

Finally, analyzing the impact of European Tort Law in the European integration process means also consider a number of problems concerning the **language(s)** in which this kind of law must be expressed. In particular, I mean its **terminology** and the style of legislative drafting to be adopted. Several strategies have been suggested by many scholars in order to address the most important challenges in developing a suitable European legal language within the various natural languages involved, but, as we know, the “language issue” in the European context requires some different treatment because in the recent decades European Private Law has regulated subjects which in many European countries form part of Private Law also thanks to the Courts’ law-making³⁰.

Knowing that the **multilingual character of the European Tort Law** has many aspects and practical consequences which deserve an extended treatment, certainly more than can be provided here, I would just like to underline that frequently there are no realistic alternatives to using legal terminology that is already established in a single country. But, considering that, from one side, I view the law, Courts and judging as instances of a more generic social phenomenon and activity and that, from the other side, I believe that the law itself is conceived not as “*sui generis*” matter but as a precise type of institution (with a normative structure) which interacts with other systems and rules (e.g., ethics, sensibility, religion) to shape outcomes, is it simple to understand that I agree with one of the most important aims of Comparative Law, that is to reject any kind of forced **legal transplant** of different legal concepts or cultural approaches from one country to another one³¹.

1.2. As **M. Stuart Madden** has written “*Tort Law represents a society’s revealed truth as to the behaviors it wishes to encourage and the behaviors it wishes to discourage. From causes of action for the simple tort of battery to the more elegant tortious interference with prospective advantage, the manner in which individuals or groups can injure a protected interests of others seems almost limitless*”³².

²⁸ *Rylands Vs. Fletcher*, (1866) LR 1Ex 265 and *Read Vs. Lyons & Co Ltd.*, (1947) AC 156. More details in J. G. Fleming, *Law of Torts*, 9th edn., North Ryde, 1998.

²⁹ See C. van Dam, *European Tort Law*, 75.

³⁰ Cf. R. L. Creech, *Law and Language in the European Union: The Paradox of a Babel ‘United in Diversity’*, Groningen, Europa Publishing, 2005.

³¹ Cf. M. Grimaldi, *The Circulation of Legal Thought Outside of Linguistic Borders*, speech to the *European Affairs Commission of U.I.N.L.* (“C.A.E.”), October 2010, Valencia, Spain; A. Sen, *Rights, Laws and Language*, in *Oxford Journal of Legal Studies*, 2011, 437-453.

³² M. Stuart Madden, *Exploring Tort Law*, 11.



These words are pretty clear. Their meaning is that the dynamism and the ferment of Tort Law both show that its most prominent identified objective continues to be the **creation of an optimally uniform body of law** that gives notice to all that certain behaviors that cause injury or loss to others will trigger obligations, usually including the **cessation of the wrong conduct** and the **compensation of the injured party** for harm caused to him³³. So, the restoration (when, where and if possible) of the famous and well-known “*status quo ante*” is what Tort law always asks and looks for. More recently, this form of corrective justice and its motivations have been reevaluated and enlarged to include Tort law justifications with an economic basis. I refer to movements as “**Law and Economics**”, “**Economic Analysis of Law**” (EAL) or terms as “**cheapest cost avoider**”. The common assumption lying behind these terms and names is that the various economic paradigms suggest that an informed and rational individual (the well-known “*homo oeconomicus*”³⁴) will make decisions that tend to ensure that the benefits he enjoys by his activities are not outweighed by the sum total of the internalized potential liability costs, including secondary and social costs.

Well, I would like to use this paper also as an occasion to **merely address** the potential contribution of the EAL to the debate concerning the need for harmonization of Tort Law in Europe³⁵. First of all, as I just have said, it is clear that EAL enables a debate concerning the economic functions of Tort Law. Its approach is built on the well-known theories of **Ronald Coase, Guido Calabresi, Steven Shavell, William M. Landes, Richard A. Posner, Robert Cooter, Thomas S. Ulen** and **Pier Giuseppe Monateri**³⁶ who, for example, argue that a strict liability rule will especially be useful in case of hazardous activities. It is true to say that the economists will not immediately analyze all the legal refinements of the Tort Law system, which has the advantage of focusing on goals and functions of Tort Law at a more general and abstract level, but it is also true that while focusing on the prevention of accidents and of the costs of this very delicate operation, EAL can effectively explain why and how many European Tort Law systems have chosen a strict liability regime for hazardous activities and have kept a negligence/fault regime for non-hazardous activities.

In short, this kind of analysis has the capacity to make clearer how much **economic background** is hidden under many specific rules of Tort Law and, to me, it can really give an important contribute to the debate around a European integration and harmonization of

³³ *Ibidem*, 1.

³⁴ Cf. V. Dahrendorf, *Homo sociologicus*, (1958), 3rd edn., Rome, 1989, 32, 55.

³⁵ M. Faure, *Economic Analysis of Tort Law and the European Civil Code*, in *Towards a European Civil Code*, III, 2009, Kluwer Law International, 2004.

³⁶ G. Calabresi, *The costs of accidents, a legal and economic analysis*, New Haven, Yale University Press, 1970; W. Landes and R. Posner, *The positive theory of tort law*, *Tort and Law Review*, 1981; S. Shavell, *Economic Analysis of Accident Law*, Cambridge, Harv. Univ. Press., 1987; P.G. Monateri (with others), *Il mercato delle regole*, I-II, Bologna, 2006.



Private Law, and so towards a possible European Civil Code using the “**efficiency**” **criterion**. Indeed, this criterion is a focal point for EAL because Law and Economics provides everyday its critical analysis of Tort Law through it.

At the same time another important contribution offered by this approach to the European integration process is demonstrated by the fact economics has focused many efforts on the division of competences within federal systems. This is really a topic which, in the context of European harmonization process, is obviously relevant to the subsidiary principle. From an economic point of view, the question which is addressed in the economics of federalism is what the optimal level would be for specific types of regulation. In other words, I think that **Michael Faure** is right when he writes that “*the economic criteria which are advanced in the literature in favour of harmonization can also be applied to the various areas of Tort Law, such as environmental liability, product liability of medical malpractice. In all of these cases it is possible to indicate, with the help of EAL and the use of its instruments, that the possible benefits of harmonization may be*”³⁷.

Nonetheless, there are also some negative aspects which we should consider whilst analyzing this particular kind of approach and I think that it would be important to spend few words about them too. For instance, one of its negative sides is that **economics will simplify the working of Tort Law by not addressing the details of the legal technique**. EAL focuses its efforts on functions and goals and hence usually not on legal detail and, at least about Tort Law, is concentrated only on its instruments and goals (this will lead some lawyer to argue that economics hereby simplifies and refined legal reality of Tort Law). Partially, this is undoubtedly the case and they are undoubtedly true. But I strongly believe that this kind of methodology could be used to take a critical look at existing European legislation and thus to provide a critical perspective for the “judging European legislation”. In other words, it is time to focus our attention to the analysis of whether the economic argument for the harmonization of the different conditions is valid or not. Moreover, maybe I should also say that this point of view can really help the developing of our debate because applying the economics of federalism to the harmonization of Tort Law within Europe has a particular advantage: a balanced view can be presented of the need to harmonize Tort Law. Indeed, **EAL does not come up** with black or white statements in “favor of” or “against” the integration process, but just “*allows balanced criteria to be advanced on the basis of which those areas and topics which may be good candidates for harmonization are indicated*”³⁸.

So, understand with the EAL if a European harmonization is not only **right** but also a **sustainable economic development** means that we have to concentrate our investigation on those areas of Tort law where it seems there are no differences, at least in practice. This “*modus operandi*” is evidently useful, but it is also not so simple to conduct because the mentioned concept of “sustainable economic development”, which is central to the

³⁷ Cf. M. Faure, *Economic Analysis of Tort Law and the European Civil Code*, in *Towards a European Civil Code*, 660.

³⁸ *Ibidem*, 661.



achievement of these key-goals, must be absolutely thought in terms of policies and programmes designed to meet the needs of present generations without compromising the ability of future generations to meet their own needs too.

For example, we could think about the choice between a **strict liability** regime and a **negligence/fault** one for, then, establish that the legal systems largely agree on the area where a strict liability regime is applied can be the model to use for conceiving and building the “Europeanization” of Tort law. This is a very important option because we already know that the differences in form are merely technical and of course do not reflect varying preferences. But at the same time it is possible to concentrate our efforts on the weighing of interests that every judge has to undertake in a negligence case when he has to establish a standard of care for a particular behavior. In this second case, if we can find out that the underlying methodology is pretty similar in the various systems considered, then we could assume that harmonization is might be possible.

And what about the various disadvantages? Is this model able to remove any disadvantage or not? Of course not, because, for instance, also using this approach many relevant **differing outcomes** will remain and the only way to consider these outcomes as an advantage is hoping that they correspond to differing preferences not so relevant.

Moreover, there are many areas in Tort Law where the **different preferences** are much stronger than the ones mentioned above but lawyers and politicians should not touch and manipulate them because there is no reason to do otherwise. Take for example the **amounts awarded for non-pecuniary losses**: although many have argued that there are still considerable differences between the Member States in that respect, is pretty difficult to argue that these differences themselves lead to huge economic problem. So, there would not be a strong argument to harmonize and it is therefore really difficult to see any transaction cost benefits from any harmonization process here.

Everybody knows that the European Commission’s intention is to extend and go more deeply into the debate concerning European legal integration because it has noticed **very wide divergences among national systems** of Contract and Tort Law (although most Commission’s directives in the area of European Private Law are minimum directives, which give national legislators the freedom to go further, for example by giving consumers more far-reaching protection³⁹). More precisely, the Commission notes two kinds of problems: (i) there are inconsistencies in the “*Acquis Communautaire*” in the area of Contract and Tort Law on the road towards an uniform application of European law; (ii) these divergences among the national legal systems upset the operability of the internal market.

Well, if these are the problems noticed with a comparative-economic approach from the Commission, my conclusion is that **an harmonization of European Tort Law is not needed from an economic point of view** and, to be honest, this specification is really

³⁹ *Communication from the Commission to the European Parliament and the Council: A more coherent European contract law, an Action Plan*, COM (2003), 68 final (OJ C 63, 15.3.2003). See also COM (2001) 398 final, 11.7.2001 (OJ C 255, 13.9.2001).



useful since the European Commission itself has long advanced an economic (and weak) reason to justify its action. And the fact that there are many examples of economic market integration with differentiated legal systems (i.e., United States), is just the edge of the iceberg.

In short, I think that from a **comparative** point of view at the **normative level there might be important reasons in support to the desire to conduct an harmonization** of European legal systems and, of course, of European Tort Law but they cannot be just “economic”⁴⁰ and they should not use to push it with political excuses. Of course this means also the harmonization of the various conditions of competition that are keeping alive the integration process **where it is possible** but, in conclusion, there may be other, **“non-economic”**, reasons to justify harmonization and they need to be spelled out more specifically. And, as lawyers, **is our business to do so**.

1.2.1. Here is a question: does exist (or not) a “**common core**” across the various European legal systems about the recoverability of “**pure economic loss**” (PEL)? And, if yes, is it a methodological or a substantive one? This question is very important because, as I will say in detail farther, the Europeanization of Tort Law risks to produce a heavy burden among European societies in terms of transaction costs.

Well, getting the answer means understand first that PEL is one of the most discussed topics in today’s Tort Law scholarship because it is used to understand to what extend should Tort Law rules be compatible with the market orientation of the European legal systems⁴¹. Secondly, notwithstanding the importance of this kind of discussion, there is not a **universally accepted definition of PEL** and what is generally clear enough is just the negative cast and the patrimonial character of the loss that I am talking about. For example, in those countries where the term is well known its meaning is essentially explained in a negative way (loss without antecedent harm to plaintiff’s person or property) and the word “pure” plays a fundamental role, for if there is economic loss that is connected to the slightest damage to a person or to the property of the plaintiff then the latter is called “consequential” economic loss and the whole set of damages may be recovered without question⁴².

⁴⁰ J. Spier – O. Haazen, *The European Group on Tort Law (“Tilburg group”) and European Principles of Tort Law*, *Zeitschrift für Europäisches Privatrecht*, 1999.

⁴¹ The literature about it is overwhelmingly. See, e *multis*, R. Bernstein, *Economic Loss*, 2nd edn., 1998; S. Banakas (edn.), *Civil Liability for Pure Economic Loss*, 1996; J. Kleineman, *Ren Förmögenhetskada*, 1987; J. M. Barendrecht, *Pure Economic Loss in The Netherlands*, in E.H. Hondius (edn.), *Netherlands Reports to the Fifteenth International Congress of Comparative Law*, 1998; B. Markesinis, *The German Law of Torts*, 4th edn., 2002; L. Houry, *The Liability of Auditors Beyond Their Clients: A Comparative Study*, 46 *McGill Law Journal*, 2001, 413.

⁴² See M. Bussani - V. V. Palmer, *The Frontier Between Contractual and Tortious Liability*, in *Towards a European Civil Code*, 698.



Besides, before going any further, I would like to underline that the question posed above must face the fact that Comparative Law research always shows that analysis about PEL is not just a “Civil law *Vs.* Common law” issue. Indeed, also inside the Civil law system is possible to find some very important differences about the nature and the concept of the PEL and that is why understand them is as much important as understand the various similarities. The **irrelevance of the legal families** is well-shown by this example: **France, Belgium, Italy and Spain** take a liberal stance toward PEL and a main characteristic of their Tort Law is the presence of a **unitary general clause** which does not screen out PEL. To be more specific, France permits recoveries in a very huge number of delict cases while in Spain, Italy and Belgium the number of delictual recoveries is significantly minor. Instead, **The Netherlands, England and Scotland** show a different situation: these systems are characterized by causation case-by-case approach which carefully studies the concrete socio-economic implications before granting or denying recovery for PEL⁴³. However, judges in The Netherlands appear to be more receptive to this form of loss than the ones in UK although there are similarities in their reasoning and their judicial technique. Finally, the Tort Law of **Germany, Austria, Portugal, Sweden and Finland** is distinctly more conservative towards this issue. For instance, a striking characteristic in the first three systems is that PEL is not among the so-called “absolute rights” which are protected by their Tort Law⁴⁴. So, overall the appeal of the BGB provisions, pecuniary losses which are not the consequence of the infringement of some subjective right are not recoverable⁴⁵.

Well, in conclusion, it is time to appraise to what extend arguments and counterarguments about the recoverability of PEL have helped in shaping the actual rules of European legal systems and, at least **methodologically speaking**, we can say that **there is not a general common core** across Europe. Indeed, there is: (i) a flexible causal determination in **Spain, Italy and France**; (ii) a preliminary judicial screening using a “duty of care” analysis in other countries (i.e., **England and Scotland**); (iii) a rigid causation techniques aiming straightforwardly to exclude “third party loss” (i.e., **Sweden and Finland**); (iv) a scheme of absolute rights that, by deliberate omission, leaves this interest protected (e.g., **Germany, Austria and Portugal**)⁴⁶.

By the way, it is possible to identify a **limited and substantive common core** among European legal systems of principles governing PEL: (i) consequential economic loss is recoverable in every system whether the source of the loss is intentional or negligent

⁴³ *Ibidem*, 704.

⁴⁴ For a comparative analysis between Italy and England, see M. Ferrari, *The Liability of Private Certification Bodies for Pure Economic Loss: Comparing English and Italian Law*, in *Journal of European Tort Law*, 2010, 1, 3, 266.

⁴⁵ G. Wagner, in *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, Vol. 5, *Schuldrecht Besondere Teil*, III, 5th edn., 2009, Vor § 823 para 14 f.

⁴⁶ See the results of the study conducted by M. Bussani – V. V. Palmer, *The Frontier Between Contractual and Tortious Liability*, 712-713.



conduct; (ii) PEL turns out to be a head of damage that faces no problem across European countries when plaintiff's loss is due to negligently performed professional services; (iii) all systems agree that intentionally inflicted economic loss is recoverable where the conduct in question is regarded as culpable, immoral or contrary to public policy.

2. Tort Law is about balancing the interests of individuals and of public bodies by distributing **rights, duties** and, as I have said above, **money**. Once understood that, it is simple to get that study the policy which European Tort Law acts with means study the different Courts' approach within Europe. As **Martin Shapiro** has written in his "*Courts. A Comparative and Political Analysis*"⁴⁷, students of law have generally employed an ideal type of Courts involving: (i) an independent judge applying; (ii) preexisting legal norms after; (iii) adversary proceedings in order to achieve; (iv) a dichotomous decision in which one of the parties was assigned the legal right and the other found wrong. This is absolutely true. And it is like that because a study about Courts is essentially the **measurement of deviance from a "general" prototype** to the real Courts in respect of different cultures and legal sensibilities⁴⁸.

I will discuss farther about the differences lying between the Courts of the United Kingdom and the Continental Court systems, and about the basic social logic of both, because right now I would like to introduce the matter underlying the focal point of my analysis: the differences lying behind the so-called "**Code Law**" and the "**Case Law**" systems.

As everybody knows, the contrast lying down among these two systems is that Common law is drawn as a Case law model and Civil law as a Code law model. This is not so the right perspective because, first of all, we must not confuse the term "Common law" with the term "Case law": the latter includes but is not exhausted in Common law (not only a constitutional law but also a considerable extent statutory law is shaped by judicial decisions with some occasional intervention from the real legislators). Anglo-American judges often construct their opinion as a mosaic of forms, citations and comments about earlier judicial decisions and this is the reason why in many cases they proclaim that the source of a basic legal rule being applied is a previous decision. More particularly, **English judges** treat a precedent as evidence and/or example of an underlying Common law rule and not as a single piece of legislation.

Instead, in the **Continent** (where, for example, since the World War II, **German** judges usually adopt a *quasi*-American style because leading precedents are openly acknowledged to provide and improve the working legal rule) judges generally argue about their codes interpreting them and making direct comments about their provisions. The

⁴⁷ The Univ. of Chicago Press, 1981.

⁴⁸ About the role of the "Imagine of the Law" worldwide considered, see P.G. Monateri, *The Books and the Gavel: L'immagine della Legge e la teoria del "Sublime americano"*, in *Polémios*, 1, 2011, Turin.



extent to which Continental judges rely upon case law is well evidenced by the publications of the opinions of the leading appellate tribunals. Besides, academic authority (mostly well-known legal scholars) always influence their conduct.

From the other side, understand the Common law system (and not only the American one) requires, for example, the study of the thought of **Frederick Pollock**⁴⁹, a contemporary of Pound (and of Max Weber) who has taught us that Common law is not systematically rational, and of **James C. Carter**⁵⁰, an accomplished corporate lawyer and leader of the American bar. Instead, the Civil law system requires, for example, the study of **Max Weber**'s⁵¹ approach because he explained that its legal formalism is the product of systematic rationalization developed in the universities and its pragmatism allows to realize that in European countries academic jurists "controlled" legal education and, of course, legal development whereas in Common law system lawyers were trained mainly by practitioners and judges to develop the law in a piecemeal fashion. Of course, to get not only the role that European Courts nowadays play but also the meaning of the difference between Case law and Code law, it is important to know the role of modern **European Codes** because it could help to understand how much European Courts are (or not) bounded to legislative provisions and how they must conduct the **judicial interpretation** of them.

One of the main problems is the **linguistic indeterminacy**. To eliminate it would require the existence of an exhaustive test for determining the application of a general term under any kind of condition. But this is simply impossible. For example, the writers of the **French Civil Code** only gave a few very brief and general provisions and so it uses a very general terminology. Much of its provisions consist of verbal symbols that do not contain "a source of law" but only some line of legal thought. So, to being applied, this Code needs the constant help of a serious and well-conducted interpretation and in fact it frequently relies on the academic training of lawyers and of scholars to fill in detail the gap of substance in its provisions. The general character of articles 1382-1386 implied that the legislator only gave the rough guidelines and left the interpretation to the Courts (the historical perspective regarding this kind of approach is self-evident). This is the reason why, for example, when a case arrives to the highest Courts one of the judges has to explain

⁴⁹ *The Genius of the Common Law*, New York: AMS Press, 1967 (1911).

⁵⁰ His arguments were no so different from its orthodox predecessors. As he wrote, "That a judge can not make law is accepted from the start. That there is already a rule by which the case must be determined is not doubted [...] It is agreed that the true rule must somehow be found. Judges and advocates –all together– engage in the search. Cases more or less nearly approaching the one in controversy are adduced, analogies are referred to. The customs and habits of men are appealed to. Principles already settled as fundamental are invoked and ran out to their consequences; and finally a rule is deduced which is declared to be the one which the existing law requires to be applied to the case", *The Ideal and the Actual in the Law*, 24 *American L. Review*, 1890, 752. See also R. Watson Gordon, *The Legacy of Oliver Wendell Olmes Jr.*, Stanford Univ. Press, 1992, 42.

⁵¹ *Economy and Society*, Berkeley Univ. Ca. Press, 1978.



it to his colleagues whom are about to decide it and his report will not only summarize the arguments of the plaintiff and of the defendant, but provide an analysis of his own (so, individual cases are analyzed and distinguished academic authorities are cited). As a direct consequence, it means that in France Courts were (and still are) able to keep the Code's provisions up to date over the centuries in a society always on moving. It also means that the French doctrine plays an important role in analyzing, explaining and interpreting the decision made by the Courts (and by the *Cour de Cassation* mostly).

Besides, it is also different the **legislative approach** among the various European countries. Have different policies means in concrete terms have many different number of features, such as the importance of strict liability, the treatment of public authorities and of course the function of Tort Law itself. Just to give some ideas, as I have pointed out above, **French Code civil** uses a very general and loose provisions that were supposed to be interpreted by Courts in the spirit of the French Revolution. The **United Kingdom** does not have a single national Tort Law but three regional tort law systems: the Law of England and Wales, the one of **Scotland** and, finally, of **Northern Ireland**. Furthermore, **England** (which emphasizes on the freedom to act and where the concept of "rights" is under exam by scholars for the fact that the relationship between this freedom and them is considered to be awkward because its Tort Law is strongly focused on remedies and not on them⁵²) focuses its approach primarily on how someone should behave. Its Tort Law is mainly about "**distributive justice**" to provide compensation and to regulate conduct, as it has been stated, for instance, in *Nettleship Vs. Weston* and in *McFarlane Vs. Tayside Health Board*⁵³ where it is pretty clear that the reluctance towards rules of strict liability is related to the concern for unfathomed economic consequences for society (reluctance that is also related to the absence of a general liability for public authorities for lawful conduct which may cause a disproportionate damage)⁵⁴.

Passing over, **German** Tort Law (which focuses on rights protecting a person's life and goods because the main Tort Law provision, 823 I, BGB, is used to protect citizens' Private Law rights as the right to life, the right to physical integrity, the right to health, the one to personal liberty and the property's one) must be positioned in an intermediate "step" among England and French systems because it is strongly focused on regulating conduct but also stretches the requirements as much as possible within existing framework. To be truthfully, German Civil Code is not so much a complete and detailed set of laws or an

⁵²Although it is possible to find an exception of that in *Chester vs. Afshar*, 2004, UKHL, 41, AC 2005 134, All ER 2004/4, 587, ETL, 2004, 230.

⁵³ 1971 and 1999. See C. van Dam, *European Tort Law*, 127.

⁵⁴ Few words to specify that "corrective justice" is concerned about making good a wrong without taking into consideration the needs, the character, or the worth of the parties concerned, whereas "distributive justice" is concerned with the distribution of goods in society as a whole, taking into consideration every person's need and desire. Cf. E. J. Weinrib, *The Idea of Private Law*, Cambridge, Harvard Univ. Press, 1995, 1; C. van Daam, *European Tort Law*, 127-130.



incredibly elaborate textbook about law (that means that **lawyers and judges** always seek to resolve a case without expecting to find a specific, concrete and useful legal rule for the situation involved) but, as well as the French system, German one is based on notions of equality and solidarity as well as in both countries an extreme doctrine of judicial law-making –called free “**decision theory**”– enjoyed a considerable vogue in the early twentieth century. So, German Tort Law takes a somewhat intermediate position between the French and the English systems although it seems closer to the first one. Nonetheless, the difference between them, lying on the fact that the former (which has very general provisions as I have pointed out above, because it does not take rights as its starting point because they are implied in the way that the *Cour de Cassation* has interpreted the few provisions of the *Code civil* dedicated to liability) is primarily focused on the matter of how someone can get damages.

Finally, **Belgium, Switzerland and The Netherlands** have introduced versions of the French code during the nineteenth century and are very similar to it for many aspects⁵⁵. About **Italy** it is important to underline that the Code of 1942 (which uses a language that is not absolutely precise and self-explanatory) is very similar to the one made on 1865 and many Italian legal authorities and scholars admit that it needs to be strongly interpreted by judges. Indeed, it contains specific provisions for judicial interpretation where it does not clearly determine the case at bar. This means that in Italy **scholarship** played (and still plays) a fundamental role in legal culture and in **developing judicial interpretation** and it has always been emphasized in the literature. But, although this emphasis, what has not been so noted is “*the extent to which the existence of that role undercuts the clear and simple picture of Civil law judges (and, at least to me, of Italian ones) deciding their cases according to a set of preexisting legal rules neatly and unambiguously set forth in the national codes*”⁵⁶. This is why, considering for example the art. 2059 of the Italian *Codice civile* (which states that damages for non pecuniary loss are only to be awarded in the cases provided for by the legislator),

⁵⁵ See, about Belgium, its Civil Code (Book III, Title IV, Chapter II), the Act of 3 July concerning Employments Contracts, the Act of 21 November 1989 on Compulsory Motor Vehicle Liability Insurance, the Act of 10 February 2003 Concerning the Liability of and for Member of Staff Serving Public Legal Bodies, the Act of 31 March 2010 Concerning Compensation for Damage Resulting from Medical Care; about Switzerland its Code of Obligations of 30 March 1911 (First Title, Second Chapter and Title Twenty-Six), its Civil Code (Title Nine, Second Chapter and Title Nineteen on Land Ownership), the Collective Scheme Investments Act of 23 June 2006, the Traffic Circulation Act of 19 December 1958, the Aviation Act of 21 December 1948, the Pipeline Act of 4 October 1963, the Explosive substance Act of 25 March 1977, the Product Liability Act of 18 June 1993, the Environmental Protection Act of 7 October 1983, the Genetic Engineering Act of 21 March 2003 and the Public Liability Act of 14 March 1958; about Netherlands see its Civil Code (Book 6, Title 1, Section 10 on Statutory Obligations to Pay Compensation and Title 3 on Tortious Acts) and the Chapter XII of its Road Traffic Act (*Wegenverkeerswet*). All these texts are consultable on K. Oliphant – B. C. Steininger, *European Tort Law. Basic Texts*, Jan Sramek Verlag, 2011.

⁵⁶ M. Shapiro, *Courts. A Comparative and Political Analysis*, The Univ. of Chicago Press, 1981, 147.



the various developments in Case law have clarified that after the entry into force of the Constitution in 1948, the reference to cases where the law allows the repair of non-pecuniary damage also refers to the provisions contained in the Constitution as it recognizes and guarantees the inviolable person's rights (sometimes extendible to companies as well, as the right of image and of reputation clearly show)⁵⁷.

2.1. As I just have said, the **United Kingdom** is characterized by the presence of three legal systems: the Common Law in England and in Wales, the Scots Law in Scotland and the Anglo-Irish Law in Northern Ireland. In particular, **Scots Law** is an important example of a mixed system and has methodological connections with the Roman-Dutch Law characterizing for example the **South Africa's** legal system. Is it possible to discover some analogy between these three legal systems, for instance in the role of the Courts and in the way they are managed by judges' creative work since their creation in the Middle Ages, when the law was not conceived as a set of rules enacted for a specific territory. Nonetheless, the difference lies in the Courts' social influence.

The construction of the **Scottish legal system** has been organized around a formal co-presence of sources of case law with codified sources⁵⁸. The Court of Session, High Courts, Sheriff Courts and Justice of the Peace Courts are administered by the Scottish Court Service (SCS). The Scottish Court Service is also responsible for the Office of the Public Guardian. Besides, in Scotland, the Superior Courts consist of the Court of Session and the High Court of Justiciary. The Principal Clerk of Session and Justiciary is responsible for the administration of all these Courts and is based at Parliament House in Edinburgh, whereas the Court of Session is the Supreme civil court (always in Edinburgh). It sits in an appeal capacity and also as a civil court dealing with disputes between people or organizations. As everyone can image, their jurisdiction might involve cases relating to debt, damages, divorce and children. The principal judge is called the Lord President. Administrative functions are mainly dealt with by the General, Petition and Inner House and Extracts Departments. The High Court of Justiciary deals with criminal appeals and serious criminal cases and trials are held before a judge and jury. It is important to explain that in Scotland a jury consists of fifteen people who are selected for each trial by means of a ballot. People cited to attend for jury service are chosen randomly from the electoral roll. Although the Court is based in Edinburgh, trials are held in towns and cities throughout Scotland as a means of reducing inconvenience to witnesses, jurors and court users. The principal judge is called the Lord Justice-General and, finally, the administrative functions in relation to criminal matters are mainly dealt with by the Justiciary Office.

Anyway, while analyzing the influence of the Common law in the building of Scots law, it is important to say that they have different judicial systems. Indeed, in the **Common law**

⁵⁷ See the twins sentences by the *Corte di Cassazione*, 2008, nn. 26972, 26973, 26974, 26975.

⁵⁸ More on <http://www.scotcourts.gov.uk/index.asp>



legal system⁵⁹, the old County Courts' system had been equated with the criminal magistrates Courts by the *Courts Act 1971* and then they have been modernized with the *Magistrates' Courts Act 1980* and, finally, with the *Justice of the Peace Act 1997*. The system of superior Courts was reformed by the famous *Judicature Act 1873*: it established the *Supreme Court of Judicature*, which since 1925 has been divided into the **Court of Appeal** from one side and the High Court of Justice in the other one (which has its roots in Queen's Bench and in the Chancery).

Besides, for many centuries, the highest appellate court had been delegated to a precise Board of the House of Lords mainly formed by the Lord Chancellor and by the Lords of Appeal in Ordinary (or, as they were called, Law Lords), but in 2003 the fundamental figure of the Lord Chancellor has been suppressed and the position of the Law Lords has been re-considered⁶⁰. Moreover, the *Constitutional Reform Act 2005* established the formal change of the name of the House of Lords to the **Supreme Court** which is entrusted with the

⁵⁹ About the history and the evolution of one of the most important Common law institutions, the jury, in disputes relating to rights on land, where the defendant was authorized by Henry II to assert its own reasons rather than the evidence of the judicial duel, through the witness of twelve neighbors, and also about the role of the not so well-known "petty jury", see F. W. Maitland, *The Form of Action at Common Law*, Cambridge, 1948, and A. Padoa Schioppa, *Storia del Diritto in Europa. Dal medioevo all'età contemporanea*, Bologna, 2010, 209.

The importance of the jury should not be taken for granted. Continental trial procedures are really different from those present in Common Law systems just thanks to the jury. In Anglo-American countries trial must be shaped to present all the evidences and arguments in a case at one single time and are placing largely orally. Then the jury can hear the whole case, reach a verdict and then return to their private home as, for example, the movies "*The Verdict*" and "*The Untouchables*" clearly show. Instead, Continental Courts have always been staffed by professional, long-serving and judicial bureaucracies that usually employ judges of lower rank to gather and prepare the evidence in written form (for, then, present it to higher rank judges). Furthermore, about the importance fo this institute, think for example that recent years have witnessed the widespread diffusion of the jury trial across the globe and nations as culturally and geographically diverse as Mexico, Kazakhstan, and Japan have recently taken steps to adopt mechanisms for the lay adjudication of criminal cases. This is why, considering that ever since the late 18th century, when Thomas Jefferson's *Declaration of Independence* decried that the "absolute Tyranny" of King George "depriving us ... of the benefit of Trial by Jury", jury plays a fundamental role in trials, I really recommend the reading of R. Y. Park's paper *The Globalizing Jury Trial: Lessons and Insight form Korea*, *The American Journal of Comparative Law*, 2010, 58, 525.

⁶⁰ The Lord High Chancellor of Great Britain, or Lord Chancellor, not to be confused with the *Chancellor of the Exchequer*, is a senior and important functionary in the government of the United Kingdom. Remembering that Sir Thomas More (executed with John Fischer in 1535 by Henry VIII) was one of the most important early Lord Chancellors, He is the second highest ranking of the Great Officers of State, ranking only after the Lord High Steward. The office he heads was known as the *Lord Chancellor's Office* between 1885 and 1971 and the Lord Chancellor's Department between 1971 and 2003. Well, as I have said, in 2003 the Department was renamed the *Department for Constitutional Affairs* and the Lord Chancellor was appointed Secretary of State for Constitutional Affairs. Then, in 2007, it was renamed *Secretary of State for Justice* and the department became the *Ministry of Justice*.



constitutional jurisdiction and that will absorb the functions of the glorious Judicial Committee of the Privy Council. It sits in the former Middlesex Guildhall, on the western side of Parliament Square (an highly symbolic of the United Kingdom's separation of powers, balancing judiciary and legislature across the open space of Parliament Square, with the other two sides occupied by the executive –the Treasury building– and the church – Westminster Abbey–). More precisely, from 1st October 2009, the Supreme Court has replaced the Appellate Committee of the House of Lords as the highest court in the United Kingdom and has assumed jurisdiction on points of law for all civil law cases in the UK and all criminal cases in England, Wales and Northern Ireland⁶¹.

The Supreme Court decides devolution issues about whether the devolved executive and legislative authorities in Scotland, Wales and Northern Ireland have acted or propose to act within their powers or have failed to comply with any other duty imposed on them. Devolution cases can reach the Supreme Court in three ways: (i) through a reference from someone who can exercise relevant statutory powers such as the Attorney General, whether or not the issue is the subject of litigation; (ii) through an appeal from certain higher courts in England and Wales, Scotland and Northern Ireland; (iii) through a reference from certain appellate Courts.

For a complete view on the Tribunals and Courts of **Northern Ireland**, which has a very complicated but at the same time interesting judicial system, see the Northern Ireland Courts and Tribunals Service Organizational Structure documents⁶².

Finally, it is true that the United Kingdom does not have a single unified judicial system but of course there are exceptions to this rule. For example, in immigration law the **Asylum and Immigration Tribunal's** jurisdiction covers the whole of the United Kingdom and also in employment law there is a single system of employment tribunals for England, Wales, and Scotland (but not for Northern Ireland)⁶³.

2.2. In this section I would like to be really brief because, as everyone can image, the picture of the Continental Courts' system is pretty difficult to describe and resume in few pages. Nonetheless, there are certain common characteristics that may by explain⁶⁴.

Comparing Continental Courts to Anglo-American judiciary is very important and interesting because, to give an example, as **Amalia D. Kessler** has recently written, "*when American lawyers think of the French judiciary they imagine a system radically different from their own - a system, in short, of bureaucratized justice. Indeed, the French system is widely viewed as typifying the*

⁶¹ More on <http://www.supremecourt.gov.uk/>

⁶² Available on <http://www.courtsni.gov.uk/en-GB/pages/default.aspx>

⁶³ More on <http://www.justice.gov.uk/about/index.htm>

⁶⁴ For an interesting attempt to apply the conventional prototype of "courtiness" to the Civil law Courts of Western Europe, which a I have written about in the previous pages, I suggest again the reading of M. Shapiro, *Courts. A Comparative Political Analysis*, 155.



*European judicial model - made perhaps most famous through John Langbein's much cited article on The German Advantage in Civil Procedure. But while this bureaucratized model of the French judiciary is, insofar as it extends, accurate, it is also woefully incomplete and thus misleading*⁶⁵.

She is totally right. Indeed, as she has noticed, to depict the French judicial system in these terms is like to ignore a vital component of the system itself (think for instance to the commercial and labor Courts) that is premised on an elective judiciary. To being more precise, in this other and ignored component of the French judicial system, judges lack formal judicial training of any kind and are elected mid-career to serve temporary terms of office. The focal point is that those elected to office belong to the particular professional (and social) groups whose disputes they will resolve and which, in turn, are responsible for electing them. So, what information we can get from such a system? The answer is pretty simple: its judges are expected to have the substantive expertise (and social and political legitimacy) effectively necessary to resolve disputes.

But here my aim is just to remember that in most countries there are basically **four levels** of Courts: local ones at the lowest level, presided by a singly judge and using a simplified procedures (for example, in **Italy**, many cases, also of criminal law, are devolved to a Judge of the Peace which uses a simple and fast procedure to get the case's solution⁶⁶). At the next level is possible to find the **Courts of first instance** (which serve as trial courts in most difficult cases; they are usually composed by a panel of at least three judges and which usually use former and longer procedure than the one mentioned above). Then, there are regional **Courts of Appeal**. Appeal is a very important matter to discuss about because it is nearly a universal phenomenon in addition to give a fundamental contribute to the stability of triadic structure in the seeking of justice.

Finally, at the highest level there is a single **Supreme Court** (usually named "of Cassation", although in Spain is just called *Tribunal Supremo* and in Portugal is called *Supremo Tribunal de Justiça*) which, in few words, hears appeals that raise particularly serious issues of law and sites in large panels, usually composed by seven or more judges. Besides, there are also **Constitutional Courts**. Here the picture is very complex to resume but it is important to remind that in France, since the Revolution, the judicial review has always been rejected because the power of the *Conseil d'État* to resolve certain conflicts and impose authoritative interpretations of statutes on government agencies has been the closest approach to this institute. However, the rigidity of the modern French Constitution adopted in 1958 represents a revolutionary break with the historical legal tradition of that country. Now the control of the respect of the Constitution is centralized under the *Conseil Constitutionnel's* jurisdiction and since 2008 there is a subsequent and incidental control (closer to other civil law experiences, see art. 61 Cost.)⁶⁷. The **German constitutional jurisdiction** is centralized

⁶⁵ *Marginalization and Myth: The Corporatist Roots of France's Forgotten Elective Judiciary*, *The American Journal of Comparative Law*, 2010, 58, 679.

⁶⁶ See art. 7, *Codice di Procedura Civile* and, about criminal law, *Legge 468/1999* and *D.lgs. 247/2000*.

⁶⁷ See the *Loi constitutionnel* n. 724. Cf. also P.G. Monateri – A. Somma, *Il modello di civil law*, 165.



under the *Bundesverfassungsgericht* (BverfG) which has the functions written from art. 93 to art. 100 of the *Grundgesetz für die Bundesrepublik Deutschland*. Its members are elected by a first half from the *Bundestag* (they stay in charge for 12 years) and the second half from the *Bundesrat* (with a two-thirds majority and they cannot be re-elected)⁶⁸.

It is pivotal to underline that this model has circulated **all over the world**. As someone knows I am very interested about the nature of the **South African** legal system as a mixed one and also about its connection with the European legal model and the Europeanization of Contract law (towards a **European Civil Code**). So, for example, after saying that in (very) general terms it is possible to describe the South African law as part of the Civil law legal family it is important to specify that its categorization as mixed legal system is undoubtedly and always drawing attention to the various sources of it. More particularly, the Common law of South Africa has been rooted in Roman-Dutch Law when it first found application at the Cape of Good Hope but, nevertheless, it appears that, in practice, the entire *Ius Commune* of Western Europe of that time was (and still is) accepted and applied as the dominant law of South Africa.

Without spending too much words about this matter, it is the case to highlight that in South Africa an important distinction is made between superior and lower Courts⁶⁹. South Africa has a regime of constitutional supremacy and all legislation is ultimately justiciable by the Constitutional Court. More precisely, the Constitutional Court has jurisdiction as the Court of final instance in constitutional matters and its decisions are binding upon all Courts⁷⁰.

Then there is the Supreme Court of Appeal, which is based in Bloemfontein, the Judicial Capital of South Africa. It is the highest Court which has the final say on all matters, except those that involve the constitution. For example, all criminal appeal cases from the High Court end up in this court, unless the appeal relates to a point of constitutional law, in which case the Constitutional Court has the final say. The Supreme Court of Appeal used to be called “*The Appellate Division*”, as it only hears cases on appeal. Except for the Constitutional Court, no other Court can change a decision of the Supreme Court of Appeal as its decisions are binding on all courts of a lower order. Three to five Judges listen and decide on all cases of the Supreme Court of Appeal. The final decision of this court is the one supported by the majority of the judges listening to the case. At the

⁶⁸ See G. Parodi, *La Germania e l’Austria*, in P. Carrozza – A. Di Giovine – G. F. Ferrari, *Diritto Costituzionale Comparato*, Rome-Bari, 2009, 221.

⁶⁹ More details are available on http://www.westerncape.gov.za/eng/pubs/public_info/C/32303#4

⁷⁰ The Constitution of the Republic of South Africa, which is one of the most progressive in the world and enjoys high acclaim internationally, has been approved by the Constitutional Court (CC) on 4 December 1996 and took effect on 4th February 1997. It is the supreme law of the Republic because no other law or government action can supersede the provisions of the Constitution. More on <http://www.info.gov.za/documents/constitution/>



lower level there are several provincial High Courts with a defined geographical area to determine all matters between litigants, including also constitutional jurisdiction.

Besides, it is known that in addition to the regular chain of Courts, or the double chain of criminal and civil Courts, most **European nations** have developed a number of specialized Tribunals. In Italy, for example, commercial and civil law has been merged, but in France and in Germany they have not and it is possible to distinguish many jurisdictions: social security, agricultural, rents, tax, juvenile.

In **South Africa**, within the structure of the High Court, a number of special Courts have been created to deal with specialized matters, such as tax appeals, water cases, patents, competitions appeals (see the Competition Act 89 of 1998) and land claims appeals (see the Restitution of Land Rights Act 22 of 1994).). Finally, at the lowest levels there are the Magistrates' Courts, created by statute with limited jurisdiction (they deal with the less serious criminal and civil cases and they are divided into regional Courts and district Courts; in Criminal Courts the State prosecutes people for breaking the law) and the Small Claims Courts, which hear any civil matter involving less than R 7 000 (unless both the person suing and the person being sued agree to limit the claim to less this sum), although some cases cannot be taken to this Court even if they involve a lower amount (examples of these claims are divorce, matters concerning a will, malicious prosecution, wrongful imprisonment, seduction, breach of promise to marry).

3. In this paper I am focusing my efforts on the role of national Courts in creating the “soul” of the European Tort Law. I am doing so not only discussing about the role of **Comparative Law** in the European integration context and reflecting on the help that **EAL** is able to give to this type of analysis, but also discussing the role of **European Courts in developing a precise model of integration**. More precisely, in Chapter 2 I have discussed about Courts' nature and structure, also reflecting on **the congruence of administering and judging** in the European context. This was the basis to discuss here about an important circumstance, that is that during the quest to get the case's resolution, either under preexisting legal rules, judges are undoubtedly law-makers. In short, judges exercise a particular form **political power** every single day whilst approaching to a case. And, as we will see further in detail in Chapter 3.2., considering that **politics plays a very incisive role** in judging, it is pretty clear that politics has another field where exercises its influences.

Law and politics in Europe are “brothers in arms” since the 1960s when, to be precise, the ECJ rendered a set of fundamental decisions that gradually served to “constituzionalize” the Treaty of Rome, officially signed in 1957⁷¹ (the Court of First Instance was established

⁷¹ More precisely, it was signed on 25 March 1957 by Belgium, France, Italy, Luxembourg, the Netherlands and West Germany, this Treaty is an international agreement that led to the founding of the European



in 1989, but the ECJ itself was established already in 1952 with the Treaty of Paris, signed in 1951, to implement the legal framework of the European Coal and Steel Community - ECSC-). Well, after what I have discussed about so far, now it is time to get some conclusions about this delicate process and it is time to do so **carefully control for a host of factors**, including **the flaws of harmonization** if forced with **political methods**.

First of all, it is important to re-underline that there are three different fields concerning European Tort Law: (i) the case law on the European Convention on Human Rights (ECHR); (ii) the European Law; (iii) the one that interests us, “*alias*” the **national tort law systems in Europe**. These three different levels of the concept of European Tort Law are very deeply different but, at the same time, they are increasingly influenced by other national systems and by supranational law. Understand the European Tort Law level that I have discussed about (that is, the last one listed), means spend few words about the importance of legal traditions and of diversities. Indeed, **European Tort Law is still a matter of diversity** rather than harmony. As we will see farther, Tort Law is not just a system, because it is about balancing the various interests of individuals, private and public bodies by distributing rights, duties and, then, money. So, it is true to say that there are many differences in policy approaches between the various legal systems, as it is true that they are reflected in a number of features that, as lawyers and comparatists, we have to know and to understand if we want to get the different concepts of what is just, fair and reasonable among Europe.

By the way, if, from one side, EU Law and the ECHR mentioned above as “arms” of the Council of Europe⁷² are powerful engines to provide a leaps towards harmonization, from the other side Comparative Law, that over the last decades has become an indispensable source for legislators, lawyers and, of course, **judges** not only at national level, has taught us that “**diversity**” is not a synonymous of “**distortion**” and that differences may impose extra compliance costs, but there is no empirical evidence that this leads to market problems (and, I already said it, the United States’ market is just one of the many possible examples about it). This is why, as we will see farther, the main question about the nature and the effects of the law is a question about **who counts as a legal authority and how such authority is to be exercised is determined by predetermined** (also social) **rules**. So, once considered the **lack of competence of EU** about the general harmonization, I am glad to know that a **general harmonization of European Tort Law is not on the political agenda** because, despite of what one could assume, **there is not an empirical evidence that internal market needs it**.

More particularly, it is just the case to say that the lack of competence of EU is based, considering what I will discuss about the nature of the law and the making of a legal system

Economic Community on 1st January 1958. See for more details A. Stone Sweet, *The Judicial Construction of Europe*, Oxford Univ. Press., 2004.

⁷² Just remember that its goal is to protect individuals, businesses and organization against infringement of their human rights by the Contracting States.



in Chapters 3.2.-3.2.1., on the lack of the indispensable authorizations and instructions. Indeed, authorization and instructions are “legal recipes”: the first ones indicate who has the power to do which actions whereas the second ones inform the power holder how to exercise it. Therefore, “*when the law creates authorizations, [...] power holders need not piece together from other parts of the law that their actions will have certain effects; rather, they can tell directly from the recipe that they have the power conferred*”⁷³.

To explain the reasons of my point of view, I need to spend some words about the concepts of “**law**” and “**legality**” and about the role of “**politics in judging**”. Finally, I will focus my efforts on the meaning of the “**judicial law-making**”, on the meaning “**legal traditions**” and on the importance to respect them refusing any kind of their manipulation always believing that the unity of a set of legal norms is derived from precise social, cultural and political elements.

3.1. The law is a necessity (“*ubi societas, ibi ius*”). It, which is an act of will, is usually identified with a set of rules (called “norms”) which aim is to prevent the emergence of disputes or to settle them or at least, in its physiological aspect, to organize the various forms of social life. So, people are expected to respect them. This is why it conveys two different types of content: descriptive and prescriptive (we ought do what it is described in the norm).

As we have already seen in Chapter 2, according to **James C. Carter**, that a **judge cannot make law** is accepted from the start. A judge, he has said, can only make the law by making a wrong declaration, which then becomes a part of the law through “*stare decisis*”⁷⁴. Of course he was referring to American judges, but his thought is pretty clear and should be analyzed worldwide. These words must be compared with those said by one of the most important constitutional scholars: **Albert V. Dicey**. The title of a lecture that he has delivered at Harvard Law School in 1898 was “*Judicial legislation*” and he began it declaring “*As all lawyers are aware, a large part and, as many would add, the best of the law of England is judge made law...it is, in short, the fruit of the judicial legislation*”⁷⁵.

Even considering that Carter’s assertion appears less strange in light of his background (he knew what others meant when they insisted that judges make the law, but he believed in a bigger definition of “law” as a ultimately social act in origin), he was pretty wrong and in the next pages I will demonstrate that a judge, especially the one who must decide in the field of Tort Law, is at least sometimes an “**occasional**” legislator. Indeed, he makes (occasionally) the law by giving a **new interpretation** of a statutory law or of a norm written in a code, and he does it sometimes privileging social facts over moral ones or, otherwise, doing the exact opposite some other times. But he always must use (and in the

⁷³ S. J. Shapiro, *Legality*, Harvard Univ. Press, 2011, 229.

⁷⁴ See *The Ideal and The Actual in The Law*, 24 American L. Rev 752, 1980.

⁷⁵ See *Law and Public Opinion in England During the Nineteenth Century*, London, 1905-1914.



majority of the cases he does so) the **guidance offered by the law** knowing that this kind of “path” is often determinate because also general terms have a pretty clear common core.

Nevertheless, explain this aspect while conducting an analysis on the evolution of the European Tort Law requires also to concentrate some efforts on the concept of “**Law**” and of “**Legality**”. In short, considering that everyday judges all around Europe (and all around the world) have a strong relationship with the law whatever this term effectively means, my aim throughout this section will be to take up the well-known questions of “**what is the law**”. First of all, I will do so by discussing and examining the **making legal system** process (which is an art and not a perfect science) because this is a matter concerning the main functions of the law in a modern society and, then, by investigating how closely those functions are tied to the use of force by officials (so by judges as well⁷⁶). Besides, I will conduct my analysis also reflecting on the “**judicial legislation-making**” as a fundamental Courts’ activity⁷⁷. Doing all these things, of course, means also consider (in general terms) **how judges think** when their approach themselves to a case whilst they are conducting the judicial process.

As **Oliver Wendell Holmes Jr.**⁷⁸ has written in his “*The Path of the Law*” (1897), “*When we study law we are not studying a mystery but a well-known profession. We are studying what we shall want in order to appear before judges, or to advise people in such a way as to keep them out of court. The reason why it is a profession, why people will pay lawyers to argue for them or to advise them, is that in societies like ours the command of the public force is intrusted to the judges in certain cases, and the whole power of the state will be put forth, if necessary, to carry out their judgments and decrees. People want to know under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves, and hence it becomes a business to find out when this danger is to be feared. The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts*”.

I really believe in this consideration and I would like to start my contribution reminding that the term “law” (as the term “legal system”) is very ambiguous and the question “what is the law” has many possible answers. The law is something natural and artificial at the same time and, by and large, as I have already said, can be easily considered as a **system of norms** (the law is a rather unique normative system because its provisions are made by human actions).

So, I must start saying that law’s essential character is prescriptive because it purports to guide action, later modes of behavior and, in short, constrain the practical deliberation of

⁷⁶ Judges are legal officials as legislators, regulators, prosecutors and police officers are as well. They are generally grouped together as officers of the law in order to distinguish them from those who lack legal power to act.

⁷⁷ An analysis on the concept of “Law” requires more than few pages, so consider this my little contribution as just an introduction to this delicate matter.

⁷⁸ Who Jerome Frank had qualified as “the completely adult jurist” in *Law and the Modern Mind*, 270, (1930), 2009, UK.



its subjects. As pointed above, the law is artificial because it is typically a product of an act of will but it is also true to say that sometimes it evolves naturally and that many laws in developed legal systems grant rights of various kinds and provide legal powers to change other rights and obligations⁷⁹. Once noticed that, I think it is important to focus our attention comparing the efforts made by Hobbes, Austin, Kelsen, Hart and Bentham⁸⁰.

A long tradition in jurisprudence⁸¹, which has started with **Thomas Hobbes**, sees the law as the tool of political sovereignty because with it the political sovereign rules and directs the conduct of its subject. Well, surely a modern legal system is more complex than that but this approach is important to get the basis of the discussion. For Hobbes (as for **Hume**) the law secures compliance by threatening coercion and sanctions whereas, for **Locke**, it acts as third-party adjudicator, providing impartial resolution of disputes for those who consent to its authority.

Jeremy Bentham was a great jurist. In particular, he was a deep observer of its society and, in fact, not only elaborated the **Panopticon's theory** (1791) many years before the George Orwell's *Big Brother* in 1984 (1949), but also has become the father of the **modern legal positivism**. He exposed its irrational beliefs about the concept of law because, for him, legal positivism was a liberating doctrine considering that it exposes the contingency and mutability of the law. If law is an act of human will and since it is created by human activity as I just have said, for Bentham it could always have been created otherwise. That means that there are no excuses for accepting the "*status quo*" and since the law is flexible, where it is broken, it ought to be fixed.

Austin's theory of law is very interesting because, as **Benjamin N. Cardozo** has written, from holding that the law is never made by judges, the votaries of the Austinian analysis have been led at times to the conclusion that is never made by anyone else (customs, they say, no matter how firmly established, are not law until adopted by the Courts)⁸². According to him, what makes "normative" instructions consists in the origins of them. Indeed, for him, instructions or commands of the political sovereign are what we call

⁷⁹ A. Marmor, *Philosophy of Law*, Princeton Univ. Press, 2011, 2-3.

⁸⁰ T. Hobbes, *The Leviathan*, Cambridge: Hackett, 1994; J. Bentham, *An Introduction to the Principles of Morals and Legislation*, New York: Hafner, 1948 (reprint of the edition of 1823); J. Austin, *The Province of Jurisprudence Determined*, London; H. Kelsen, *General Theory of Law and State*, New York: Russell and Russell, 1961; H. L. A. Hart, *The Concept of Law*, 1st edn. Oxford, 1961. I really recommend the reading of the mentioned S. J. Shapiro's *Legality*.

⁸¹ With the term "jurisprudence" is it possible to indicate the normative one and the analytical one. The former is the study of the law from a moral perspective and comprises two branches (one interpretive and one critical) whereas the latter, which is not concerned with morality, analyses the nature of law and legal entities and includes legal systems, laws, rules, rights, authority, validity, obligations, interpretations, sovereignty, Courts, property, crime, tort, negligence and other stuff.

⁸² See *The Nature of Judicial Process*, Feather Trial Press, 2009 (1921), 125. Cf. also W.J. Brown, *The Austinian Theory of Law*, 311, G.B. LLC, 2010.



law. He sharply has said that only if the command or the instruction emanates from the political sovereign, then it is legal. Moreover, for Austin the sovereignty is the “sovereignty” simply because the bulk of population habitually obeys it. But his theory is not only unable to provide and explain certain basic features of sovereignty, it is even unable of accounting for the very intelligibility of claims and thoughts about legal authority which a legal systems is composed by.

Understand **Kelsen’s** thought is necessary to analyze Hart’s philosophy of law. As he explicitly has said, the main function of law in pour societies is to monopolize the use of force and is pretty obvious that in his view the law is essentially an instrument of political sovereignty as well as Austin believed (this view belongs to a long tradition started with Hobbes and this is the reason why it is important to remember the Hobbesian approach as I did at the beginning of this Chapter). But Kelsen’s failure to provide a non-reductive theory of legal validity, is a lesson that Hart carefully learned and his alternative point of view to Austin is a reductive version of Kelsen’s theory of the basic norm. For **Hart**, Austin first failed to recognize that sovereignty is an institution itself because institutions are constituted by rules; then, he continued, Austin failed to recognize that rules are not merely regularities of behavior. So, once showed that the idea of sovereignty is essentially a juridical one, he found both of the components of Austin’s theory fraught with incongruences, and it is simple to get why: we cannot explicate the source of the law in term of political sovereignty because the concept of sovereignty is for real itself a juridical one and, secondly, only a fraction of the law is composed by commands (i.e., a contract is formed by an offer and an acceptance and the law which determines what is the former and what is the latter doesn’t have the structure of “do this or else” as a command instead requires).

Once considered that, for Hart, Kelsen’s analysis missed the crucial point that the main function of most legal norms is actually to guide the conduct of law’s subjects. In short, **the law is there to provide reasons for its subjects to behave in certain ways** and not to tell officials (as **judges**) when they must use force to compel behavior. The point is that in every legal system there are many types of norms and there is absolutely no reason to assume that all these types contain a command. In short, Kelsen and Austin share the view that it is the element of using force to compel compliance that makes the law a unique normative systems but Hart challenged this argument (so challenged the Hobbesian tradition) using the variety of legal norms (and their different social functions) and the tight connection that the Hobbesian tradition in jurisprudence forged between law an political sovereignty⁸³. Knowing that, and so disagreeing with Kelsen’s thought, is also useful for judges themselves because they are officials always working with a different ideas and types of “sanctions”.

Hart founded his point of view on the idea that legality is constituted by the **rules of recognition**. For him, these are social rules and the theoretical functions of them is basically the same that Kelsen has described, but the difference between Hart’s rules of

⁸³ A. Marmor, *Philosophy of Law*, 41.



recognition and Kelsen's basic norm lies down behind the nature of these norms: for Hart, a rule of recognition (i) has not to be presupposed; (ii) is an actual and social norm followed by a given community and to explain it he needed a detail account of what social rules are and, of course, how they can ground both the ideas of "legal validity" and "normativity". For him the rules of recognitions are the rules formed by actual patterns of conduct, belief and attitudes that determine and identify the ways in which law is created and modified in the relevant community and, in particular, they are followed by judges and other legal officials. Besides, he has identified three possible ways in which one can account for social rules. The first one of these three ways is also the most important, that is the **internal point of view**: it is the best one for the members that accept the rule as reasons for their action. By the way, there are also an "external" and an "extreme external" point of view and the latter, in particular, only reports on the rules in terms of observable regularities of behavior.

What here needs to be expressively underlined is that Hart's aim was to show how the internal point of view can be accounted for in terms of people's belief and attitude. The consequence of this approach is that the upshot of the distinction is about the **external point of view** and not about the internal one. Nevertheless, someone has discovered and revealed an hole in Hart's theory. If social rules of recognition are the ones followed by judges and other officials, how can those same rules constitute the role of such people as judges and officials? Well, for Hart, we can only identify certain individuals as judges (and in general term as official) thanks to precise rules that confer the relevant legal power and make them as "institutions". So, as **Andrei Marmor** has rightly noticed, it seems that from one side we need some legal rules to explain who counts as "an official" but, at the same time and from the other side, what counts as law is determined by the rules that those officials must follow⁸⁴.

3.1.2. Once considered that, another important step in Hart's theory that should be remembered here is that he described the law as "**descriptive and morally neutral**". Hart was a legal positivist as Austin and Hume were, but his approach was in part different because he clearly assumed that in spite of variations between different legal systems, **law is a fairly universal phenomenon** in human societies and, as a consequence, has certain features that are essential or characteristic of law (and we can identify them without forming any moral or political judgment about the merits of the law). This thought has caused many reactions from many contemporary legal philosophers as **Ronald Dworkin**, that has presented his theory as a moral-political one claiming that without relying on some views about what makes law good and worthy we cannot understand what law really is⁸⁵. His assumption is that the main moral-political question about law is the question about the

⁸⁴ *Ibidem*, 56.

⁸⁵ See *Law's Empire*, Cambridge, MA, Belknap Press of Harvard Univ. Press, 1986, and *Justice in Robes*, same editor, 2006.



legitimacy of coercion and, so, in developing this, judges (as all officials) have an essential role. For Dworkin the justification of the use of the (collective) force is what theories about the nature of the law should care about.

By the way, the law has a normative and an authoritative side at the same time, and this is why the study of what the law “is” requires to spend some effort on the concepts of “**authority**” and “**normativity**” as well. Indeed, in my opinion, the legal system of a community is made up by a set of rules that help to regulate the organized life of the community itself. Then, the legality of a rule is not the consequence of some peculiar character inherent its particular content but is something due to the fact that the rule itself must be considered, according to the criteria set by each legal system that it contributes to form, provided by “authority”. This, in short, is the “normativity” of a rule.

As **Jospeh Raz** has said, the law is essentially an authoritative institution and the reasons to comply with an authoritative directive are, by their very nature, identity-related reasons⁸⁶. The focal point is that a debate on the **nature of authority** is obviously a debate about how to give some sense to the idea that one person is obligated to do something because another person has the power to tell him what he must/should/could (or not) do. In fact, whenever the law imposes an obligation or establishes a right in your favor it has a dual message: you ought to do it and you ought that way because the law says and requires so. The final message, if we want to find it, is that is the law that requires what you (or others) ought to do.

It is a matter about **who counts as a legal authority** and why rules (also the social ones) determine how to exercise this authority. Once again **Hart’s approach** could really help our analysis because he has said that in every society that has a concrete functioning legal system, there are also certain social rules followed by relevant population that determine who “counts” as the legal authority and how such this authority is structured. This, as **Andrei Marmor** has rightly pointed out, is the “**conventional foundation of law**”⁸⁷.

Finally, considering that Bentham and Austin (as other positivists) often argued in favor of replacing Common law-decision-making with legislation and codification (and so that Hart was not the first to point out the deficiencies of guidance by precedent), analyzing “when”, “where”, “how” and especially “why” judges “make law” with their decisions requires, from one side, to know that the aim of judicial legislation (that is the resolution of a dispute) is clearly different from the aim of legal reasoning (that is the discovery of the law) and, from the other one, also requires to spend some effort on the steps that are necessary to make a **legal system**. Indeed, realizing in general terms how a legal system is made will be important also to get the **lack of competence of the European Commission** about the Europeanization of tort laws.

⁸⁶ See *The Concept of a Legal System*, Oxford Clarendon Press, 1970, *The Authority of Law*, Oxford Clarendon Press, 1979, and *Between Authority and Interpretation*, New York: Oxford Univ. Press., 2009.

⁸⁷ Princeton Univ. Press, 2011, 73.



I believe that **Scott J. Shapiro** is right when he says that the making of a legal system is somehow a form of **social planning**. Once have considered what makes “social” a planning activity and that a planning theory is able to secure existence of fundamental legal rules without generating vicious circles or infinite regresses, he says, legal institutions “*plan for the communities over which they claim authority, both by telling members what they may or may not do, and by identifying those who are entitled to affect what others may or may not do. Following this claim, legal rules are themselves generalized plans, or planlike norms, issued by those who are authorized to plan for others. And adjudication involves the application of these plans, or planlike norms, to those to whom they apply. In this way, the law organizes individual and collective behavior so that members of the community can bring about moral goods that could not have been achieved, or achieved as well, otherwise*”⁸⁸. I think he is right because, once argued that as there are no specific ends that intentions are supposed to serve in human soul, there are no substantive goals or values that the law is supposed to achieve an realize. This is the main scope of the legal institutions/authorities mentioned in Chapter 3.1.2.

But, before going any further, now is time to make an important specification about their nature from an ontological point of view. **Ontology** is one of the most fundamental discipline because its aim is to study (and describe) what “there is” (whereas **Epistemology** studies and describes “how” we know what “there is”)⁸⁹. Well, judges, as money, countries, an obligation, a wedding, a pen, Europe itself and Wall Street are all **social objects**. They have many differences from the ideal (as numbers) and the natural (as a mountain or a lake) ones: in particular they exist only because we think that they exist and they have the shape and functions that we give them⁹⁰.

Institutions and authorities were made in history (and so they are still “possible” and useful) because they were (and still are, although they must prove it every single day) able to creating and sharing a plan for the citizens’ everyday motivating others to heed and follow their plan. So, remembering that “directing” and “authorizing” are not mutually exclusive activities, what I am talking about here is a matter of **normativity and authority** (so, of the normativity of a legal authority) and, at the same time, a matter of sustainability of the development of a manageable social life in legal terms, because one of the principal purposes of this kind of planning is to force each member of the group to internalize the costs and the benefits of his actions in the perspective to get a socially optimal decision for a number of people everyday bigger.

In other words, if we want to understand the “soul” of the law-making process, we have to get that “*a norm is a plan as long as it was created by a process that is supposed to create*”

⁸⁸ See *Legality*, 155. For a different point of view on the impact of Hart’s legal theory see S. Sciaraffa, *The Ineliminability of Hartian Social Rules*, *Oxford Journal of Legal Studies*, 2011, 31, 603-623.

⁸⁹ As I have showed during the *British Association of Comparative Law’s Workshop on The Use of Comparative Law in Postgraduate Programs*, at The University of Nottingham (UK), 1st-2nd July 2011.

⁹⁰ On the extremely fundamental role of Ontology, see M. Ferraris, *Documentalità. Perché è necessario lasciare tracce*, Rome-Bari, 2009.



norms”⁹¹. Then, as I have pointed out above, we should have the right instruments to say that the lack of competence of the European Commission lies down behind the circumstance of who rightly counts as a legal authority. It is a matter of **formal and substantive justification** under a **legitimate authorization and instruction**.

The term “legitimation” indicates an act of providing legitimacy and refers to a process whereby that act becomes legitimate by its attachment to norms and values within in given society. It is the process of making something acceptable and normative within in given society. And the European Commission does not have neither the former nor the latter to conduct (and push for) an harmonization of European Private (and so Tort) Law.

3.2. American judges have a great deal of discretionary authority whilst approaching to a case and an enlightening example of that is well showed by *New York Times Co. Vs. Sullivan*⁹². In this case the Supreme Court ruled out that a public figure cannot obtain a damage for defamation unless the defendant knew, or had been reckless in failing to discover, that the libel or slander was false. This was a rule established in the form of a precedent which halted in its tracks the evolution of a legal regime for regulation defamation of public figures. That is why most Anglo-American lawyers believe that judges use more than just logic when resolving legal issues and, more importantly, that they are legally permitted to do so.

Now, considering that judges in Common law systems use more than just logic when interpreting the law and resolving a dispute, the following question is: what about the European Continent? Do the European Courts have the same discretionary as the American ones or not whilst they are approaching to a case? The answer is that they exercise a **form of (moral) discretion in the penumbra** although the role of the unconscious in judicial decision-making is obscured by the convention that requires a judge to explain his decision in an opinion. Besides, they are also occasional legislators. I know that it might seem that judges would legislate only after they had tried and failed to decide a case by reference to the orthodox materials of legislative text and precedent, but some judge does it in a different way and reverses the sequence: he starts by making the legislative judgment by asking himself what outcome would have the best consequences for the dispute, and only after he asks (always to himself), and then considers, if that outcome is right or not.

We know that under the **John Stuart Mill’s Harm Principle**, every State (and its officials as judges) should not limit one person’s freedom except to prevent or remedy harm to others⁹³. Well, knowing that the search of an impartial, transparent, stable and predictable “*nomos*” not made by men but made by laws was already the pillar of ancient Greek and

⁹¹ S. J. Shapiro, *Legality*, 128.

⁹² 376 U.S. 254 (1964).

⁹³ See *On Liberty*, 1859, New York, reprint edn., 1982.



Roman moral and political traditions, nowadays this research imposes to focalize our efforts on the soul of legal reasoning. And we have to do so also knowing that something new in the realm of justice administration seems to have forth over recent decades: a massive **intervention of international and supranational actors**, both governmental and non-governmental (as the various non-governmental organizations and the multinational corporations), which have mainly acted in the name of the principle of the rule of law within national judicial systems⁹⁴.

There is another thing to say: judges are not law professors. Their job is totally different (as their approach to a case) and this should not taken for granted. Consider, for example, the role of their audience. The primary audience for an academic writing consists of other academics but, for example, an appellate judge, who writes what he hopes is the best opinion for that case, writes for his fellows judges, with at least a glance over his shoulder at the national Supreme Court⁹⁵.

If, as I have said earlier, “**legal activity**” is not simply the creation and application of rules but also an incremental process whose functions is to guide, organize and monitor behavior through the settling of normative questions under precise authorizations and instructions⁹⁶, then “**legal reasoning**”, whose object is a process concerning the discovery and the finding of the “right” law, is not the same thing as legal research and as judicial decision-making. It is an art, not a science. And it is imperfect because there are many limits to legal knowledge (as there are in every art as well). In other words, understand what a “law” is involves more than just looking up a statutory provision in a legal code. This is the reason why legal positivism is very unsatisfying and why jurists against it cannot reconcile a theory of law that grounds all legal facts exclusively in social facts and forgets the realities of legal practice.

After have specified that, if someone wants to know why and how judges are occasional legislators (also all over Europe) it is extremely vital to know first the role of “**legal formalism**” in modern times as a descriptive theory (totally different from an empirical theory about how judges actually make decisions) about the content of modern legal systems. This theory, which has seen by many as flawed because it assumes that judges are prohibited from deciding cases on the basis of moral considerations, is really committed to the four theses of “judicial restraint”, of “determinacy” of “conceptualism” and of “amorality of adjudication” and in short claims that in modern regimes there is always a

⁹⁴ D. Piana, *Judicial Accountabilities in New Europe*, Ashgate, 2010, 1.

⁹⁵For instance, as A. Braun has written in *Burying the Living? The Citation of Legal Writings in English Courts*, *The American Journal of Comparative Law*, 2010, 58, 27, “until recently English judgments were characterized by a dearth of references to academic legal writing” although “recent years have seen English judges openly expressing their interest in academic legal writing. Law reports nowadays are characterized not only by references to books or articles produced by legal academics, but also by numerous examples of cases in which judges declare their indebtedness to scholars for the assistance they gain from their work, or acknowledge the influence legal academics are having on the decision-making process”.

⁹⁶ Cf. S. J. Shapiro, *Legality*, 203.



right answer to every legal question and that is the **responsibility of a judge** to find and apply this answer in a correct and useful way.

Well, it has been useful to analyze **Hart's** thought. He was the first to clearly argue that judges exercise discretion *only* in the penumbra because they are legally bound to the law in applying the law itself. And he seemed to be pretty right considering, for example, art. 12 *preleggi Codice civile italiano*, which states that “*In applying the law cannot be attributed to it the other way that made clear by the proper meaning of words according to the connection of them, and the intention of the legislator. If a dispute cannot be determined with a specific provision, it has regard to the provisions governing such cases or similar matters; if the case is still somehow uncertain, it is decided according to general principles of the legal system*”. At the same time Hart has fixed to distance between positivism and formalism arguing that simply because social facts, which have their limitations, determine the content of the law does not entail that judicial decision making is avoid of moral reasoning⁹⁷.

A **formalist judge** never interprets the law or decides a case by engaging in moral reasoning because, according to the formalist way of thinking, legal reasoning in general, and judicial decision-making in particular, are completely amoral processes. A **positivistic judge** committed to this conception because (in the majority of the cases) he privileges social facts than moral ones (which are crowd out then) in the determination of legal content. This is why positivistic Courts are supposed to play a very restrictive legislative role: even though they may add a new meaning to the law, they cannot revise it even when they are compelling moral reasons to do so. But, indubitably, social facts are limited (as their help in getting a dispute's resolution) and there are many limits of human guidance, so legal positivism, if properly understood, does not assign a reductive role to Courts because actually requires that, at least in certain cases, judges engage in policy argumentation. This means that being a judge generally involves the consideration of genuine **moral concerns** (that, in fact, are rather used by judges in the inevitable penumbra).

In short, although many argue that positivistic Courts are supposed to play a very restrictive legislative role, just in some legal system this is true and rules restrain judges' discretion because in others they accord to judges **substantial discretion to override the law** when compelling moral reasons exist⁹⁸. Nevertheless, the fact is that **conservative judge** has a different approach than a **liberal one** as it has been demonstrated by an important study, made under the supervision by **John Lost**, which has listed the core elements of conservative ideology.

So, knowing that a judge is a public official and that **one intrinsic satisfaction of judging is the utility that some people derive from a public service** (and that it would be insufficient by itself to attract enough highly competent lawyers to Courts' staff), as

⁹⁷ See *Essays in Jurisprudence and Philosophy*, Oxford Univ. Press, 1983.

⁹⁸ S. J. Shapiro, *Legality*, 254-255. See also, as a critique to legal positivism, R. M. Cover, *Justice Accused*, Yale Univ. Press, 1984, when he says that legal positivism encouraged antebellum judges to uphold the fugitive slave law and hence to return runaway slaves to their masters.



lawyers we should ask ourselves why Courts and judges can get their decision wrong? And how is it possible to control the quality of Courts' decision and their law-making process? Considering that from a strong **Dworkinian point of view** the judgment might not be successful at getting the right answer⁹⁹, the institutional answer to this problem is totally different and is concentrated on the fact that appeal Courts at the higher level control the correctness of lower level Courts' decision.

Another possible answer lies in those following facts: (i) “**to decide**” and “**to conclude**” are interestingly different modes to get “the case's resolution”; (ii) there is a imperative duty of judges to decide (with some exceptions as, for example, when a case is outside a Courts' jurisdiction so that, in effect, the only decision to make is a decision to not decide); (iii) decisions are made in a form of public sentences, so it is simple to say that since they are public documents they can be scrutinized for checking **their conformity to the norms of the judicial process** (although what I will say about the “discovery” and “justification”). Besides, we also should remember that from an **ontological (and epistemological) point of view** there is never “a single right” answer because it is always possible to take in consideration different arguments to get different decisions and justifications (and in this sense a wrong judgment has not satisfied ideal conditions of communicative rationality).

There is another thing to say. As **Cicero** has written in “*Brutus*” [152], “*quod numquam effecisset ipsius iuris scientia, nisi eam praeterea didicisset artem, quae doceret rem universam tribuere in partes, lat entem explicare definiendo, obscuram explanare interpretando, ambigua primum videre, deinde distinguere, postremo habere regulam, qua vera et falsa indicarentur et quae quibus propositis essent quaeque non essent consequentia*”. So, interpreting is taking a meaning from obscure “signs” and we all know that there are many different ways to conduct the interpretation of the law. Indeed, one could use: (i) the logical criterion (*argumentum a contrario, argumentum a simili, argumentum a fortiori*); (ii) the historical criterion; (iii) the systematic criterion (see **Celso**, D. 1,3,24: “*incivile est nisi tota lege perspecta una aliqua particula eius proposita indicare vel respondere*”); (iv) the equitable criterion.

Understand these circumstances is pivotal to get another important difference concerning the process of judicial decision-making. Indeed, we must consider two other paradigms about every judgment: “**discovery**” and “**justification**”. This is not the right forum to discuss about them in a long way¹⁰⁰, but it is at least necessary to say that discovery is about a written judgment and tells us what has been the agreed interpretation and justification. Unfortunately, it does not show why and how the solution was chosen (remember what **Lord Mansfield** has suggested). The published version of a sentence does not uncover the reality of the actual process and so the main difficult of this kind of

⁹⁹ See *Taking Rights Seriously*, Harvard Univ. Press, 1977.

¹⁰⁰ More on Joxerramon Bengoetxea, *The Role of the Courts in Developing a European Social Model*, DJØF Pub., Copenhagen, 2010, 283.



approach is mostly methodological: discovery is a very difficult way to investigate and it is very hard to get mistakes made by judges in getting the dispute's solution.

On the other hand there is "**justification**". Its paradigm is interested in the judgment as agreed, signed and published. This is bounded with what I have said above: decisions are made in a form of public sentences and since they are public documents they can be scrutinized for checking **their conformity to the norms of the judicial process**. Nevertheless, in this way the risk lies in the aspect that the judge's official and formal opinion could become the only object of study as access to the case law, and this would be a typical Veil of Maya. Saying it with other words, this is an extreme formal approach to get the "*ratio decidendi*" and, as every extreme thing, has a dangerous side to pay attention with. In fact, it tends "*to neglect the fact that important considerations might actually have had a bearing on the result and yet they do not feature in the written judgment, nor there is anything in such judgment that might give an impression or an indication of the relevant considerations discussed in deliberation, or those carrying the day*"¹⁰¹. The universal norms of a legal system are applied to the particular facts of the case and such operation is not only mechanical or unreflective (that is a part of the creative role of a judge).

However, as **Richard A. Posner** has written in his "*How Judges Think*"¹⁰², when a decision depends on several factors, a jurist should use his intuition than try to evaluate consciously each factor separately and so combine the evaluations to form an ultimate conclusion. It is just a matter of costs: the costs on consciously processing the information may be so high that intuition will enable a more accurate and speedier decision than analytical reasoning would.

There is another thing to say. Every judge is a **labor-market player** and every market is two sided: **buyers and sellers**. So, remembering, that a labor market consists on the buying side of a set of employers who want to hire workers for a particular type of job and on the selling side of a set of workers who prefer that type of job to the alternatives open to them, judges should be independent agents and should not to hear the siren song of the current political incumbents calling on them as they have to not hear any siren song of any kind of promotion¹⁰³. Indeed, promotion seekers to one side, the best the appointing authorities can do to advance their political goals is to appoint judges who share those goals yet. So, although an independent judiciary is a considerable social and economic good thing, it is indubitably that **political inclinations** play a fundamental role in judging.

But I would like to strongly underline that not only political inclinations determine a judge's prior because considering that while doing his (or her) job a judge must follow the law, at the same time there are many other factors than politics that influence a judicial

¹⁰¹ *Ibidem*, 284.

¹⁰² See p. 108.

¹⁰³ *Harvard Univ. Press*, 2008, 57.



decision. And these factors are unconscious, experience, temperament, ideology and all the **other nonlegalist and nonpolitical factors**¹⁰⁴.

Already in **Kant**'s epistemology sensory impressions are made intelligible by being subjected to mind-generated categories such as causation and time. Moreover, as **Benjamin N. Cardozo** once has said, "*we may try to see things as objectively as we please; nonetheless we can never see them with any eyes except our own [...] we no longer interpret contracts with meticulous adherence to the letter when in conflict with the spirit*"¹⁰⁵. So, the focal point is that every judge wants to be a good judge and he (or she) decides cases in accordance to the law but, as Richard Posner has written, "*intuition, emotion, and preconception are all forms of telescoped or tacit thinking, as contrasted with explicit, logical, step-by-step reasoning, and all are influenced not only by such obvious factors as upbringing, education, the beliefs of peers, and reigning social beliefs but also by personality*"¹⁰⁶.

Besides, we should not forget that a busy judge probably wants to decide the case sensibly and with reasonable dispatch because he does not have the time, the inclination and the habit of doing introspection that would make him wonder about the nature of the judgment he is going to do. But from the other side he (or she) is a human being having his (or her) personal inclinations and backgrounds (such sex and race and the ones listed above) and he (or she) inevitably uses his (or her) unconscious to resolve a dispute. This is why in my opinion **Martin Wayne** is right when he points out that in making a judgment one is conscious of both his freedom and his constraint: the former because to make a judgment is to make a choice and the latter because judgment is a matter of deliberation and of weighing different alternatives¹⁰⁷.

In conclusion, the application of "a rule" to "a fact" is pretty clear when both are (at least) pretty certain but it becomes problematic when they are not. In these cases the nonlegalist and nonpolitical factors as intuitions, emotions, preconceptions, education, moral and religious values and all personal characteristics that include race, sex, ethnicity and all the other innate identifiers of a person, play a really fundamental role. It is true that the role of the unconscious in judicial decision-making is obscured by the convention that requires a judge to explain his decision in an opinion¹⁰⁸. This is the reason why what we should call a "good judgment" is an elusive faculty best understood as a compound of empathy, modest, maturity and a sense of proportion. It becomes an important factor because if law were logical then there would not be an admired quality in judges; but law, in most of the cases, is not so logical. Another characteristic of the factors just listed is that

¹⁰⁴ For instance, judges whose background is law teaching rather than private practice tend to be harder on the lawyers who appear before them. And also the gender, like other personal factors, always has been found to play a significant role in judicial decision and this suggests that often judges lack good information about the merits of a case they have to decide.

¹⁰⁵ *The Nature of Judicial Process*, 13, 36.

¹⁰⁶ *How Judges Think*, Harvard Univ. Press, 2008, 98.

¹⁰⁷ See *Theories of Judgment: Psychology, Logic, Phenomenology*, Cambridge Univ. Press, 2006, 5.

¹⁰⁸ Again, R. A. Posner, *How Judges Think*, 110.



they are totally different from experience mentioned above, otherwise it would be impossible to explain how some highly experienced people have poor judgment and some young and inexperienced people have an excellent one. Of course their contribution is opaque and difficult to discover as well, but this should not become an excuse to say that is not possible to declare the methods followed as “good” or “bad”, and then say if judges misfire and so did not get the right decision.

In these cases many of us use their “common sense” card. Indeed, as everybody knows, cultural cognition includes **common sense**, which resembles intuition because is what everybody can get without having to think hard to a specific subject. As **Benjamin N. Cardozo** has written against **von Savigny’s** conception of law as something realized without struggle or aim or purpose, as a process of silent growth, as a fruition in life and manners of people’s history and genius, “*judges do not pick their rules of law full-blossomed from the trees [...] every judge consulting his own experience must be conscious of times when a free exercise of will, direct of set purpose to the furtherance of the common good, determined the form and tendency of a rule which at that moment took its origin in one creative act*”¹⁰⁹. **Analogies** may also be suggestive, like parallel plots in literature, as devices; but in truth they cannot resolve legal disputes intelligently because to say that something is in some sense respects like something else is to pose questions rather than answer them¹¹⁰.

Obviously, studying the **sentences’ style** is also fundamental to get the differences between the various judges’ approach to a case. A sentence which ends a process says much about the characters that differentiate the various legal systems all over Europe. Generally, at first glance, a **Common law** sentence is the typical act of a power that does not feel itself subordinated to other powers, and therefore does not conceal its dialectic and its internal divisions. Diametrically opposed is the form and the nature of a **Civil law** sentence: it takes the form of the judiciary syllogism consistent with the vision of the judge as the “mouth of the law” (this is why, for example, a **French** sentence seems to being vitiated by inadequate reasoning). Remembering what I have said about the distinction between the job conducted by a judge and by a law professor (and about their different audience), it is extremely interesting to analyze the German experience. Indeed, a **German** sentence seems to being a dialogue between judges and law professors with lots of explicit references to the ideas expressed on the critical issues of law which are relevant to the dispute.

¹⁰⁹ *The Nature of Judicial Process*, Feather Trial Press, 2009 (1921), 37.

¹¹⁰ Cf. R. A. Posner, *How Judges Think*, 181.

The “*Law and Literature*” movement shows it constantly. It has become very important to get the importance of the impact of the law in the literature starting from Sophocles’ “*Antigone*” (played for the first time in 442 B.C.). See J. Boyd White, *When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character, and Community*, The Univ. of Chicago Press, 1985; Id., *Justice as Translation: An Essay in Cultural and Legal Criticism*, The Univ. Of Chicago Press, 1994; Id., *The Edge of Meaning*, The Univ. of Chicago Press, 2003.



3.2.1. We have already seen that the object of legal reasoning is the discovery of the law, whereas the aim of judicial decision-making is the resolution of a dispute. Now it is time to explain, in few steps considering what I have discussed about so far, why judges are **occasional legislators**. But, first, I would like to remember that the question about the nature of the law is a question about the conditions of legal validity and legal normativity which, as everybody knows, have both recently re-generated another kind of debate in contemporary philosophy of law (one about the nature of the “enterprise” to build a legal system and one about its utility in concrete terms).

National European Courts do not mechanically apply a set of complete and self-explanatory preexisting rules. Indeed, as I have said in Chapter 1, the Western codes are often incomplete or ambiguously worded and necessitate a large measure of judicial creativity if appropriate legal treatment is to be found for litigants. So **Civil law** nations and legal systems depend on their Courts to legislate many of their legal rules (as scholars play a central role in developing a always more conscious legal sensibility). Besides, as everybody knows, the law of **England, Scotland, Ireland and Wales** is largely judge-made.

Of course, this matter is sometimes bounded with the role of rhetoric which, as **Aristotle** has taught, is the set of rational methods used to persuade in situations in which the techniques of logic and other methods of exact enquiry are unusable. Moreover, in developing an analysis on the judicial reasoning, Aristotle’s assist is also useful for analyzing the concept of “**corrective justice**” which, from one side, means judging the case rather than the parties¹¹¹ (a principle which must be followed nowadays more strongly) and, from the other one, is one of the many meanings of the term “rule of law” (term that, to being precise, is also used to designate a political system in which all public officials are, just like private persons, fully subject to legal process¹¹²).

Finally, the judicial law-making process is bounded with the sense of the locution “**judicial independence**”. Case-by-case judicial law-making violates the prototype’s demand for preexisting legal rules and this is the reason why there has recently been considerable interest in prospective overruling¹¹³. And then, if judges are inevitably law-makers, what happens to the prototype that I have showed in Chapter 2? Is it possible, for example, to ask ourselves in which extent, considering that Courts “make” the law, judges will be incorporated into the governing coalition after they left their office? Well, the answer is pretty clear: in most societies this do not represent a problem at all because judging is only one of the many tasks of the government cadre. However, in the societies that seek to create independent judiciaries, this reintegration will nonetheless occur, even at substantial costs to the proclaimed goal of judicial independence (which will be extremely difficult to get).

¹¹¹ R. A. Posner, *Law, Pragmatism, and Democracy*, Harvard Univ. Press, 2003, 284-286.

¹¹² W. Bagehot, *The English Constitution*, 1867, Oxford Univ. Press, 2009; A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, 1885, Nabu Press, 2010.

¹¹³ Cf. M. Shapiro, *Courts. A Comparative and Political Analysis*, 35.



Passing from theory to reality, and remembering that this is not the right forum to discuss in a long way about this delicate topic, I have to say that in many nations the matter regarding the nature and the consequences of judicial independence is conceived not in terms of tripartite constitution with checks and balances, but simply as a professional judiciary sufficiently insulated from the governmental influences. Besides, there are many solutions to handle this matter in a useful way and in Western legal systems it is possible to find a concrete example of them.

For instance, **England** and most **Continental countries** have deviated sufficiently from theories of parliamentary sovereignty to allow considerable autonomy to their Courts. More particularly, in **Common law systems** the judiciary has been traditionally placed on the same floor of the legislative power, also because there is usually a climate of suspicion about the role of the legislative power itself. Instead, in Civil law countries the judiciary power is treated as a delegated power from the nation which, for this reason, has (and must use) an implicit power to supervise its activities. Therefore justice is administrated “**in the name of the people**” and, at the same time, it is possible to discover another phenomenon that is a peculiarity of the origin of the Common law systems: the “escape from the jurisdiction”, that is a side of the crisis in the administration of justice rising in Civil countries (and this is way people are using alternative dispute resolutions allowing that a private “board” decides for resolve their disputes)¹¹⁴. The picture is pretty clear in **France**, where there are a corps of administrative judges who form an integral part of the bureaucracy itself and that the government exercises a very strong influence over the selection, training, promotion and assignment of the regular judiciary in order to assure its loyalty to political authority. The French Constitution provides a series of guarantees of independence of the judiciary (at least for the “ordinary” judges; by the way see its art. 64) in the aim to ensure a form of separation between Courts and government. For example, there is a *Conseil Supérieur de la Magistrature* and judges “*du siège*” cannot be removed from their office and functions. Nevertheless French judges are all appointed by the Minister of Justice after a public examination.

In conclusion, judges are inevitably “**occasional legislators**” because: (i) **codes and statutes are often incomplete** and there is an huge lack of rules in them; (ii) despite of what many argue, that is positivist Courts are supposed to play a very restrictive legislative role, just in some legal system this is true and rules restrain judges’ discretion, because in others they accord to judges **substantial discretion to override the law** when compelling moral reasons exist. So, although the judicial law-making process is obviously developing under the protection of “codes’ wing” and cannot go beyond it (every judge must respect the law, even if he interprets it extensively), for many aspects this is a problem for the keeping of the independence of legislation. And the reason is self-evident.

I have said it earlier: judges (as legislators, regulators, prosecutors and police officers) are generally grouped together as officers of the law in order to distinguish them from those

¹¹⁴ P. G. Monateri – A. Somma, *Il modello di civil law*, 168.



who lack legal power to act. Their role is fundamental because we consider **English, German, Italian, Polish** judges (as their ministers and legislators) as a part of their social and cultural systems and they represent them in front of the world. Now, in short, I would like to underline another circumstance about the relationship between judicial law-making and the independence of the judiciary. If we limit the notion of independence very narrowly to **the absence of direct outside interference** in the outcome of a particular case, Western European Courts are essentially independent. In a considerable number of countries, and most particularly in France, the political actively controls the career opportunities of judges and this kind of approach allows that in these countries judge who wish to succeed professionally are likely to give the regime the kinds of decisions it wants (even though the politicians apply no direct pressure). Finally, it is absolutely correct to say that in all Western European nations, the judiciary is a hierarchically organized civil service, more or less cut off from private practitioners, and with relatively close affinities and connections with the rest of the higher levels of the career government bureaucracy¹¹⁵.

3.3. The question posed at the beginning of this paper, as I just have said above, is strongly bounded with the importance of traditions in legal changes and after showing and discussing the various elements of the matter as I have done in the previous pages, its answer is extremely simple to get: **legal harmonization**, where it is possible, **cannot being set up against (and consequently cannot trump) different legal cultures and sensibilities**.

Indeed, as **H. Patrick Glenn** has written in his fundamental “*Legal Traditions of the World*”¹¹⁶ a tradition “*is accordingly composed of information, and it would be inappropriate to see it, as mooted by J. G. A. Pocock, as an indefinite series of repetitions of an action*”. Rightly he continues arguing that traditions are perceived as an important information resources and that an essential question is about the nature of the information constitutive of tradition.

The fact that we distinguish between different groups and systems of rules reflect an important fact about our **social world**: namely, this is **highly pluralistic**. And this is the first thing that a comparatist should know and appreciate because its ideological and practical diversity allow us to distinguish (and understand the various differences of) the various groups and competing demands that they place on us¹¹⁷. Is not just a matter of legal systems. When we step out from a legal system into another system as ethics, politics or religion (as we are used to do it in search of a greater legitimacy of their essences) we must face their nature and characteristics all together.

Well, it is totally true, as **Hart** has pointed out, that in spite of the many variations between different legal systems, **law is a fairly universal phenomenon** in human societies

¹¹⁵ I agree with M. Shapiro’s analysis, in *Courts. A Comparative and Political Analysis*, 156.

¹¹⁶ IV, Oxford Univ. Press, 2010, 13.

¹¹⁷ See again S. J. Shapiro, *Legality*, 11.



and, as a consequence, has certain features that are essential. Nonetheless, once underlined that, after considering what I have discussed about in the previous Chapter (and, in particular, what is “law”, what is “legality” and how judges think whilst they making their “judicial legislation”), I strongly believe that a legal system and a legal “**tradition**” of a country **must be respected in conducting legal studies about harmonization process** because they are not only composed by “rules” but also by **sensibility, conscience** and **social cultures** of the people whom made them. This is why a good jurist, and of course a good comparatist, knows that it is impossible (as it is totally wrong and insensate as well) to force any kind of **legal transplant** of these factors¹¹⁸. And there is another thing to say: also the way **to interpret the various rules** belongs to a tradition. Lawyers quickly learn that most of the litigation arising in their society is not about the kinds of difficult legal issues they have studied at university; it is about humdrum matters of fact as what has really happened and as who said (or written in a contract) this or that. Then, in practice, whilst they are in front of a judge, they see that in the vast majority of the cases they handle disputes are settled out of the Courts, in front of their clients. So, it is evident that sometimes law is clear enough and, some other times, as someone says, that it is less clear than people tend to think¹¹⁹.

It becomes necessary to think about the **distinct identity of each legal tradition**. They are internally unstable as they are meanwhile they relate themselves to other traditions and **the choice of the information to be captured by a single country’s tradition is fundamental to the tradition itself**¹²⁰. Therefore, the pool of information captured by the adherents of a particular tradition cannot be entirely controlled by the tradition itself. This is the reason why it is important to highlight that, although the Civil law tradition has always been focused on the centrality of the person (as Common law is the one of adjudication), **identities have always been problematical in Europe**¹²¹.

A tradition is a fundamental part of any identity and nowadays **exceptions abound among** forcing the European harmonization of Private Law. Of course, an investigation on the nature and on characteristics of a legal tradition may better be understood as a self-reflection and as a critical interrogation of the various and conflicting political projects underlying behind it¹²². Besides, this investigation is strictly bounded with the matter about the use of morality in the law field and in its development with political methods. As pointed out earlier, authors like **Dworkin** think that there is a form of political morality in

¹¹⁸ A. Watson, *Legal Transplants: An Approach to Comparative Law*, Edinburgh, 1974.

¹¹⁹ Cf., again, A. Marmor, *Philosophy of Law*, 137-138.

¹²⁰ The two sources of instability, internal and external, are related to one another since a tradition is formed internally by an exchange of information but at the same time opened to further exchanges of information from the others.

¹²¹ For a pessimistic analysis of the concept of “identity” from an anthropological point of view, see F. Remotti, *Contro l'identità*, Rome-Bari, 2007.

¹²² See G. Marini, *Foreword Legal Traditions. A Critical Appraisal*, *Comparative Law Review*, Vol. 2, No 1, 2011.



law's soul which legitimates coercion and collective force to enforce political decisions (not just the formal morality showed by **Lon L. Fuller**, who has explained the distinction between the morality of duty and the morality of aspiration, both of which bear on the design and operation of social institutions –the former by setting the necessary preconditions of any purposive social endeavor, the latter by suggesting directions for such endeavor¹²³), and that hard cases have to engage in legal-moral-political reasoning to claim that the integrity of law requires a given solution and a right answer. Here I would just like to underline that is in the hermeneutic of the law that there is not always a single right answer to get because, as I have pointed out above, legal reasoning, which is not a science, could be rational, rhetorical and persuasive but never mathematical or magical.

But there are also other aggravating circumstances to consider. First of all, it is impossible to refuse that the concept of “**Europe**” itself has **blurred boundaries** and that is extremely confused. More precisely, it is discussed and criticized after: (i) the problematic –and, at least for now, dead– talk about the dream of a **European Constitution**; (ii) the news adopted by the **Treaty of Lisbon**, entered into force on December 2009¹²⁴; (iii) the fact that **Germany** first said no to fiscal stimulus, no to boosting the euro-zone's rescue fund, no to join Eurobonds when it did not want to help **Greece** rising from its finance and debt crisis whereas its Constitutional Court says “yes” to its bailout¹²⁵ unleashing then the resignation of Jürgen Stark from the European Central Bank's –ECB– board before that on the beginning of last October the German Chancellor Angela Merkel has said to the European Parliament that if Germany would have banks to recapitalize, then its first approach would be to allow them to do that themselves; (iv) the problematic situation of other countries like Spain, Portugal, Ireland and Italy).

Second of all, considering that a slew of recent indicators (as that Germany's exports slow, the fiscal screw tighten, that the banks' travail imply tighter credit and that a skewed Franco-German partnership is upsetting Europe) are suggesting that the euro-area is slipping into a form of “recession”, it is absolutely evident that there is not only a **so grave and a so menacing crisis of Europe and of euro** that even rescue talk only fuels ever-rising panic amid a huge lack of conviction and courage (so investors have sniffed out that Europe's leaders seem unwilling ever to do enough, whilst instead of austerity and pretence, a credible rescue should start with growth and, where it is unavoidable, a **serious**

¹²³ See *The Morality of Law*, Yale Univ. Press, 1964, 15-30.

¹²⁴ Go to http://europa.eu/lisbon_treaty/index_en.htm.

¹²⁵ Indeed, the *Bundesverfassungsgericht* has thrown out a lawsuit brought by German professors hoping to make the bailouts of Greece illegal. As we all know, the Court has said that the bailouts cannot be a blank check, and it also has said that parliament must vote on all future aid deals.



restructuring of debt¹²⁶), but there is also a deep **crisis of politics** (and of its various identities and goals) **in European society itself**¹²⁷.

Also the role of ECB is problematic. Indeed, as **James Bradford DeLong** has recently written, our current political and economic institutions rest upon the wager that a decentralized market provides a better social-planning, coordination, and capital-allocation mechanism than any other that we have yet been able to devise. But, since the dawn of the Industrial Revolution, part of that system has been a central financial authority that preserves trust that contracts will be fulfilled and promises kept. Well, considering that time and again, the lender-of-last-resort role has been an indispensable part of that function, is self-evident that this is what ECB is now throwing away¹²⁸. The fact is that the euro has been poorly structured from its conception. Every monetary union needs also a fiscal and political union for working and the leaders of the euro-zone must now decide which way to go: towards a complete union or to any union¹²⁹.

After that, remembering that Europe has recently claimed the scalps of two leaders (first George Papandreou, the Greek prime minister, promised to resign and did it, and then Italy's Silvio Berlusconi did the same thing), and that both have been in trouble for some time, but the immediate cause of their downfall is plain: the ultimatum they received from euro-zone leaders at the G20 summit in Cannes to reform their economies or else, it is clear that saving the euro requires more pain for some, more generosity from others and fundamental change for all. The question is: is it worth it? It is self-evident that sooner or later, citizens must be asked, because without their support no reform can last. And a real choice must include the option of leaving the euro. Now that this "taboo" has been breached, the euro zone should start thinking about how best to arrange the departure of those that cannot, or will not, live by Germanic rules.

In short, despite of what **Olivier Gandall** and **Yannick Lemel** have argued perhaps with a too optimistic vision¹³⁰, the meaning of **being a "European"** is pretty unclear and is

¹²⁶ See the farsighted worldwide analysis conducted by V. Tanzi, *Government versus Markets. The Changing Economic Role of the State*, Cambridge Univ. Press, 2011.

¹²⁷ To be honest, among millions of Europeans, the Euro-zone crisis inspires, also some kind of glee. Think for example that on September 12th more than 100 Tory MPS British Conservatives "squeezed" into the Thatcher Room in Westminster Palace and agreed that the crisis is a golden opportunity to get a change to renegotiate Britain's relationship with the European Union. See T. Giaro, *Legal Tradition of Eastern Europe. Its rise and demise*, *Comparative Law Review*, Vol 2, n. 1, 2011.

¹²⁸ See *The ECB's Battle Against Central Banking*, on *Project Syndicate*, 2011; more on <http://www.project-syndicate.org/commentary/delong119/English>

¹²⁹ See K. Rogoff, *A Gravity Test for the Euro*, on *Project Syndicate*, 2011; more on <http://www.project-syndicate.org/commentary/rogoff86/English>. See also R. Bootle, *Governo Unico per Uscire dal Guado*, on *Il Sole 24 Ore*, Saturday 5th November 2011, 23; more on <http://mobile.ilsole24ore.com/sole24ore/post/99?url=AapGJvIE>

¹³⁰ See their interesting analysis displayed on *Valori e culture in Europa*, Bologne, 2010.



under exam by philosophers, economists, scholars, lawyers and Courts¹³¹. And this exam on the European identity is strongly bounded with the role and the future of a European *Ius Commune* that, as everybody knows, concerning the discussion of whether Private Law systems are converging or “ought” to converge remembering that it disintegrated in the 18th century with the rise of rationalism and nationalism when the new imposed rules wanted to clarify the identity of the nation to be supported by a national codification, starting with Prussia in 1794, France in 1804 and Austria in 1811. This has been the beginning of the “nationalization process” as we know it today and of the nationalization of the rules of **Private Law**.

If an important phase of the entire European cooperation process has been launched with the foundation of the **Council of Europe**, as intergovernmental organization established in 1949, another important step was made with the establishment of what later became the European Union with the sign of the Maastricht Treaty (formally, the **Treaty on European Union** or **TEU**, signed on 7th February 1992 by the members of the European Community and then entered into force in 1993) which changed the name of European Economic Community into the **European Community**. From that moment, finally, the discussion about the Constitution for Europe, first step of a **bigger legal harmonization plan**, has always been supposed to bring further changes by improving the division of competences, the instruments of action as well as **democracy, transparency** and **efficiency** of the European Union.

When I’m writing, with the locution of “**European Private Law**” is usually indicated the system of rules and principles of law common to the private law of the various European countries. At a second level, however, the so-called “**Common Private Law**” is further distinguished by scholars, at least in its strict sense, in primary and secondary private law.

Well, if already in 1970, with the initiative taken by the Secretary of UNIDROIT, took place the “push” of the rationalization and standardization process of the international trade law, it has been the **European Parliament** that, in two different resolutions of 1989 and 1994¹³², has made explicit the idea of harmonization of such organic law allowing a **leap forward in European integration**. From these initiatives was born the first edition of the UNIDROIT Principles of 1994 (republished in 2004), followed by the work of the *Lando Commission*, and by the important efforts made by the *Study Group on a European Civil Code*, founded in 1998 by Christian von Bar, and the *Research Group on Existing EC Private Law*, or *Acquis Group*, that made, together, the “**Draft Common Frame of Reference**” in 2009 (hereinafter DCFR). With all these works, the matter of a new Private Law for Europe is really changed into something new.

¹³¹ We all remember the sentence (and its effects) passed by the German Federal Constitutional Court on June 2009. More on <http://www.bundesverfassungsgericht.de/en/press/bvg09-072en.html>

¹³² *Resolution A2-157/89*, 26th June 1989, C 158, 400 e *Resolution A3-0329/94*, 25th July 1994, C 205, 518.



More particularly, the Lando Commission has been created to prepare a collection of standard “**Principles of European Contract Law**” (called **PECL**) not only on Contract Law in specific sense, but on the law of obligations generally understood. After the passage of the first two intermediate stages (in 1995 and 1999), the work led to the publication, in 2003, of the third and final part of the principles which, combined with the first two, had the merit to imagine and thus “constitute” a “European law of obligations” (particularly in contract law’s field) conceived and designed as “soft law” that perhaps could be a good basis of a future codification of Private Law. It becomes evidently necessary to state that if, on the one hand, the analogy of that document with the UNIDROIT Principles is clearly evidenced in its text, on the other hand we have to face the fact that in **arbitration case law** the use of the PECL is pretty much sporadic (and this allows to discern some doubts about its ability to become a true and useful “*lex mercatoria*”).

Instead, about the work of the last two study groups that I have mentioned above, I must briefly point out that the first one, engaged since 1999 in the comparison of the various Private Law systems of European countries, considers itself the successor of the **Lando Commission** as it is moved by the desire to create a library of common European principles and concepts (together with comments and annotations). Once individuated, this “core” is destined to being implemented in the Member States because the aim of the Group is that it could be used, for developing its potential for harmonization, by **European Courts**. In particular, scholars that had written it had, during their studies, the opportunity to focusing themselves on some really relevant areas of Private Law (e.g., the purchase contract, the contract of donation, the load-standing of the trusts, the transfer movable property and **torts**).

From 2005 started the preparation of the so-called “Common European Framework of Reference” which, as I have said earlier, has already been prepared in a form of draft in 2009 (**DCFR**). So, nowadays, the so-called “**Common European Private Law**” is conceive as a set of principles and rules developed at academic level with a **meta positive view of social uniformity**.

Speaking about Tort Law in particular, the searching of harmonization is clearly showed by the circumstance that many argue that the quest of a common system should culminate in a new symbol of cultural unity. Although still largely a piecemeal framework dealing with discrete issues, the development of a common set of tort law rules may herald a more coordinated and broader intervention by the EU in the Tort Law’s area. But this is only a possibility and, as I will show further, on the same medal there are always two different faces.

In 2000 Walter von Gerven published his “**Cases, Materials and Text on National, Supranational and International Tort Law**”, as from the late 1990s the **European Group on Tort Law**, founded in 1993 by Jaap Spier and Helmut Koziol and known as *Tilburg Group*, started to publish a series of books under the title “**Unification of Tort Law**”. From that moment a ever-rising number of journals and papers are dedicated to this



matter such as the *European Review of Private Law* and the “*Zeitschrift für europäisches Privatrecht*”.

Besides, regular overviews of publications are provided by Ewoud Hondius, whereas the European Tort Law Yearbook, edited by Helmut Koziol, provide concise overviews of recent Tort Law developments. Finally, the *Study Group on a European Civil Code* mentioned above has created in 2005 a draft on “**Non-Contractual Liability Arising out of Damage Caused to Another**”¹³³ meanwhile, in the same year, the *European Group on Tort Law* published its draft of “**Principles of European Tort Law**”¹³⁴.

The last text, in particular, is very important on the debate about the harmonization of European Tort Law. It holds a basic rule for liability: **Article 1:101** states that “(1) *A person to whom damage to another is legally attributed is liable to compensate that damage. (2) Damage may be attributed in particular to the person a) whose conduct constituting fault has caused it; or b) whose abnormally dangerous activity has caused it; or c) whose auxiliary has caused it within the scope of his functions*”. As everyone can get, this basic rule represents the basis and the first brick to pose in the building of a “new” European *Ius Commune*, although it does not say more that someone can be liable for fault and that he can be strictly liable. It is so general that it is inevitably far away from the three most important basic rules on Europe: (i) English law of torts which has a very similar basic rule in personal injury (the tort of negligence, whereas a duty of care will only be assumed in cases of actively caused damage and breach of this duty will be based on lack of care); (ii) a German judge, that is inclined to apply an higher standard of care than the English Courts, will focused his attention on § 823 I BGB (and this implies also the direct infringement of a right or the breach of an unwritten safety duty (called *Verkehrspflicht*); (iii) a French judge will hardly be interested in fault liability and for his basic rule will jump to strict liability rule of art. 1384, al. 1, *Code civil*¹³⁵.

All these works show that the search of a “new” *Ius Commune* is the very heart of the current debate on the development of a “Common European Private Law” and, of course, on the harmonization towards a European Civil Code and of a European Tort Law. This kind of quest **has stirred lawyers and caused deep division among academics**. In fact, it divides academic private law and comparative law world into believers and unbelievers: the former believe in a new and unified European Private Law, whereas the latter **pointedly withdrawn this idea** from a real prospective refusing that **differences and division will or should be overcome**.

Secondly, there are also differences about how the way of harmonization could be effectively supported in the three legal systems showed above. For example, whereas **France** and **England** are generally reluctant about this matter, **Germany** seems to be the most supportive country. Well, I strongly believe that the European Tort Law’s agenda must be filled out with the understanding of the various economic, social, cultural and

¹³³ More on www.sgecc.net.

¹³⁴ More on www.egt1.org.

¹³⁵ See C. van Dam, *European Tort Law*, 109-118.



policy backgrounds of national Tort Law rules and not only conceiving Tort Law as a spear of politics.

The most famous text in this confused context is obviously the **DCFR** (the most important rival of the PECL) and its social values underlined are an important field for developing many analyses. In sum, it seems likely that the CFR will become a common frame of reference in a much broader sense, for all actors involved in the developing multi-level system of European Private Law. The majority of its rules belong to what is usually referred to a “general private law” but it is undoubtedly that for every question of Private Law it is possible to imagine rule alternatives which can be placed on a scale from strong autonomy to strong solidarity. At the same time it is extremely clear that DCFR is based on excessive use, also in its Tort Law part, of general clauses and open-ended concepts which guarantee an excessive law-making power to the national Courts. That is why a group of German legal scholars have denounced this (from many aspects wrong) methodology in making DCFR¹³⁶.

Nevertheless, there is no dearth of legal provisions in DCFR about Tort Law. Its Book VI is totally dedicated to it and with 57 articles it supplies far more than the national legal systems dedicate to the general law of torts (for example, as I have said above, French *Code civil* is about only five articles). Its proposal, as everybody knows, was to reconcile the French general clause with the more specific approaches of German and English law and this attempt has the virtue to settle a major divergence within the European legal systems in an “elegant way”. But, as **Gerhard Wagner** had rightly written, the question remains, for example, how the combination of a set of specific “tort” (i.e., protected interests) with general principles preserving the tradition of *Code civil*.¹³⁷

Its basic rule is the pretty the same of the one written in the PECL and mentioned above. Indeed, **Article VI. – 1:101** states that “*A person who suffers legally relevant damage has a*

¹³⁶ See, for example, H. Eidenmüller, F. Faust, H. C. Grigoleit, N. Jansen, G. Wagner & R. Zimmermann, *Der Gemeinsame Referenzrahmen für das Europäische Privatrecht - Wertungsfragen und Kodifikationsprobleme*, 63 JZ (2008), 529-584; J. M. Smits, *The Draft-Common Frame of Reference for a European Private Law: Fit For Purpose?*, 15 *Maastricht Journal of European and Comparative Law* (2008), 145-148; E.H. Hondius, *Towards a European Civil Code*, in: A.S. Hartkamp et al. (eds.), *Towards a European Civil Code* (The Hague, London, New York: Kluwer Law International, 2004), 13; H. Collins, *The “Common Frame of Reference” for EC Contract Law: a Common Lawyer’s Perspective*, in: M. Meli and M. R. Maugeri (eds.), *L’armonizzazione del diritto privato europeo* (Milan: Giuffrè, 2004), 107–124; M. W. Hesselink, *The European Commission’s Action Plan: Towards a More Coherent European Contract Law*, 10 *European Review of Private Law* (2004), 397-419; *Manifesto*, note 5; Lurger 2007, note 18, 181; Lehne 2007, note 16, 1-4; G. Wagner, *Die soziale Frage und der Gemeinsame Referenzrahmen*, ZEuP (2007), 180-211; House of Lords (European Union Committee), *European Contract Law - the way forward?* (HL Paper 95) (London: The Stationery Office Limited, 2005), 115; and *European Contract Law: Quo Vadis* (Editorial Comments), 42 CMLR (2005), 1- 7, 4.

¹³⁷ See *The Common Frame of Reference: A View from Law & Economics*, Munich, European Law Publishers, 2009, 230.



right to reparation from a person who caused the damage intentionally or negligently or is otherwise accountable for the causation of the damage. (2) Where a person has not caused legally relevant damage intentionally or negligently that person is accountable for the causation of legally relevant damage only if Chapter 3 (Accountability) so provides”. So we have to look at the **Chapter 2 of Book VI**, dedicated to *Particular instances of legally relevant damage*, to make any consideration about any kind of judgment on DCFR help in harmonization of national tort laws.

Article VI. – 2:101: Meaning of legally relevant damage, states: (1) *Loss, whether economic or non-economic, or injury is legally relevant damage if: (a) one of the following rules of this Chapter so provides; (b) the loss or injury results from a violation of a right otherwise conferred by the law; or (c) the loss or injury results from a violation of an interest worthy of legal protection. (2) In any case covered only by sub-paragraphs (b) or (c) of paragraph (1) loss or injury constitutes legally relevant damage only if it would be fair and reasonable for there to be a right to reparation or prevention, as the case may be, under VI. – 1:101 (Basic rule) or VI. – 1:102 (Prevention).*(3) *In considering whether it would be fair and reasonable for there to be a right to reparation or prevention regard is to be had to the ground of accountability, to the nature and proximity of the damage or impending damage, to the reasonable expectations of the person who suffers or would suffer the damage, and to considerations of public policy. (4) In this Book: (a) economic loss includes loss of income or profit, burdens incurred and a reduction in the value of property; (b) non-economic loss includes pain and suffering and impairment of the quality of life.* Section 2: *Particular instances of legally relevant damage.* Instead, **Article VI. – 2:201: Personal injury and consequential loss** states that (1) *Loss caused to a natural person as a result of injury to his or her body or health and the injury as such are legally relevant damage. (2) In this Book: (a) such loss includes the costs of health care including expenses reasonably incurred for the care of the injured person by those close to him or her; and (b) personal injury includes injury to mental health only if it amounts to a medical condition.*

Of course the latter is the most important provision of Chapter 2 but it is not so easy to get its structure because it carries further the notion of “damage” and, at the same time, tries to avoid the language of “interests” and “rights”. We can say that the second stage of Art. VI. – 2:101 merely consists of a fair and reasonable provision whereas the third one adds more substance by explaining that for a right to reparation or prevention to be fair and reasonable we have to pay attention to the ground of accountability, to the nature and proximity of the damage or impending damage, to the reasonable expectations of the victim and to the consideration of public policy and, last but not the least, to the definitions of economic and non-economic loss that I have described in Chapter 1.2.1. So, from one side, a violation of a legal right (such as bodily integrity and property) always conducts to an action for liability and, from the other side, outside this cases, liability may still be established under Art. VI. – 2:101 (2) and (3), but only where judges exercise their discretion accordingly.

It is clear that the separate torts defined in Art. VI. – 2:202 DCFR provide for legal certainty while the general clause of Art. VI. 2:101 delineates the DCFR’s scope of protection and provides a basis to expand it beyond the cases specifically defined in the former (if the need of that should arise). Once again, considering that even the basic choices



remained unsettled by Chapter 2 (like the scope of protection in the area of completion law), the question is how this compromise might work in practice because every single tort defined in Chapter 2 raises a range of critical considerations as to the scope of protection which must be answered with the help of interpretation¹³⁸. In conclusion, the framers would not be surprised by the fact that a Court may be reasonably arrive at the conclusion that it suffices to focus on the general clause and on its limits instead of carefully elaborating the scope of particular provisions of Art. VI. – 2:201 ff.

Besides, as last example regarding DCFR, about **accountability (Art. VI. – 3:202 – 3:207)** it must be said that drafters did not adopted the model of general clause of strict liability but just made a catalogue of special cases that certainly captures the most important categories of abnormally dangerous activities. Well, the question is why they did it considering that they were looking for harmonization whereas, for example, as I have said, **England** only has a few general rules (for instance, about damage caused by defective products, by animals and by employees) because over there this matter is treated as an outcast which one should rely in exceptional circumstances¹³⁹. Maybe the drafters did not want to let judges to delineate the scope of strict liability on a case-by-case basis because, under a general rule, it is for them to do it.

Passing over, it is now time to specify that, obviously, the price of local foreseeability is a lower degree of the Europeanization of Private and Tort Law, but at the same time on the other hand if is this the main problem, then “*the mere fact of further developing the law within the same conceptual framework could still lead to a gradual convergences of the laws of the Member States on a pace that is respectful of existing needs for legal certainty*”¹⁴⁰.

These works, all made by academics that are sympathetic towards legal harmonization, and especially the DCFR, are for sure valuable in some aspects but it is also true that thanks to all of them it seems likely that the first matter of European harmonization debate is about to conduct harmonization with political methods using **positive law**. As I have said above, law and politics in Europe are “brothers in arms” since the 1960s and the study of European integration in both political and law theory has been for a long time characterized by competing and often polarized conceptualizations. **Antonina Bakardijeva Engelbrekt** is right when writes that this debate in political science has been chiefly between intergovernmentalists (neo-realists) conceiving of the European Community and the Union as still ultimately depending on the power of the Member States and functionalists, stressing the importance of autonomous supranational institutions¹⁴¹. Similarly, in the field of law the line has always been between international law scholars and federalists (so constitutionalists) emphasizing the transfer of competence to the supranational level and

¹³⁸ *Ibidem*, 240.

¹³⁹ *Rylands Vs. Fletcher*, (1866) LR 1Ex 265 and *Read Vs. Lyons & Co Ltd.*, (1947) AC 156. More details in J. G. Fleming, *Law of Torts*, 9th edn., North Ryde, 1998.

¹⁴⁰ M. W. Hesselink, *CFR & Social Justice*, *European Law Publishers*, Amsterdam, 2008, 27-28.

¹⁴¹ *The Role of the Courts in Developing a European Social Model*, DJØF Pub., Copenhagen, 2010, 312-313.



the parallels with a federal states. Of course, all these approaches about the European integration process involve also the matter about the harmonization of the different national tort laws.

Instead, the reasons which I have showed above and explained about (the crisis of European identity and the fact that internal market doesn't need a legal harmonization for growing up) are a clear sign and witness of the importance of the differences (and of the different cultural roots) concerning the various Private and Tort Laws. If **harmonization** itself is not on the legislative agenda, **there is no reason why it should be the first goal** of the European Private Law.

The need for harmonization seemed to be self-evident to a great extent because the idea has always been that differences between Member States are an obstacle to the achievement of an internal market. But, as I have showed in the previous Chapters, there are as many different scenes behind the rules of tort laws as many different approaches. This means that there are lots of preliminary questions which need an answer before getting the stage where a sustainable rule could be effectively reached from¹⁴².

Moreover, to be truthfully, I do not think that the various national tort laws provide obstacles for the free movement of goods and service or the distortion of competition. As every comparatist knows, diversity is not synonymous with distortion and my opinion internal market does not need such kind of harmonization (there is no empirical evidence that such a kind of differences between national tort laws lead to market problems). Many examples of economic market integration with different legal systems are an evident proof of that. On the contrary, as **Cees van Dam** has noticed¹⁴³, it is true that every harmonizing measure entails compliance costs but it is also true that new rules are usually unclear and may be applied differently throughout the internal market (the EC Directive on Liability for Defective Products is just an example of it¹⁴⁴).

Finally, a real harmonization of tort laws will require not only to take in consideration other compensation systems, such as private insurance and social security systems, but will also require the harmonization of **criminal and administrative law** because many legal systems acknowledge the possibility to be liable for damage caused by the violation of a statutory duty and so if the desire is to harmonize the rules for breach of statutory duty, one should then harmonize the statutory rules that can be invoked as a basis for this tort.

Besides, it is true that legal positivism, if properly understood, does not assign a restrictive role to the Courts, but it is also true that the fact that contemporary positive law (thought as

¹⁴² The German challenge to the legal basis of Directive 98/43 on the advertising of tobacco products is a clear sign of that. See ECJ 5 October 2000, Case C-376/98, ECR 2000 I-8419, *Germany Vs. European Parliament and Council*.

¹⁴³ C. van Dam, *European Tort Law*, 135.

¹⁴⁴ Directive 85/374/EECC, OJ L 210/29, 7.8.1985.



a systemic law made by different interacting elements) changes everyday so fast and so easily in every European country is a sign of the **crisis of the classical legal sources**¹⁴⁵.

This circumstance demonstrates us that positive law, at least as we are used to conceive it, is undergoing strain. So, once considering its weakness, it cannot be used to manipulate or forcing legal harmonization in Europe. But we should pay attention to another fact, that is the variegated nature of a legal tradition. For example, the contemporary Civil law tradition manifests itself in many ways and the idea of positive law is only one of them. So, if we want to conduct a correct and useful analysis about the Europeanization of Private and Tort Law we should not forget that the notion of a system of norm is a unity of presently interacting elements¹⁴⁶.

What, then, is nowadays the rightful meaning and the perspective of the “**justice**” in Europe? What are, in particular, the possible future horizons of the “**idea of justice**” in an everyday increasingly crisis of the concept and of the identity of the European Union? Everybody can get the importance of the answer to this question considering that the European Commission wants to spread a typical model of **social justice**.

Plato, in “*The Republic*”, attempted to reveal the real nature of justice. He has focused his efforts on the human soul by constructing a just state and extrapolating from the latter to the former¹⁴⁷. Well, to me, the first step to make along this path should be the analysis of thought made by **Lon L. Fuller**, the Hart’s major intellectual antagonist. He has taught that the affinity between legality and justice has deeper roots than the ones connected to the idea that a rule articulated and made known permits the public to judge of its fairness. It is like this because, for him, “*even if a man in answerable only to his conscience, he will answer more responsibly if he is compelled to articulate the principles on which he acts. Many persons occupying positions of power betray in their relations with subordinates uniformities of behavior that may be said to constitute unwritten rules. It is not always clear that those who express these rules in their actions are themselves aware of them. It has been said that the most of the world’s injustices are inflicted, non with the fists, but with the elbows. When we use our fists we use them for a definite purpose, and we are answerable to others and to ourselves to that purpose. Our elbows, we may comfortably suppose, trace a random pattern for which we are not responsible, even though our neighbor may be painfully aware that he is being systematically pushed from*

¹⁴⁵ From the entered into force of the *Practice Statement* (1966, 1 WLR 1234, 1966, 3 All ER 77, made in the House of Lords by Lord Gardiner, on July 26, 1966 on behalf of himself and the Lords of Appeal in ordinary) in England took place the weakness of the “*stare decisis*” process which, they have said, created “*injustice*” and “*unduly restrict(s) the proper development of the law*”. It, in short, allowed the House of Lords to depart from its previous decisions as the Lords instead were used to do (at least formally) from 1898. See K. Mackenzie, *Back to the Future: The Common Law and the Charter*, 1993, 51 Advocate 927 at 929, 930; F. M. Bloom, *States Courts Unbound*, 2008, 93 Cornell L. Rev. 501. See also F. Palermo, *La produzione giuridica e i sistemi delle fonti*, in *Diritto Costituzionale Comparato*, Rome – Bari, 2009, 819. For the prior practice see *London Street Tramways Co v. London Country Council*, 1898, AC 375.

¹⁴⁶ Cf. H. P. Glenn, *Legal Traditions of the World*, 162.

¹⁴⁷ Written around 380-360 B.C., Book II.



*his seat. A strong commitment to the principles of legality compels a ruler to answer to himself, not only for his fists, but for his elbows as well*¹⁴⁸.

We should start from the meaning lying down behind these words and we should do so never forget that, first of all as lawyers, and then as comparatists, is our business to see the relationship between our particular fact and the whole frame of the universe¹⁴⁹.

¹⁴⁸ L. Lon Fuller, *The Morality of Law*, 159.

¹⁴⁹ O. Wendell Holmes Jr., in H.J. Berman, *Law and Revolution. The Formation of the Western Legal Tradition*, I, viii, Harvard Univ. Press, 1983.