Workshop
RECON models operationalised
ARENA, University of Oslo – Friday 27 March 2009

Defending and Reconstituting Democracy in Postnational Constellations Through Conflict of Laws

And a Three-dimensional Conflict-of-Laws Approach to Europe's Multi-level System of Governance

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DRAFT
in English, with typos and incomplete footnotes

I. Introduction

1. Objectives

The quite ambitious effort we are undertaking in our contribution requires and necessitates three preliminary remarks:

1. The first is methodological: We are lawyers writing in the categories of our discipline. This is why we simply cannot, and should not even try, to implement the RECON models literally. Each of them has to be translated (in the sense of "über-setzen"), *i.e.* reconstructed in the language of our discipline before we can make use of it and explain our queries or evaluation. This is a trivial remark only in the abstract. As soon as it come to terms like governance, network, legitimacy, accountability, etc. etc. the challenges become concrete and difficult. Recall the Joerges/Neyer trademark of "Deliberative Suprantionalism" as a case of exemplary importance.

2. The second is substantive and concerns our task at this meeting. The RECON models are of general importance but deal primarily with the Reconstitution of Democracy in Europe. WP 9 Subproject 1, however, deals primarily with global governance. We are in our *legal* conceptualisation of legitimate governance aiming at a comprehensive

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paradigm which is of relevance for both the global and the European postnational constellations. There are obvious differences between the two and we cannot explain our approach to global governance in isolation. For both reasons we focus in this paper on Europe. Work on global governance and the contrast between the global and the European *problematique* is, however, under way[1] and will be presented in dues course.

3. The third is a request for patience. RECON has been confronted with the conflict-of-laws approach at various occasions but never as systematically as in this contribution. Of course we hope to present our ideas in a comprehensible way. Interdisciplinarity however, is a challenging demand not only for lawyers reading political science but also for social scientists who are confronted with legal science.

2. Translating the Models: Promises and Prospects

We start with some remarks which are premature before we have developed our argument (in Section II). They should nevertheless provide some orientation also for those who do not read the whole text:

Model 1: Audit Democracy, Delegated Democracy

We do not go here into the factual strengths and normative weaknesses discussed by E.O. Eriksen and J.E. Fossum.[2] A core normative assumption which we share with Eriksen & Fossum[3] is that nation state face a "structural democracy" failure"; they are unable to cure themselves. We also refrain from using the notion of delegation to justify transnational governance because the compensation of democracy failures provides legitimacy in its own right. The most important discrepancy between our approach and various versions of model 1 is apparent from the way we limit the legitimacy of transnational governance. We do not subscribe to the broad range of efforts to downplay the political dimensions of EU governance (as "economic" or "technocratic") and we do not believe that Member States could or should

[1] See. Ch. Joerges, "Conflict of Laws as the Legal Paradigm of the Postnational Constellation", contribution to the CRC 597 / RECON Workshop on "The Social Embeddedness of Transnational Markets". Bremen 5-7 February 2009, available at http://www.reconproject.eu/projectweb/portalproject/BremenFeb09.html; F. Rödl, "Regime-Collisions, Proceduralisation and Law's Unity: On the Form of Constitutionalism Beyond the State", in R. Nickel (ed.), Conflict of Laws and Laws of Conflict in Europe and Beyond - Patterns of Supranational and Transnational Juridification, RECON Report * /2009 (forthcoming)**.**

[2] Reconstituting European Democracy, RECON WP 1/2008, 13-20.

[3] Ibid., 27.

control the transnational level. To rephrase: the validity of traditional International Law was dependent upon a consensus among states. EU governance is something else. Our insistence on democracy is irreconcilable with all forms of technocratic legitimacy notions.[4]

Model 2: "Federal Democracy"

It is one of the merits of the Eriksen/Fossum paper that the authors do not content themselves with objections political realists come up with. They rather question the attractiveness of federalism as a normative perspective.[5] We agree in principle without exploring the state of modern federalist theory.[6] Please note that our approach presupposes strong binding commitments in the EU which are in some respects, in particular when it comes to the Europeanisation of administrative functions, stronger than, at least different from the German federal model with its assignment of all administrative powers to the *Länder*.

Model 3: A Regional Democracy with a Cosmopolitan Imprint

We posit or conjecture in all modesty that our approach has a lot to offer in terms of a legal conceptualisation of such a model. As we have indicated at various occasion,[7] we are subscribing to the notion of a democratic European „*Bund"*, in which no level or unit of law production enjoys a legitimacy trumping another – that characteristic distinguishes the „Bund" from a federation (Model 2) on the one hand and from the audit democracy (Model 1) on the other. What are conflict-of-laws approach seeks to understand and conceptualise in addition, are the tensions (conflicts) between the legislating legal orders. The recent jurisprudence of the ECJ in the field of labour law provides a telling example – but only an example. We seek more generally to understand how the assignment of legislative competences – or the refusal to establish such competences -- mirrors massive socio-

[4] As an aside a remark on D. Chalmers: "Deliberative Supranationalism and the Reterritorialization of Authority", in Ch. Joerges: "Rethinking European Law's Supremacy", *EUI Working Paper Law* 12/2005, 29 – 44 and P. Kjaer, "Three-dimensional Conflict of Laws in Europe" ZERP DP */2009 arguing: "The main concern of Joerges is the ability of the law to curb the territorially based power of the nation states. This is a relevant objective. But as argued by Chalmers, territorially vested authority is no longer the only form of authority….". We do defend democracy but not the state as such, let alone the territoriality principle as it was understood in international private and public law .

[5] In particular at 21.

[6] See D. Halberstam, „Of Power and Responsibility: The Political Morality of Federal Systems", 2004 (90) *Virginia Law Review*, 732-834; "The Bride of Messina: Constitutionalism and Democracy" (2005) 30 *European Law Review*, 775- 801. .

[7] *E.g.*, "Integration Through De-Legalisation", *European Law Review* (2008) 33, 219-312, at 304.

economic interests and tensions. This query will also guide our nalysis of the differences between European and global governance.

II. The Conflict-of-Laws Approach to the European Constellation[8]

We are by no means the only ones to plead for a turn to conflict of laws at all levels of governance. It may therefore be useful to start with a note explaining the specifics of our approach by contrasting it with it with its most prominent neighbour, namely Gunther Teubner's resort to conflict of laws a means of operationalising (juridifying) systems theory at all levels of governance[9] and the suggestion developed in collaboration with Andreas Fischer-Lescano's to reconstruct transnational law as a law of regime collisions.[10]

To restate their core argument briefly: The societal division of labour, so fundamental for societal modernity, cannot be framed by the nation state anymore. Rather, the highly differentiated societal spheres, which are domestically already only reflexively governable, push their respective law beyond the boundaries of the nation state. These processes trigger functional transnational legal regimes -- some of public, some of private, some of hybrid character -- to emerge, which manifest themselves as autonomous legal constitutions. After the erosion of the state's ability to govern and due to the solipsism of the highly differentiated subsystems, courts come into play both as fora and actors alike in this situation. They find themselves confronted with the collisions of the laws of these functional regimes, which they take as merely legal conflicts and which they decide upon; however, at the heart of these conflicts lies in fact the collision of the incommensurable rationalities of the differentiated functional subsystems. The judicial mediation of conflicts -- and here their form under the conflict of laws becomes significant -- should not give precedence to one societal rationality over the other, in order to reconstitute societal hierarchies; rather, it is important that none of

[8] We draw in the following parts on Ch. Joerges & F. Rödl, „Zum Funktionswandel des Kollisionsrechts II. Die kollisionsrechtliche Form einer legitimen Verfassung der post-nationalen Konstellation", in: A. Fischer-Lescano *et al*. (eds), *Soziologische Jurisprudenz*. Festschrift für Gunther Teubner, Berlin: Walter de Gruyter 2009, 599-612 (forthcoming)..

[9] See, *e.g.*, G. Teubner, Societal Constitutionalism: Alternatives to State-centred Constitutional Theory?, in Ch. Joerges, I.-J. Sand & G. Teubner (eds.), *Constitutionalism and Transnational Governance*, Oxford: Hart 2004, 3-28, also in *Ius et Lex* 2004, 31-50 and in P. Schiff Berman (ed.), *Law and Society Approaches to Cyberspace*, Aldershot: Ashgate 2007, 143-168..

[10] Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law, (2004) 25 *Michigan Journal of International Law*, 999-1045.

the competing rationalities gains absolute primacy; all rationalities should be given as far-reaching validity as possible, even in the case of conflict.

Our resort to conflict-of-laws methodologies is equally comprehensive. In our understanding, however, conflict-of-laws is a response to the complexity of conflict constellations in our societies which requires the coordination or balancing of conflicting concerns. The "proceduralisation of the category of law"[11] is the response to that problematic within constitutional democracies. That notion we retain in our re-interpretation of European law as a "new type of conflict of laws". The challenges of the European constellation are, however, distinct in two ways. As already underlined, we start from a democracy failure of nation states which European law is to cure.[12] As we have framed it back in 1997: "The legitimacy of governance within constitutional states is flawed in so far as it remains inevitably one-sided and parochial or selfish. The taming of the nation-state through democratic constitutions has its limits. [If and, indeed, because] democracies presuppose and represent collective identities, they have very few mechanisms to ensure that 'foreign' identities and their interests are taken into account within their decision-making processes".[13] If the legitimacy of supranational institutions can be designed so as to cure these deficiencies – as a correction of 'nation-state failures', as it were – they may then derive their legitimacy from this compensatory function.

The responses European law can provide are, however, limited. The Union is not a comprehensive polity; it lacks a *Kompetenz-Kompetenz* and its legislative activities remain restricted to "limited fields". The most important limitation, which is coming to the fore in the recent jurisprudence of the ECJ stems from the "social deficit" of the integration project. Fritz Scharpf's notion of the "decoupling" of the (largely European) economic from the (primarily national) social constitution captures this problematic well. What we praise as Europe's

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[11] The notion of proceduralisation was developed by Rudolf Wiethölter in his analysis of the litigation on the constitutionality of Germany's co-determination law; "Entwicklung des Rechtsbegriffs am Beispiel des BVG-Urteils zum Mitbestimmungsgesetz und—allgemeiner—an Beispielen des sog. Sonderprivatrechts" in V. Gessner & G. Winter (eds), *Rechtsformen der Verflechtung von Staat und Wirtschaft,* Opladen: Westdeutscher Verlag, 1982, 38–59; Jürgen Habermas took the notion systematically up in his *Faktizit¨at und Geltung,* Frankfurt: Suhrkamp 1992, 516–540; see also his *Between Facts and Norms*, Cambridge, Mass: MIT Press 1998, 427–446.

[12] It is worth noting that Jürgen Habermas has pointed to the "ever greater gap between being passively affected and actively participating" already in his very first essay on European integration (*Staatsbürgerschaft und nationale Identität*, Zürich: Erker, 1990, reprinted as Annex II to *Between Facts and Norms*, *op. cit*., 491-516, at 503). The Luhmannian parlance should not distract from Habermas' democratic concerns. They coincide with our argument that the supranational European law of conflicts of law has to counter the democratic deficits of nation states: its inability to include those concerned into national decision-making.

[13] Ch. Joerges & J. Neyer, "From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology", 3 (1997) *European Law Journal* 273-299, at 293.

chance to cure democracy deficits here turns into a threat. Europe simply does not have the means to develop some equivalent to the welfare traditions of the democracies of Western Europe. To be sure, a destruction of Europe "*Sozialstaatlichkeit"* is a democratic problem only if you assume that democratic governance presupposes that the citizens should be in a position to influence the economic and social organisation of their societies.[14]

These remarks should suffice as a basis for the following elaboration of our three dimensional conflict-of-laws approach. In each of the three dimensions we will take up a problematic of exemplary importance. We will first comment upon the tensions resulting from the disjuncture of the economic and social spheres which seemed to be in equilibrium during the "golden era" of "embedded liberalism"[15] (1.). We will then illustrate the second dimension of our approach by referring to the European handling of problems of the risk society, there defending notions of transnational problem-solving that take law not exclusively as a product of judicial legal practice but provides for the participation of experts and societal actors and for procedures ensuring the democratic legitimacy of the outcome this generated. (2.) Our third point concerns the normative relation of civil and public constitutions. The empirical emergence of para-legal "civil constitutions" (*Zivilverfassungen*)[16], especially in the transnational context, can hardly be doubted. However, we argue that the coexistence of civil and public constitutions should not be seen as a factual pluralism of autonomous and equivalent codes. At this point, we would rather like to introduce an asymmetry, which has to exist in the relation of civil and public constitution. This argument is grounded in the fact that every civil constitution and its law is made subject to the examination by public constitution.[17] We illustrate this point with the process of European norm-generation (3).

II.1 The First Dimension: The Recent Responses of the ECJ to the Social Disembedding of the European Economy

The recent jurisprudence of the ECJ on the impact of European primary and secondary law on national labour law has attracted European-wide an unprecedented critical attention. We were

[14] On this premise cf., Ch. Joerges, "What is left of the European Economic Constitution? A Melancholic Eulogy, (2005) 30 *European Law Review,* 461-489, at 462-464.

[15] The term has been coined by G. Ruggie, "International Regimes, Transactions and Change: Embedded Liberalism in the Postwar Economic Order", (1982) 36. *International Organization*, 379-415.

[16] G.Teubner, note 9 *supra*.

[17] *Cf.*, Ch. Möllers, "Transnational Governance Without a Public Law?", in Ch. Joerges, I.-J. Sand & G. Teubner (eds.), *Constitutionalism and Transnational Governance*, Oxford: Hart 2004, 329-337.

among the first to articulate such critique,[18] which we need not repeat here. Suffice it to underline the conflict-of-laws dimension of the by now (un)famous decisions in *Viking*[19] and *Laval*.[20] In both cases the ECJ has attributed to the supremacy doctrine an extremely far-reaching and rigid meaning. European economic liberties were applied to Finnish trade unions held to constrain the exercise of the right to strike in *Viking*; the posted workers directive was interpreted as a comprehensive regulation which restricted the right to strike as guaranteed under the Swedish constitutional law in *Laval*. As Loïc Azoulai[21] has pointed out, this jurisprudence represents a move away from the original construction of the common market "partial integration" to a regime of "total integration".[22] The revolutionary character of that move becomes apparent in the most basic exercise students of conflict of laws have to undertake in the search for the applicable law, namely that of "characterisation". Economic liberties and collective labour law are very different species; to assign supremacy to the former misconceives that discrepancy. Similarly, a directive with very limited objectives cannot and an unspecified "social dimension" of the Union cannot trump the labour and social constitution (*Arbeits-* and *Sozialverfassung*) of a Member State.

To restate the institutional background of these objections briefly:[23] The primarily economic orientation of the integration project and its detachment from statal welfare functions has never been changed substantially. During the formative era of the European Economic Community this configuration did not cause serious concerns. It seemed safe to assume that both spheres could peacefully coexist: while the Common Market would provide all those involved with increases in prosperity, the Member States would remain responsible for (re-)distributing these gains. Implied was the further assumption that the freedom of trade and services in the Common Market would not lead to a European-wide direct wage competition among workers from different Member States; because the price of human labour, if measured on the basis of its productivity, was Community-wide at a comparable level –

[18] On the "Social Deficit" of the European Integration Project and its Perpetuation through the ECJ-Judgements in *Viking* and *Laval*, RECON_wp_0806.pdf, by now also published in *European Law Journal* (2009) 15, 1-19.

[19] Case C-438/05, *International Transport Workers' Federation, Finnish Seamen's Union v Viking Line ABP, OÜ Viking Line Eesti*, judgment of 11 December 2007.

[20] Case C-341/05, Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundet, avd. 1, Svenska Elektrikerförbundet, judgment of 18 December 2007.

[21] The Court of Justice and the Social market economy: The Emergence of an Ideal and the Conditions For its Realization, (2008) 45 *Common Market Law Review*, 1335–1356.

[22] Ibid., at 1346.

[23] Cf., more comprehensively, Ch. Joerges & F. Rödl, "'Social Market Economy' as Europe's Social Model?", in L. Magnusson & B. Stråth (eds.), *A European Social Citizenship*, Brussels: Lang 2005, 125-15820; F. Rödl, "Arbeitsverfassung", in A. v.Bogdandy (ed.), *Europäisches Verfassungsrecht*, 2nd ed., (forthcoming).

distortions of that initial equilibrium, this was the third assumption, could be counterbalanced by readjustments in the then still flexible exchange rates.[24]

These assumptions are of a constitutive importance for the defence of statal welfare functions because all welfare states restrict wage competition among employees through legal minimum working conditions and/or the legal sanctioning of collective bargaining. It is the very objective of labour law to exempt the labour, the false commodity, from the regular competitive market mechanisms. To be sure, the opening of national economies for free trade in goods and services threaten these historically grown but also fought for limitation. This threat is felt, whenever a new state whose limiting mechanisms are less effective or geared towards lower standards becomes a member of the Union. This is why enlargement has caused foreseeable social tensions that could not sufficiently be cushioned by transfer payments.[25]

However, the competition in goods exerts such pressures on the welfare states of "old Europe" only indirectly and much softer than an imposition of direct wage competition through legal *fiat.* Precisely that happened in the *Rüffert* case.[26] At issue was the compatibility with European law of a so-called "*Tariftreuegesetz*". This type of legislation is a weak Ersatz for an industry-wide binding collective wage agreement. It has been enacted in a number of *Länder* with social democratic governments and requires from firms who contract with a public authority "loyalty" (*Treue*; compliance) with local collective agreements.[27] Those contracting with a public authority contractors have, as far as they fulfil a public order, to pay their employees according to the locally relevant pay agreements. By dint of this instrument, which is correctly also termed „small extension of a collective agreement", the binding force of industry-wide pay agreements can at least in the area of public work be enhanced, and particularly in industries like the construction industry, they can almost be restored. The "*Tariftreuegesetzgebung*" was contested on legal grounds in Germany but its constitutional validity was at the end unambiguously confirmed by Germany's constitutional court.[28]

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[24] F. Rödl, *ibid.*

[25] Cf. G. Ross, „Das ‚Soziale Europa' des Jacques Delors", in St. Leibfried & P. Pierson (eds.), *Standort Europa*, Frankfurt (Main): Suhrkamp 2002, 327-68 (336).

[26] Case C-346/06, Rüffert *v.* Land Niedersachsen, Judgment of 3 April 2008.

[27] For an overview see Th. Schulten & M. Pawicki, „Tariftreueregelungen in Deutschland", *WSI-Mitteilungen* 2008, 184-90.

[28] BVerfG, judgment of 3 November 2006, available at http://www.bundesverfassungsgericht.de/entscheidungen/ls20060711_1bvl000400.html.

The ECJ, however, declared Lower Saxony's *Tariftreuegesetze* to be incompatible with the freedom as guaranteed by Article 49 TEU and the Posting Workers Directive.[29] That Directive stipulates that a number of core labour provisions, which are prescribed by law or by a legally binding collective agreement in the building industry, apply also to those employees posted only temporarily in the host state. The EJC interpreted that Directive in a surprisingly extensive way. The Court declared any conceivable means other than those explicitly named in the Directive for extending domestic working conditions to posted workers, to be prohibited by the Directive.[30] The German mode of extending collective agreements limited to the public sector seemed so implausible to the ECJ that it did not pass the first step of the justification test for the limitations of fundamental freedoms: it seemed incomprehensible that the law was indeed meant to protect employees.[31]

Once again, the ECJ assigned supremacy to the economic "laws" of the European market over the social objectives of national legislation. It thereby touched upon precisely a condition which is of central symbolic and practical importance for the survival of the modern welfare state under conditions of open boarders and transnational markets. To be sure, legislation like the one at issue in *Rüffert*, has always been and is bound to remain politically contested.[32] However, for precisely that reason the legitimacy of a European intervention into such a contested field is extremely problematic. The ECJ has taken a clear position against a classical concern of the labour law of all West European democracies.

The *Rüffert* ruling illustrates rather graphically that societal conflicts can underlie collisions of different -- in this case economic and social – "rationalities", which nation states had managed to bring tame by the recognition of both the "laws" of the market *and* the exemption of labour relations that type of governance. The seemingly neutral appeal to a legal rule, which subjects these orders to the general discipline of a federal order or to the European principle of primacy, seems simply misplaced. Similar reasons militate against a general precept of proportionality or mutual considerateness. In constellations like that of the *Rüffert* an application of such principles would be foster the "invasion of the market" into spheres which have been exempted from its rules after decades of social and constitutional contestation. European law and its institutional actors should understand and respect the societal backdrop

[29] Directive 96/71/EC, OJ L 18/1996, 1.

[30] The ECJ did again not mention, let alone discuss, the opinion of his Advocate General (AG Bot in *Rüffert*; AGs Mengozzi and Poiares Maduro were treated likewise in the *Laval* and *Viking* judgments, notes 20 and 21 *supra*).

[31] Case C-346/06 (note 26), para. 40.

[32] *Cf.* With many references M. Kittner *Arbeitskampf*, München: Ch. Beck 2005.

of the shape of Union competencies, according to which the articulation of social rights largely remains with the Member States.

II.2 The Second Dimension: Substantive Conflict-of-Laws Against Technocratic Rule

While Europe had failed to develop transnational labour and social constitution, Europeanisation exerted remarkably progressive and modernising effects in the field of so-called social regulation, in particular the regulation of health and safety at work environmental and consumer protection. As in the midst of the 1980s all institutional actors agreed that integration should be pushed ahead by the "completion" of the internal market, it became quickly apparent that this project required extensive regulatory and institutional reforms. Advocates of a neoliberal market-Europe, found this irritating, but the development did not really come as a surprise as Europe's effort of market building encountered a number of nationally established regulative practices, which it could not easily abolish: extensive regulatory reforms seemed therefore to be a more attractive alternative.

Modern regulatory politics requires in view of its problem-solving ambition that expertise be taken into account e.g. when it deals with the uncertainties of the risk problematic, complex economic issues or the social implication of a particular policy choice. Furthermore, it seems often well advised to ensure the co-operation of societal actors. Regarding all these aspects, the European level of governance was badly equipped for the tasks its project required. This weakness translated into innovative constraints, opportunities and risks. For the architects of the Internal Market, it was not really an option to establish a hierarchically structured bureaucracy or European agencies modelled after American patterns. Instead, it seemed obvious to return to those practices with which Europe had already established a level-transcending, continuously active "political administration", *i.e.*, the committee system as first developed in agricultural policy.

In official parlance, this institutional arrangement termed "comitology".[33] Its obscure sound equals the complexity of its task to reduce the functional and structural tension of the Internal Market project. Often enough, the implementation of pertinent regulatory policies touches upon politically sensitive topics. The comitology system has then to mediate between

[33] For details, see J. Falke, 'Komitologie – Entwicklung, Rechtsgrundlagen und erste empirische Annäherung', in Ch. Joerges & J. Falke (eds.), *Das Ausschußwesen der Europäischen Union: Praxis der Risikoregulierung im Binnenmarkt und ihre rechtliche Verfassung*. Baden-Baden, 2000, 43-159; E. Vos, EU Committees: the Evolution of Unforeseen Institutional Actors in European Product Regulation, in Ch. Joerges & E. Vos (eds.), *EU Committees: Social Regulation, Law and Politics*, Oxford-Portland: Hart Publishing 1999, 19-47.

functional requirements and normative concerns. The composition of committees will therefore mirror the task of taking different strands of expertise into account before coming to a practical synthesis. Comitology does however also mirror more or less adequately the given plurality of interests and political diversity, which have to be balanced in the implementation process.

In our introductory remarks, we introduced comitology as a mode of conflict mediation that cannot be understood as merely an "application" of law to the problem at hand. The irrefutable need to include scientific and practical expertise in the search for the proper regulatory measure, also affects its transnational operation. An exclusively judicial treatment of these collisions would be confronted with an irresolvable dilemma, as only two equally inadequate possibilities were available: Courts could either stress the territorial scope of a Member State regulation, according to the tradition of public conflict of laws[34], and would thereby fail to build up the Internal Market; or they could instead establish a pure country of origin principle, which would realise a liberalist conception of conflict of laws[35]-- and would thence risk that the discontent of the citizens of the Union with such deregulatory perspectives. Therefore, material norms are required that do not appear as substantive norms will be needed which should, however, not be established and perceived as some law of a super-ordinate federal legal level, but which should functionally remain collision norms as "material norms in the conflict of laws"[36]. In contrast to the norms of public and liberalistic conflict of laws, such substantive solutions cannot emerge in strictly and exclusively legal operations. Rather, these substantive responses have to be generated in procedures which mirror their political implications and mediating functions. For exactly that comitology is a quite appealing institution. Its "regulatory committees" resemble "mini-councils", whose legitimation is derived from the delegation by democratically legitimated Member State governments. With the inclusion of competing concerns and the introduction of scientific and practical expertise, a "discovering procedure of the praxis"[37] has been established, which is

[34] **Cf.,** for that tradition e.g. G. Kegel & I. Seidl-Hohenveldern, „Zum Territorialitätsprinzip im internationalen öffentlichen Recht", in A. Heldrich, D. Henrich& H.J. Sonnenberger (eds.), *Konflikt und Ordnung. Festschrift für Murad Ferid*, Münbchen: C.H. Beck 1978, 233-77.

[35] St. Grundmann, „Das Internationale Privatrecht der E-Commerce-Richtlinie", *Rabels Zeitschrift* 67 (2003), 246-97.

[36] See earlier E. Steindorff, *Sachnormen im Internationalen Privatrecht*, Frankfurt (Main): Klostermann 1958.

[37] For the term itself, see Ch. Joerges, *Verbraucherschutz als Rechtsproblem*, 1981, 111 ff.; "Relational Contracts Law in a Comparative Perspective: Tensions Between Contract and Antitrust Law Principles", (1985) *Wisconsin Law Review* 581-613; "Quality Regulation in Consumer Goods Markets: Theoretical Concepts and Practical Examples", in T. Daintith & G. Teubner (eds.), *Contract and Organization*, Berlin: de Gruyter, 1986, 142-163.

based on the productivity of the co-operative handling of complex conflict situations; some significant pieces of evidence indicate that the considerations of problems are usually conducted in an objective-deliberative manner, which is unfortunately insulated from the broader public -- such diplomacy is irreconcilable with its transnational functions.

These failures are by no means a particularity of the European constellation. At all levels of governance the edge of bureaucracy with regard to knowledge and power threatens to undermine the constitutionally foreseen relationship of legislation, government and bureaucracy.[38] Everywhere, and hence also in supranational contexts, it is important to prepare for the risks posed by increasingly detached European and international functional bureaucracies and expert circles.[39] Some appropriate safeguards can be discerned in the comitology system, *e.g.*, the transparency of the comitology towards the European Parliament and the recognition of the rights of individual citizen rights to information[40] as well as the safeguard clauses in all pertinent secondary legislation, which does not allow some permanent opt out but ensures political rights to renewed consultation and decision.[41] More advanced proposals regarding a deeper and primarily procedural constitutionalisation of the comitology system have however to consider two difficulties. The first one concerns the barriers of comprehension between experts and the general public. The other one results from the socio-economic and cultural dependencies of risk politics. Constitutionalisation has to take into account that a plurality of expertise in the decision-making process has to be guaranteed, and that the social and political plurality of Europe is respected in order to allow European publics to mutually observe each other and to raise the awareness for the concerns of others.[42] If all these considerations complicate unitary decisions, then this is at least normatively no disadvantage; rather it corresponds to the plurality of the EU. The practical prospects for these

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[38] See the seminal study of W. Schluchter, *Aspekte bürokratischer Herrschaft*, 1985; H. Häußermann, *Die Politik der Bürokratie*, 1977.

[39] We are in agreement with R. Schmalz-Bruns' apposite phrase, that this is the „normative point of constitutionalisation' of supranational-administrative legalisation", thus his „An den Grenzen der Entstaatlichung", in P. Niesen & B. Herborth (eds), *Anarchie der kommunikativen Freiheit*, Frankfurt a.M.: Suhrkamp 2007, 269-94 (290).

[40] Art. 5 para. 5, sec 7, 3 of the Council Decision laying down the procedures for the exercise of implementing powers conferred on the Commission, 28 June 1999, Q

OJ L 184/23, thus his n the one hand, and CFI, Case T-188/97, *Rothmans International vs. Commission*, Slg. 1999 II-2463, on the other hand.

[41] See Article 95 para. 4-8 and para. 10 TEU and as a recent quite spectacular example the Decision of the European Council of 2 March 2009 upholding the Austria's import prohibition against genetically modified maize, *not*GMO decision against European Commission , cmmented by A. Ch. Lohninger in Publiclaw.at.

[42] For the concept of a European public we refer to the work of Klaus Eder, in particular his "Zur Transformation nationalstaatlicher Öffentlichkeit in Europa", (2000) 10 *Berliner Journal für Soziologie*, 167-84.

suggestions to be implemented are slim however. Regulative politics reacts in its dominant strands with a centralising "scientification" to the increase of regulative tasks and the growth of socio-economic diversity, the latter being mainly a result of Eastern enlargement; this strategy accepts as relevant only those objections to environmental and health risks, which can be backed by scientific proof. Thereby the normative potential of comitology is pushed back. It is increasingly replaced with European agencies, which work on cognitively understood risk analyses, while the risk management itself remains with the politically responsible actors -- as if the cognitive-scientific and practical-political dimensions of risk regulation could be clearly kept apart. The factual strengthening of scientific consultation in European risk politics accommodates the interest into common European and unitary decisions; it facilitates the integration of European policy into global efforts; in the end, this fact tends to also accommodates the marketing strategies of global corporations, which do not want to be concerned with the impact of legal regulations on the well-being of domestic pigs or on innovation in genetic engineering for Polish agriculture. In this tendency to detach European regulative policies from their distributive implications, the disjunction of market integration and social integration is reproduced.

II.3 The Third Dimension: Conflicts of Public Constitutionalism and Private Transnationalism

Even if those governance arrangements with which Europe organises the economic and social regulation of the Internal Market often include non-governmental actors, still in the above-outlined "old" comitology an administrative component dominates. For the practically enormously influential area of standardisation, which affects all aspects of production and consumption, a reverse relation exists. Here state, bureaucracy and European Commission are in no way absent, but they have taken a role at the sidelines—as observers and facilitators.

In Europe, this change of position took place in 1985 by dint of the "new approach to technical harmonisation and standards". Its (success) story is fantastic:[43] After cumbersome efforts, occupying the EEC since 1969, to eliminate so-called non-tariff trade barriers had turned out to be in vain, Lord Cockfield designed a bundle of shrewdly tuned measures on behalf of the European Commission. Thereby, European legislation disburdened itself significantly by focussing on essential safety requirements. The concretisation of the latter was delegated to the European standardisation organisations CEN, CENELEC and ETSI. The

[43] Cf. The reconstruction by H. Schepel, *The Constitution of Private Governance*, Oxford: Hart 2005, esp. 35 ff.

inclusion of non-state actors signifies *de facto* a delegation of legislative competencies. At a first glance, this might seem downright paradoxical: the regulation of this "private transnationalism" (Harm Schepel) has turned out to be far more intense than in previously public policy fields, which are now covered by new governance arrangements. Widely accepted and stable procedures have emerged, which synthesise legal principles, professional standards and participation opportunities and lead repeatedly to consensual problem-solving.

Significantly, European standardisation shares many characteristics with comitology. It has in particular refrained from centralisation and guarantees with its non-unitary network structure that national delegations can make their perspective being heard. Bureaucracies and also courts are always latently and at times actually present. Standardisation happens in their shadow. It has detached itself from state law, but remains transparent and in contact with governmental actors. For Schepel, the recipe for successful standardisation is that its procedures follow political and not economic or scientific standards: fair procedures, transparency, openness and balanced interest representation are the yardsticks according to which consultations within the respective institutions are geared to. They neither foster scientific knowledge nor economic efficiency, but aim at the recognition of their results by state law.[44]

Therefore, we are confronted with a constellation in which coercive state law and the norm generation of non-state actors complement each other productively. The assertion that the process of standardisation develops and maintains such sensitivities at all levels of governance seems at least plausible to us, as Schepel's observations coincide with historical studies reconstructing the transformation of the one-dimensionally construed consumer into a politically active market citizen,[45] with sociological analyses diagnosing the moralisation of markets[46] and a plethora of economic sociological studies conceptualising markets as social institutions.[47] To generalise this point: law can and should be based on the fact that the modern economy and its markets do not function like automatons following the money mediated steering mode of supply and demand. Rather, they have to determine politically important regulations. Law can assume that the producers of these norms are in principle interested in their recognition, especially by constitutional law. Therefore, law can and should influence the very generation of these regulations.

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[44] *Ibid*., at 223.

[45] K. Soper & F. Trentmann (eds.), *Citizenship and Consumption***,** New York: Palgrave Macmillan, 2007.

[46] N. Stehr, *Die Moralisierung der Märkte*, Frankfurt a.M.: Suhrkamp, 2007.

[47] J. Beckert, *Grenzen des Marktes*, Frankfurt a.M.-New York: Campus 1997.

Like in the case of comitology, we have to ask to what extent such interactions can be understood under the conflict-of-laws approach. In contrast to questions of recognition, with which the conventional law of conflicts is confronted with in relation to foreign law and foreign judgements, here we are faced with para-legal alternatives to state law. However, at the same time regulatory issues are concerned, like in comparable national constellations, for whose solution state law lacks resources and expertise.[48] The transition to procedural forms of regulation in national law correlates with the willingness to recognise the results of societal norm-generation, which first is bound to substantial preconditions, second follows some procedural demands or at least corresponds to recognised practices and third whose results have not to be accepted by state legal systems, with whose *ordre public* they are not compatible.

The notion of the recognition of non-state law in the conflict of laws under preconditions does not represent a radically new turn in thinking about the conflict of laws. Rather, an idea is adopted and generalised which "always" existed for private legal relations in the conflict of laws, namely the recognition of the rulings of private courts of arbitration by state law (para.s 1059 ff. German Code of Civil Procedure)[49]; they are also subject to objective preconditions as well as procedural and material requirements, which are more substantial than the recognition of foreign law (Art. 6 EGBGB) or the recognition of foreign judicial decisions (Art. 328 German Code of Civil Procedure). This analogy also stresses the asymmetry of the already outlined: Private standardisation seeks the recognition of state or European law; the former depends on the latter and therefore operates in its shadow.[50] This enables us, in "old European" terms, to stick to the notion that law can only claim validity, if those legally or factually subject to it can see themselves as its equivalent authors -- this seems only conceivable in procedures under public constitution.

III. "Beschluss"

[48] E. Schanze, "International Standards – Functions and Links to Law", in P. Nobel (ed.), *International Standards and the Law*, Berne: Stämpfli, 2005, 84-103, at 90-912005; H. Schepel, "Sources and Legal Recognition of Standardisation", in Ch. Joerges & E.-U. Petersmann (eds.), *Constitutionalism, Multilevel Trade Governance and Social Regulation*, Oxford: Hart, 2006, 397-409.

[49] See, in the context of the debate about a 'private law beyond the state', F. Rödl, "Private Law Beyond the Democratic Order?", (2008) 56 *American Journal of Comparative Law*, 743-66 (764 ff.).

[50] This aspect seems also to be central in M. Herberg, *Globalisierung und private Selbstregulierung*, 2007.

[50] According to our understanding, similar intentions have K. Günther, '(Zivil-)Recht', in Ch. Joerges & G. Teubner (eds), *Rechtsverfassungsrecht*, 2003, 295-311 (305 ff.) and Ch. Möllers, note 17 *supra.*

Can we claim that our reflections fit into the RECON framework "notably with regard to the implications for democracy"? We think we can, although we are aware of the need to go in much more detail into the normative and analytical aspects of the RECON models, in particular of Model 3.

Why are we so confident? To be sure, we have to further elaborate and concretise our approach in all of its three dimensions; we have to be more precise in outlining links with legal theory, integration theory and theories of International Relations. However, it should nevertheless have become clear what our reference points are and where we would like to go.

Most important for us are the challenges to law posed by the postnational constellation. We are concerned with advancing law's twofold task: to grant and safeguard individual *and* social freedom. This requires that the forms of individual freedom find articulation in public-democratic procedures. The postnational constellation leads, on the one hand, to collisions of societally generated norms with publicly constitutionalised law and to collisions among these norms. In such a pluralist context, law can only remain democratically legitimate, if societal norm-generation becomes publicly appropriated as granted autonomy. Moreover, there are also conflicts of publicly constituted legal orders in the fragmented global multilevel system. Here, law can only preserve its democratic legitimacy, if it protects democratic autonomy and compensates for the democratic deficits of fragmentation.[51]

[51] J. Bast, „Das Demokratiedefizit internationaler Fragmentierung", (2009) *Soziale Welt* (forthcoming); Ch. Möllers, *Gewaltengliederung*, Tübingen: Mohr, 2005, at 223.