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# Judicial Deliberations

## A Comparative Analysis of Judicial Transparency and Legitimacy

Mitchel de S. -O. -L'E. Lasser

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# GENERAL EDITORS' PREFACE

It has been noted in recent years that following an intensive period of self-analysis, critique, and rethinking, the discipline of comparative law—whose health had been in some doubt—has emerged reinvigorated and renewed.

The subject matter of this book is situated clearly within the comparative law tradition, and yet at the same time seeks to reassess comparative law theory and practice in an interesting and original way. It sets out to compare the discourse and methods of judicial reasoning of the US Supreme Court, the French Cour de Cassation, and the European Court of Justice, using a methodology which approaches the courts' judgments, arguments, and documents in the way that literary texts would be approached.

While a certain amount has already been written on the European Court of Justice and its methods of reasoning, the careful comparison in this book of the methodology and discourse of the ECJ alongside that of the Cour de Cassation and US Supreme Court yields interesting and novel insights. Serious comparative work on the ECJ is as yet all too rare. While taking as the subject of his analysis an 'emblematic' civil law court, common law court, and a court which appears to be a hybrid of the two, the author offers what he terms counter-descriptions of the operation of the different systems, making use of a considerably wider range of 'judicial materials' than those that are normally taken into account in such analyses. He argues in particular that each system proposes 'an internally coherent normative vision', and that the methodology employed by each of the three—an institutional approach by the Cour de Cassation, an argumentative approach by the US Supreme Court, and a conglomerate approach by the ECJ—reflects the solution they have crafted to their particular problematic.

This book should be of interest not only to EU lawyers and to all of those interested in judges and judicial reasoning, but also more obviously to comparative lawyers interested in comparative law methodology as well as in the specific jurisdictions discussed.

Gráinne de Búrca<br>
Paul Craig

For Jessica

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'Saint Louis would not have done as well if he were hampered by a code or a judicially pronounced five-part test.'

—Justice Antonin Scalia[1]

'Je ressens un état d'esprit administratif, pour ne pas dire militaire. . . . Je comprends que le nationalisme français y ait trouvé son compte. Et nous vivons, en réalité, sur une conception administrative du droit et, donc, du juge. Notre culture judiciaire laisse à désirer.'

—Pierre Legendre[2]

[1] Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi.L. Rev. 1175, 1177 (1989).

[2] Pierre Legendre, Politix, 1995, no 32, pp. 30–31. ["I sense an administrative—if not military—mindset at work. . . . I recognize that French nationalism was quite comfortable with this. As a result, we are in fact functioning on the basis of an administrative conception of law and thus of judges. Our judicial culture leaves much to be desired."]

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# Introduction

## I. The Comparative Context

In the United States, legal theory has long associated transparently reasoned individual judicial opinions with judicial control and accountability, democratic debate and deliberation, and ultimately judicial legitimacy itself. In a canonical formulation, Owen Fiss thus states:

> But a second aspect of the legitimating process of the judiciary is threatened. I am referring to the obligation of a judge to engage in a special dialogue—to listen to all grievances, hear from all the interests affected, and give reasons for his decisions. By signing his name to a judgment or opinion, the judge assures the parties that he has thoroughly participated in that process and assumes individual responsibility for the decision. We accept the judicial power on these terms . . . .[1]

This link between judicial transparency, accountability, deliberation and legitimacy—which, after all, forms the very backbone of Karl Llewellyn's "Grand Style" of American[2] judicial decision-making[3]—has been sufficiently central to American legal identity that it has long been thought to explain the difference between Common Law and Civil Law judicial systems.

Common Law judicial decision-making—the American comparative story goes—carries such great legitimacy precisely because of its great transparency. Individually signed opinions (including concurrences and dissents), the

[1] Owen Fiss, *The Bureaucratization of the Judiciary*, 92 Yale L.J. 1442, 1443, 1458 (1983).

[2] Despite my admiration for Canada and Latin America, as well as for my Canadian and Latin American colleagues, I use the term "American" to refer only to people, concepts, and things of U.S. origin.

[3] Karl Llewellyn, The Common Law Tradition: Deciding Appeals 62–72 (Boston Mass.; Toronto: Little, Brown, 1960); Karl Llewellyn, "On the Current Recapture of the Grand Tradition", in Jurisprudence: Realism in Theory and Practice 217 (Chicago, Ill.: University of Chicago Press, 1962).

disclosure of judicial votes, the forthright recognition of interpretive difficulties, the candid discussion of judicial legal development, and public judicial debate over substantive policy issues combine to foster judicial accountability and control, to encourage democratic debate and deliberation, and thus to accord well-deserved legitimacy to American judicial power.

Civilian judicial decision-making—the American comparative story continues—lacks appropriate legitimacy precisely because it lacks sufficient transparency. Civilian judicial decisions consist of little more than cryptic and technical judicial fiats. They offer monolithic, unsigned, collegial judgments that refuse to disclose judicial votes, prohibit concurrences or dissents, and shun the overt discussion of policy in favor of syllogistic—or at least highly deductive—statements that downplay, if not mask or ignore, all meaningful judicial interpretive work.

As Jack Dawson explained in his *Oracles of the Law* (undoubtedly the most impressive and influential American comparative analysis of the twentieth century), for example, the French judiciary has unwisely maintained a cryptic style of decision-writing whose form and purpose date back some two hundred years:

> The stereotyped style of modern [French judicial] opinions is a survival from a time that is now remote but that has not been forgotten. I suggest that the ideas that inspired the style have also survived, that the principal function of a high court opinion is to demonstrate to the world at large that the high court in exercising its exceptional powers has arrogated nothing to itself and is merely enforcing the law . . . . And so the format of the 1790's continues unchanged. The majestic parade of whereas clauses is cast as an exercise in logic, working down inevitably from some provision of Code or statute. It is the law that speaks. The judges are merely its instrument, though by now the whole process could be better described as extremely expert ventriloquism.[4]

The "guarded and laconic forms of [French judicial] expression" therefore go hand in hand, argued the great American comparatist, with "the suppression of [internal] dissent" and of "deviant views".[5] This lack of judicial transparency "raises . . . issues of personal responsibility";[6] French judges "have no responsibility for shaping, restating and ordering the doctrine that they themselves produce".[7] French judges are therefore unaccountable to, and uncontrolled by, "[a]n effective case-law technique [that,] employed by judges through the medium of the reasoned opinion, with the responsibilities that it should entail, has the purpose and should have the effect of limiting the

[4] John P. Dawson, The Oracles of the Law 410–411 (Ann Arbor, Mich.: University of Michigan Press, 1968).
[5] *Id.* at 406.
[6] *Id.*
[7] *Id.* at 415.

powers of judges".[8] In a paradoxical twist, French judges have therefore deployed a "cryptic style of opinion writing whose main purpose was to prove their dutiful submission but which left them in fact more free".[9]

Dawson's critique of French judicial practice thus concludes with the following haunting image, one that has, I am afraid, continued to haunt American comparative understandings ever since: "Behind the cascades of whereas clauses one can still see stalking the ghostly magistrates of the [*Ancien Régime*'s] Parlements, majestic in their moldy red robes".[10] In the American legal imagination, in short, Civilian judicial decision-making has long stood for the very antithesis of transparently reasoned, individually accountable, democratically deliberative, and thus legitimate Common Law judicial decision-making.

This book seeks to offer a major reassessment of comparative law theory and practice, and to do so from *within* the traditional core of the American discipline of comparative law. It represents in many respects a return to, or continuation of, classic debates about Common Law/Civil Law similarity and difference, but one that calls into question some of the discipline's most basic presuppositions and received ideas. This book therefore aims to reconsider and reconfigure the very center of the discipline: above all it *disaggregates* the issues of judicial transparency and accountability, democratic debate and deliberation, and judicial legitimacy in order to produce a detailed comparative analysis of the complex and often counterintuitive relationships between them.

This book takes two specific steps in order to place itself at, and address itself to, the core of the traditional American discipline of comparative law. First, the book's analysis is constantly framed and contextualized by the discipline's traditional explanation of the fundamental distinction between Civilian and Common Law legality. Secondly, the book focuses on courts that are emblematic of Civilian and Common Law judicial practice: the French Cour de cassation—the French supreme court in civil (private law) matters—which has long been the symbol of traditional Civilian judging; and the United States Supreme Court, which has become the symbol of modern, Common Law judging.

By focusing on these specific courts, this book should steer clear of the dangers of vagueness inherent in deploying the terms "common law" and "civil law". Thus, for example, almost all of Continental Europe is composed of "civil law" legal systems. As anyone even vaguely familiar with these systems would immediately recognize, however, it is often quite difficult to tell what

[8] *Id.* [9] *Id.* at 431. [10] *Id.*

the French and German courts, to pick two obvious examples, hold in common.[11] In the same vein, the differences between the English and U.S. courts, both of which belong to "common law" systems, are hardly minor.

Furthermore, there often exists significant variation between different kinds of courts *within* any given legal system. Thus many European countries have not one set of courts, but several. The French legal system, for example, includes the judicial courts *per se*, *i.e.*, the civil courts, which handle private law (torts, contract, and property), and criminal law cases. But it also possesses a separate hierarchy of "administrative" tribunals, which handles most conflicts between citizens and the state. These two court hierarchies possess *separate* supreme courts: the Cour de cassation and the Conseil d'Etat, respectively. Furthermore, the French legal system even has a separate tribunal, the Tribunal des conflits, which resolves jurisdictional conflicts between these two court hierarchies. Finally, the French Constitutional Council—which is independent of *both* court hierarchies—rules, *inter alia*, on the constitutionality of legislation. Although these numerous courts hold certain attributes in common, it would be a mistake to treat them as interchangeable. If nothing else, the distinction between these courts is considered to be so fundamental that it is almost unthinkable for a French academic who specializes in administrative law to study—never mind say anything about—the private law (civil) courts. This is the very meaning and purpose of the rigid French distinction between the "*publicistes*" and the "*privatistes*". As the ensuing analysis will demonstrate over and over again, the devil is in the details.[12]

In addition to focusing on the French Cour de cassation and the United States Supreme Court, this book will also turn its attention to a third prominent court: the European Court of Justice ("the ECJ"). The decision to analyze the ECJ is motivated by a number of considerations. First, as the judicial branch of the European Union,[13] the ECJ may now be the single most important court in

[11] It is therefore no accident that the most subtle and complex contemporary comparative work tends to focus on the detailed examination of specific foreign legal systems. *See, e.g.*, JAMES Q. WHITMAN, THE LEGACY OF ROMAN LAW IN THE GERMAN ROMANTIC ERA: HISTORICAL VISION AND LEGAL CHANGE (Princeton, J N.: Princeton University Press, 1990); ALEC STONE SWEET, THE BIRTH OF JUDICIAL POLITICS IN FRANCE: THE CONSTITUTIONAL COUNCIL IN COMPARATIVE PERSPECTIVE (New York: Oxford University Press, 1992); JOHN BELL, FRENCH CONSTITUTIONAL LAW (Oxford: Clarendon Press, 1992); Mathias Reimann, *Nineteenth Century Legal Science*, 31 B.C. L. Rev. 837 (1990).

[12] It is probably worth noting that this distinction between the public law and private law courts, which may strike the American reader as a matter of "details", therefore represents a veritably unbridgeable chasm to those operating within the French system. One can, for example, count on the fingers of one hand the number of French academics who are qualified to teach both "public law" and private law" subjects.

[13] The European Union, or "EU", is a supranational organization of European nation states. It is currently composed of twenty-five Member States, and is currently on the verge of further

all of Europe. If, then, a comparatist wishes to analyze an emblematic European court, there is a very good argument to be made that it is the ECJ that fits the bill. In certain respects, then, an analysis of the ECJ might well represent an updating of the classic comparative analyses of the French Cour de cassation, the traditional emblem of European judicial practice.

Secondly, it is worth recognizing that the European Union has been a particularly fruitful source of motivation for contemporary comparative work. Fueled by the continual, deeply practical, and patently important process of EU-sanctioned legal harmonization, comparatists have suddenly moved into a position of relevance and even centrality. This has prompted a series of fascinating and pressing debates over core comparative law questions, such as the similarity and difference between various Civilian cultures,[14] between Civilian and Common Law cultures,[15] and between legal cultures in general.[16]

These debates have of course crystallized around a particularly burning issue: the possibility and desirability of constructing a European civil code.[17] This issue has become a veritable lightning rod for comparatists on both sides

expansion into Central and Eastern Europe. At various points since its inception in the late 1950s, the EU has also been known as the EC (the European Community) and the EEC (the European Economic Community).

Following standard parlance, this book uses the terms "EU", "the Union", and "the Community" interchangeably. When referring to specific Treaty articles, I will provide both the articles' numbers as they originally appeared in the Treaty's precursors, followed by the articles' numbers as appear in the Treaty's current iteration, the Treaty of Nice.

[14] *See, e.g.*, Ugo Mattei and Mauro Bussani (eds.), The Common Core of European Private Law (Boston, Mass.: Kluwer, 2002).

[15] *See, e.g.*, Basil S. Markesinis (ed.), The Coming Together of the Common Law and the Civil Law (Oxford; Portland, Or.: Hart., 2000); Horatia Muir Watt, *Evidence of an Emergent European Legal Culture: Public Policy Requirements of Procedural Fairness Under the Brussels and Lugano Conventions*, 36 Tex. Int'l L.J. 539 (2001).

[16] Perhaps the most rigorous and insightful of this new wave of cross-cultural analyses is that produced by a group of comparativists under the direction of Neil MacCormick and Robert Summers. *See* Neil Maccormick and Robert Summers (eds.), Interpreting Statutes—A Comparative Study (1991); Neil Maccormick and Robert Summers (eds.), Interpreting Precents—A Comparative Study (1997).

The use of the term "culture" has itself become a major point of debate within the discipline. *See* Pierre Legrand, Fragments on Law-As-Culture (Deventer: W.E.J. Tjeenk Willink, 1999) ["1999-I"]; David Nelken (ed.), Comparing Legal Cultures (Aldershot: Dartmouth, 1997); John Bell, French Legal Cultures (London: Butterworths, 2001); Jacques Ziller, *Existe-t-il un modèle européen d'Etat pluriculturel?* in P. de Decker and J.-Y. Faberon (dir.), L'etat pluriculturel et le droit aux differences 231 (Brussels: Bruylant, 2003).

[17] Surprisingly, the discipline has not done enough to capitalize on the exploding American literature in comparative constitutional law. The superb work by the likes of Alec Stone Sweet, George Bermann, Donald Kommers, Joseph Weiler, Mark Tushnet and Vicki Jackson, Norman Dorsen and Michel Rosenfeld, etc. is thus strangely absent from the discipline's core intellectual debates.

of the Atlantic. Those in favor sometimes point to the reconstruction of a (mythical?) medieval and renaissance golden age, that of the *ius commune*, during which the major centers of European law, heavily influenced by the great Italian universities and their progeny, possessed relatively interconnected legal cultures.[18] Other proponents take a far more pragmatic stance, one tinged with *Realpolitik*: European legal integration, made possible by underlying legal similarities and advanced by a common European civil code, might help to stave off American legal hegemony.[19]

On the other side of these bitter fights, opponents of European codification have insisted that European legal systems are far less similar than the codification proponents suggest. Stressing historical and cultural differences, these opponents warn against *Civilian* legal hegemony within the European Union: the age-old legal traditions of the Common Law—and especially of its progenitor, England—stand to be trampled underfoot. Finally, these opponents argue that such Civilian hegemony is likely to fail, codification notwithstanding: the Common Law countries are bound to handle a code in Common Law ways, transforming the code into something unrecognizable to Civilians.[20]

As can readily be seen, the European codification question, prompted by the continual process of European legal harmonization, represents a veritable goldmine for comparatists. These debates are at once deeply pragmatic and highly theoretical. They tie comparatists into current events (how to harmonize? whether to integrate?); link them to traditional jurisprudential conundrums (to codify or not to codify?); push them to consider cultural issues (what is a legal culture? what in a legal system is "cultural"? what is the effect of integration on legal culture?); and renew the classic comparative law questions (how to compare legal systems? what counts as similitude and difference? what are the purposes of comparison?).[21]

[18] *See, e.g.*, Reinhard Zimmerman, Roman Law, Contemporary Law, European Law: The Civilian Tradition Today (Oxford: Oxford University Press, 2001); Reinhard Zimmermann, "Roman Law and European Legal Unity", in A.S. Hartkamp *et al.* (eds.), Towards A European Civil Code 65 (1994); Reinhard Zimmermann, *Civil Code or Civil Law? Towards a New European Private Law*, 20 Syracuse J. Int'l L. & Com. 217 (1994); Reinhard Zimmermann, *Roman and Comparative Law: The European Perspective*, 16 J. Leg. Hist. 21 (1995).

[19] *See* Ugo Mattei, *European Civil Codification and Legal Scholarship: Biases, Strategies and Developments*, 21 Hastings Int'l & Comp. L. Rev. 883, 884–890 (1998).

[20] *See* Pierre Legrand, *Against a European Civil Code*, 60 Modern L.Rev. 44, 60 (1997).

[21] For examples of comparative work that are particularly sensitive to contemporary intellectual, cultural, and political debates, *see, e.g.*, James Q. Whitman, Harsh Justice: Criminal Punishment and the Widening Divide Between America and Europe (Oxford: Oxford University Press, 2003); Annelise Riles, *Wigmore's Treasure Box: Comparative Law in the Era of Information*, 40 Harv.

Furthermore, the comparative debates in the EU context clearly mirror and draw strength from the globalization debates currently raging in countless arenas. What is the relation of culture to trade? Does the opening of markets mean a race to the bottom? What does governance mean, and who—if anybody—wields it?[22] What *is* the "glocal" (*i.e.*, the intersection of the global and the local)? Can rights—be they human rights, women's rights, or cultural rights—play any meaningful role in the global economy?[23] Are there alternatives to U.S. hegemony and to its apparently neo-liberal, market driven, genetically altered ethos?[24]

In short, given that it is precisely the European Union which has provided new impetus to the discipline of comparative law, it seems only logical to focus attention on the EU's own court. The ECJ is, after all, the nodal point of the European judiciary, the court that almost all European countries now have in common.

Finally, and however difficult this may be to believe, there have been—with the notable exception of articles by Mauro Cappelletti and Jack Barceló[25]—almost no serious *comparative* analyses of the ECJ's reasoning and interpretive practice. There have been many excellent studies of the ECJ as an agent of European federalism and of EU integration,[26] but almost none

Int'l L.J. 221 (1999); ANNELISE RILES (ed.), RETHINKING THE MASTERS OF COMPARATIVE LAW (Oxford, Hart, 1999); P.G. Monateri, *Black Gaius: A Quest for the Multicultural Origins of the "Western Legal Tradition"*, 51 Hastings L.J. 479 (2000).

[22] For an example of particularly thoughtful work on this issue, *see, e.g.*, Christian Joerges and Jürgen Neyer, *From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology*, 3 E.L.J. 273 (1997). For an unusually sophisticated and challenging set of analyses of the relationship between the discipline of comparative law and governance issues, *see* David Kennedy, *Comparativism and International Governance*, 1997 Utah L. Rev. 545 (1997); David Kennedy, "The Methods and the Politics", in P. LEGRAND and R. MUNDAY (eds.), COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS 345 (Cambridge: Cambridge University Press, 2003).

[23] *See* WOJCIECH SADURSKI (ed.), CONSTITUTIONAL JUSTICE, EAST AND WEST: DEMOCRATIC LEGITIMACY AND CONSTITUTIONAL COURTS IN POST-COMMUNIST EUROPE IN A COMPARATIVE PERSPECTIVE (The Hague: Kluwer, 2003).

[24] Christian Joerges, *Law, Science and the Management of Risks to Health at the National, European and International Level—Stories on Baby Dummies, Mad Cows and Hormones in Beef*, 7 Colum. J. Eur. L. 1, (2001).

[25] In these articles, Mauro Cappelletti describes the role of the ECJ in European integration and defends the ECJ from Hjalte Rasmussen's scathing critiques, while Jack Barceló analyzes the ECJ's use of precedent. *See* MAURO CAPPELLETTI, THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE (Oxford: Clarendon Press, 1989), chapters 8 and 9; John Barceló, *Precedent in European Community Law*, in D. NEIL MACCORMICK and ROBERT SUMMERS, (eds.), INTERPRETING PRECEDENTS: A COMPARATIVE STUDY 407, 408, 433 (1997).

[26] *See, e.g.*, GRÁINNE DE BÚRCA, and JOSEPH WEILER (eds.), THE EUROPEAN COURT OF JUSTICE (Oxford: Oxford University Press, 2001); ANTHONY ARNULL, THE EUROPEAN UNION AND ITS COURT OF JUSTICE (Oxford: Oxford University Press, (1999); Jeffrey C. Cohen, *The European Preliminary*

directed specifically at the ECJ's reasoning and interpretive practice. Even the few non-comparative exceptions are not terribly recent.[27] In short, there is a gaping hole in the comparative literature, one that this book seeks to fill. In many respects, therefore, this book can be seen as a comparative attempt to come to grips with the ECJ's mode of judicial decision-making, and to do so in a way that—by learning from the comparative analysis performed in the French judicial context—resists the American temptation to gloss over the complex relationships between judicial transparency, accountability, deliberation, and legitimacy.

## II. The Project

The project therefore consists fundamentally of a comparative analysis of three emblematic courts: the French Cour de cassation, the United States Supreme Court, and the European Court of Justice. The methodological question nonetheless remains: what facet(s) of these courts should one study, and why?

First and foremost, this book offers an analysis of judicial discourse. It examines how judges reason, argue about, and decide cases, and how they then go about justifying their decisions. The ultimate goal of such analysis is to understand, to whatever extent possible, how other judicial systems conceive of law, how they conceptualize their own legal systems, and how they imagine their legal systems to function—or how they should function—and why.

This set of goals calls for a brief initial presentation of the methodological approach that I deploy in this book, a methodology that will be elaborated at length over the course of the ensuing chapters and will receive extended attention in Part III. This methodology is composed, insofar as I can tell, of three basic elements. The first is a vague but strong belief that through prolonged exposure and detailed analysis, the comparatist can in fact gain a certain fluency and eventually insight into the linguistic and conceptual universe of foreign legal systems.

*Reference and U.S. Supreme Court Review of State Court Judgments: A Study in Comparative Judicial Federalism*, 44 Am. J. Comp. L. 421 (1996).

[27] *See, e.g.*, Anna Bredimas, Methods of Interpretation and Community Law (Amsterdam: North-Holland Publishing Company, 1978); Joxerramon Bengoetxea, The Legal Reasoning of the European Court of Justice: Towards a European Jurisprudence, 181–270 (Oxford: Clarendon Press, 1993).