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# Human rights as preconditions for intercultural society

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## **Human rights as *preconditions* for intercultural society<sup>1</sup>**

### **1 Introduction**

In this contribution human rights will be considered not simply as conditions for an intercultural society such as the European Union but as *preconditions*, or, in other words, human rights will be conceptualized as constitutive and not as causal or moral conditions for 'European Integration'.

This means that the level of the analysis is epistemological rather than methodological, though at many points I will indicate the consequences of this approach for the way comparative law can be practiced, if it is to contribute to an intercultural 'area of freedom, security and justice' (art. 29 of the Treaty of the European Union).

In par. 2 I will reflect on the use of the term European, that refers to much more than a geographical territory or an economic market. In par. 3 I will question the idea of European Integration, which I will elucidate in par. 4 by a conceptualization of 'the intercultural' as a shifting fluidium of diversities. In par. 5 I will move to the constitutive meaning of human rights for a European 'Rechtsstaat' and in par. 6 I will conclude this exercise by pointing out the possible contribution of comparative law for the ongoing institutionalization of human rights as preconditions for an intercultural European area of freedom, security and justice.

## 2 What about Europe?

Starting from the treaties of the European Union one could refer to four phenomena as being 'European': the internal economic market (art. 2 Treaty of the European Community, TEC), a European citizenship (art. 17 TEC), a common European heritage (art. 151 TEC), and an area of freedom, security and justice (art. 29 Treaty of the European Union, TEU). The first and fourth of these seem to locate Europe as a geographical entity that is confined within the borders of the Member States of the European Union.<sup>2</sup> This is obviously a restriction that has its practical and political merits but I would prefer to start with a broader conception of Europe.

Europe is in the first place an idea, a concept, that refers in a rather vague way to both a continent with fluctuating borders (are Russia and Turkey part of Europe or should a line be drawn that divides these countries into a European and an Asian part?), and to a culture that encompasses Scandinavian, Slavic, Mediterranean, Anglo-Saxon, Teutonic, Celtic, catholic, protestant, Moslem, socialist, liberal and many other cultural orientations. The kaleidoscopic nature of this ever-changing amalgam of shifting loyalties has of course been transfixed for political purposes into a more dependable self-image. One could locate the birth of Europe in the early Middle Ages when the Frankish kings united a diversity of Germanic clans and tribes under the common banner of the *imperium christianum*, upon which - in the late Middle Ages - the Popes

built their pan-European empire.<sup>3</sup> It is only after the reformation and the advance of royal absolutism in the 17<sup>th</sup> and 18<sup>th</sup> centuries that finally the germs of the secular national state emerge. And only in the relatively recent 19<sup>th</sup> century the idea of the national state broke through, transforming Europe into a battlefield of territorial states that seek to differentiate themselves from each other on the basis of a national identity. As much as the idea of a Christian European empire was a tool for overcoming local or tribal loyalties during the Middle Ages, the idea of the nation was an instrument for centralizing the loyalties of the inhabitants of specific territories during the emergence of the nation-state.<sup>4</sup> These identities are partly rooted in shared ways of life and partly constructed for political reasons.<sup>5</sup>

In this paper I will understand the political and juridical constitution of the European Union against the background of this broad conceptualization of Europe as an intercultural society that is built on both common historical heritages and the attempt to institute a new subject in global economic and political relations.<sup>6</sup>

### **3 European Integration and comparative law**

From this conception of Europe it follows that a European law, apart from instituting a new juridical order with new legal instruments based on the authority of a European legislator and a European government,<sup>7</sup> must consider comparative law as one of its main sources.<sup>8</sup> It is inherent in the attempt to overcome exclusive nationalist

identifications, that a common law of Europe is based on a specific form of intercultural communication that leaves room for the diversity that is constitutive of a European identity.<sup>9</sup>

This means that the canonical hierarchy of the sources of the law - a hierarchy that is questioned since it was invented, but did solve many problems in the mean time - must be reshuffled.<sup>10</sup> The point is that the legal order of the European Union manifests itself almost exclusively as a huge network of instrumentalist legal rules, to be implemented by the Member States that inevitably differ enormously in their interpretation. In the last instance the Court in Luxembourg has to identify a coherent interpretation of these legal norms, but before that the Member States and the Commission will anticipate this coherence (trying in the mean time to read the authoritative texts in a way that serves their own purposes). Without taking comparative law serious the effort to shape a stable European Integration is bound to fail.<sup>11</sup> *Precisely at the technical level of the interpretation and implementation of legal rules a durable sensitivity is needed to the plurality of interpretations that can still be considered as interpretations of the same rule.*<sup>12</sup> The salient balance that is required between respect for the diversity of shared lifeforms and the need for legal security presumes the possibility of a communication between those differing lifeforms that surpasses taxonomies of written legal rules (comparison by mere juxtaposition).<sup>13</sup>

In the next paragraph I will explore the possibilities of such intercultural communication at an epistemological level, before moving to the relation between human rights and the European 'Rechtsstaat'.

## **4 Conceptualization of the 'intercultural'**

### ***4.1 Intermingling 'cultural orientations'***

In 1999 the cultural anthropologist Van Binsbergen held his inaugural lecture at Rotterdam University under the subversive heading *Cultures do not exist. The examination of interculturality as a way of breaking through the self-evident*.<sup>14</sup> He calls for the dismissal of the holistic concept of culture that - in his opinion - originates from an outdated interpretation of cultural anthropology.<sup>15</sup> According to Van Binsbergen this holistic interpretation of culture was connected with the 'ethnographic monograph' that was used by anthropologists as the standard method of reporting their findings. These monographs suggested that their content formed the description of one homogeneous culture. This type of report was based on a strict separation of an internal perspective (from within the observed tribe) and an external perspective (from the Western scientist). By using the method of 'participative observation' the anthropologist was thought to have access to the internal perspective of the tribe, which - on epistemological grounds - was thought to be beyond criticism. In the course of time however, it turned out that different fieldworkers could and did reconstruct completely

different internal perspectives of the same tribe.<sup>16</sup> The static conception of culture has therefore been abandoned in favor of a reflection on the intercultural communication that is the precondition for any cultural anthropological research.

As argued in the last paragraph intercultural communication is not only a precondition for anthropological research, but also for any multicultural society to survive in the long run. This means that also within the EU the focus should be on intercultural communication and on its constitutive relationship to what is called 'European Integration'. Van Binsbergen distinguishes two ways to think of this so-called intercultural communication:

- either one can postulate a universal attribute in every culture (which would enable us to maintain the traditional conception of culture as being holistic and as having clear borders);
- or one can take the totality and the borders of 'culture' as relative by starting from the idea that in every human situation there are always many different cultural orientations involved: within one person as he plays his many and often contradictory roles, as well as between different persons in their mutual interactions.<sup>17</sup>

With Van Binsbergen I would choose the second approach: instead of speaking of different cultures as distinctive entities that determine their members' actions and that

are thought to be mutually exclusive, I prefer to speak of intermingling 'cultural orientations' that are present within each person as well as within each society.<sup>18</sup> In the next paragraph this choice is elaborated on the basis of a text by Van Brakel, who discusses the epistemological aspects of intercultural communication.<sup>19</sup>

#### ***4.2 Intermingling pluralities of manifest life-forms***

On May 1st 1500 Pêro Vaz de Caminha sent a letter to the Portuguese king Dom Manuel I about the discovery of a new land, nowadays called Brazil. Vaz de Caminha reports on the first contacts between the inhabitants of this new land and his boatmen, that as far as language and culture are concerned were complete strangers to each other. These first contacts evolved via - what Van Brakel would call - a shared *Umwelt*, that is: via pointing out objects that might have an equivalent significance for people on both sides of the language- and culture-barrier:

One of them [inhabitants of the new land, mh] saw some beads of a rosary, white beads. He made a gesture that one should hand them over, and he enjoyed himself with them for some time and put them around his neck, and after that he took them of his neck and rolled them around his arm. Then he pointed at the land and again to the beads and to the necklace of the captain, as if to say that they would give gold for it. We understood it that way because we wished to.



But if he wanted to say that he would take the beads and the necklace also, than we did not understand what he meant, for we would not give it to him.<sup>20</sup>

In his text Van Brakel attaches paradigmatic significance to the phenomenon of first contacts, because - according to him - they can show us how to avoid the Scylla and Charibdis of universalism and relativism. The salience of the example of first contacts brings in the importance of a shared *Umwelt* and a more or less non-verbal communication. Pointing at objects that are used by both parties is of crucial importance in this learning-process. Exchange or donation of objects that have a specific meaning within one or both cultures functions as a primary process that induces communication.<sup>21</sup> Van Brakel refers to Davidson's triangulation-theory, that comes down to the fact that in a language-learning situation both speakers deduce the meaning of words from the reaction of the other to the same object or situation, when this reaction occurs at the same time with one's own reaction to that object or situation.<sup>22</sup> This means that a shared *Umwelt* is a precondition for intercultural communication. Of course one can learn another language by exclusively studying dictionaries and grammar-guidelines, but the understanding of the idiom of the other will be extremely restricted because it has in that case been acquired in the terms of one's own language, which robs the translation of its context.

To Van Brakel 'intercultural understanding'

refers to interaction between people of different cultures, without the intention to reify 'culture' - amongst cultural anthropologists the essentialist conception of culture has long been replaced by the idea of cultures as open, porous, overlapping interaction and as being the result of 'internal' negotiations. We are talking about what Gadamer calls horizons that are open, porous and changing and what Derrida calls de-essentializing the concept of identity.<sup>23</sup>

This way he resists the way in which multiculturalists use an essentialist concept of culture in order to fight for social and political rights for well-defined minorities. To them the concept of culture is just a means to an end.<sup>24</sup> By describing intercultural understanding as he does, Van Brakel hopes to avoid both a universalism grounded on biological or moral arguments and a relativism grounded on the life-form or language-game of a specific group or culture that is believed to determine people that fall within its borders. Still he dares to call his intercultural communication a 'fundamental' universality, but:

This 'fundamental' universality is not a universality that can be described or conceptualized in one best way, because what constitutes this universality is something that cannot be caught in philosophical or scientific theories. (...) One of my goals is to show there are no criteria for 'objective' equivalencies, that form the basis for cognitive or affective universals. It is not the case that human

knowledge is possible because the world has a specific intelligible structure and people are psychologically structured such that they will detect this structure and make a cognitive representation of it.<sup>25</sup>

Instead of objective equivalencies he suggests:

What is equivalent, is that, which people recognize as equivalent in first and other contacts - equivalence is grounded empirically, but its content is open and passing. (...) This equivalence must be claimed (demanded, determined) every time again in first contacts, and, strictly speaking, every time again in every inter-human contact.<sup>26</sup>

By capturing this universality in non-essentialist terms, he can avoid the relativist tendency 'to lock every community of life-form in its own image of the world'. For this is also a form of essentialism, concerning not the essence of culture but the essence of each separate culture in itself.

In his last chapter Van Brakel works out the concept of 'manifest life-forms' in relation to Wittgenstein's *Lebensform*, Husserl's *Lebenswelt*, Heidegger's *Dasein* and Geertz' *common sense*. While extending these concepts into his 'manifest life-forms' he aims to disclose an intercultural dimension, that refers to a pre-lingual, pre-cultural dimension in every person as well as to the multi-lingual, multicultural dimension that becomes

manifest in first contacts. We can compare his 'manifest life-forms' to Van Binsbergen's conception of the intercultural, which is based on the idea that in every human situation 'different cultural orientations are at work that are continuously accommodated (both within one person as he plays the many roles he integrates and between different persons in their mutual interactions'. This intercultural dimension is - according to Van Brakel - biological as well as cultural, empirical as well as conditional (transcendental), single as well as multiple and local as well as universal. He is not concerned to 'propose a conception that can be further investigated upon by some science or another' but with 'the everyday or manifest life-forms as manifest worlds of meaningful situations and actions in which people are already embedded and which form the background for all scientific, philosophical, intercultural and other activities'.<sup>27</sup> The core of his plea is that everyday life-forms are inherently pluriform and pluralistic, which is not only apparent when one becomes aware of the historicity of one's own image of the world, but also and precisely in the confrontation with - radically - different images of the world.<sup>28</sup>

#### ***4.3 The 'flou' of the intercultural and the practice of comparative law***

We can learn a lot from Van Brakel and Van Binsbergen about the practice of comparative law as a source of law at the European level. Sidestepping essentialist universalist pretensions and radical relativism one can look into the different legal regulations of the Member States while considering not only their legal and social

context but also by getting in touch with the *Umwelt* in which they function. This of course presumes research programs that facilitate research methods like participatory observation and a strong interdisciplinary background of the researchers involved.<sup>29</sup> It means a long-term investment into comparative law next to the numerous short-term assignments for superficial 'comparison by mere juxtaposition'. It means that reading about the social context is not the same as getting involved in the actual *Umwelt* in the above-mentioned sense or, in other words, a hermeneutical approach to comparative law takes a different angle when one incorporates the phenomenological perspective instead of sticking to mere text-interpretation.<sup>30</sup>

It also means that the 'flou' of the intercultural that is manifested within each culture can be acknowledged, such that every attempt to fix legal regulations (inevitable if one wants to compare)<sup>31</sup> can be seen for what it is: an act of identification in which equivalence or sameness is posited.<sup>32</sup>

## **5 The constitutive meaning of human rights for the European 'Rechtsstaat'**

### ***5.1 Montesquieu and the idea of the 'rechtsstaat'***

An interesting question is how these insights are related to the topic of human rights.<sup>33</sup> To explain this I will distinguish three conceptions of human rights.<sup>34</sup> One can view human rights as natural attributes of human beings or, in other words, as part of human

nature. This view is of course connected with natural law and with the claims of an essentialist universalism. Another way to understand human rights is to conceptualize them as contingent historical facts that are not part of human nature but one of many possible ways to organize the relationships between individuals and the state. To the extent this conception contends that as historical artifacts human rights are entirely contingent and cannot be judged as better or more valid than the absence of such rights. The radical relativism of Richard Rorty comes to mind. The contradictions between universalism and relativism that we encountered in our exploration of the intercultural thus seem to control the entire spectrum of cross-cultural thinking, including the discourse on the 'universality' and/or 'historicity' of human rights.<sup>35</sup>

Following the epistemological groundwork of Van Brakel I will now argue for a non-essentialist third way of conceptualizing human rights - stepping into the footprints of one of the first legal comparativists: the French 18<sup>th</sup> century founding father of the 'Rechtsstaat' Montesquieu.<sup>36</sup> Montesquieu did two things: he emphasized the relation between specific types of 'culture' and specific types of government<sup>37</sup> and he spoke out in favor of a moderate government.<sup>38</sup> So while recognizing the historicity of cultures and the related forms of government he pointed out why and how one way of organizing the public and the private is better than the other. His *De l'esprit des lois* can be read as a careful exploration of the many roads to despotism and as a prudent advice on how to prevent the republic from turning into anarchy and the monarchy into tyranny. His plea for a moderate government was not new and he could and did refer to

the mixed government of the Roman Republic but he added one crucial ingredient to his recipe for moderation: the independence of the judiciary.<sup>39</sup> His contribution to the advance of the 'Rechtsstaat' is precisely the juridical nature of his (re)construction of the state: he emphasized the artificial character of such a state. To institutionalize a durable instead of a contingent balance of powers he conceptualizes the law as an (relatively) autonomous and anonymous (abstract) body of legal relationships that constitute the relational order of society.<sup>40</sup> To protect the autonomy of the law the decision about its meaning *in concrete cases* should be kept out of the hands of the administration. So his historicism goes beyond the contingent. He elucidates the importance of a politically independent judiciary as a precondition for the workings of this legally instituted balance of powers. His keen eye for the Machiavellian nature of power-contraptions led Montesquieu to a relational conception of law that provides the skeleton for a moderate government.<sup>41</sup>

## ***5.2 Lefort and the 'instauration' of the cleavage between power and law***

This relational conception of law and the 'rechtsstaat' has been reconceptualized by Claude Lefort in terms of the relationship between human rights and democracy. Lefort speaks of the *Déclaration des droits de l'homme* of 1789 as a mutation in the symbolic order, 'instauring' a gap or cleavage between power and knowledge and between power and law.<sup>42</sup> To demonstrate the meaning of these gaps Lefort discusses the significance of arts. 10 and 11 of the *Déclaration* about the freedom of religion and the freedom of

speech, and of arts. 7, 8 and 9 that articulate the principles of legality (referring to criminal law and criminal procedure) and the presumption of innocence. His discussion starts from Marx' criticism of the 'bourgeois' character of these 'human rights'. Lefort acknowledges the fact that these human rights seem to incorporate an atomistic image of human beings that links the liberal foundation of society to the creation of a private space for unbridled capitalist advance. At the same time however Lefort points out the practical consequences of these rights and freedoms. As of their proclamation they stand for the creation of an area of freedom that is fundamentally out of control. The subversive nature of a private and public domain in which opinions can be freely articulated,<sup>43</sup> argued and diffused cannot - according to Lefort - be underestimated and must be recognized as the germ of the full-fledged democracy that broke through at the beginning of the 20<sup>th</sup> century. In the same light Lefort discusses the right to a 'fair trial' in criminal matters and including the rights of the defense to contest the incriminating and imposing interventions of government officials before and after the criminal charge and the conviction. He stresses the position of the written law that constitutes the competencies of government officials and *at the same instant* limits these competencies. For the written law to perform this double function of constitution and limitation,<sup>44</sup> its meaning must be determined outside the realm of the administration: only an impartial and independent judge or jury should be trusted to determine the meaning of the law in concrete cases. The judiciary and not the king('s officials) should be the mouth of the law, to quote Montesquieu (even if his words are mostly interpreted in a different manner).<sup>45</sup>



This third conception of human rights entails that are more than mere instruments for the advance of a bourgeois or consumer-oriented individualism. These rights institutionalize the much acclaimed balance of powers, install gaps between the powers of government and the processes by which knowledge is produced and between the power of government and the processes by which the law speaks. When invoked these rights do not only protect the citizen that claims them but at the same time protect the constitution of the democratic state. They form the preconditions for a viable democracy, because they create the positions from which opinions can be voiced and participation can be realized.<sup>46</sup> They function not only for their own sake but also and at the same time demonstrate and represent the specific balance of powers that constitutes a democratic 'Rechtsstaat'.

## **6 The contribution of comparative law to the institution of an intercultural society**

At the same instance these rights and freedoms enable the 'flou' and the flow of the intercultural as discussed in par. 4, especially when they function at a European, transnational level. Both the Court in Strasbourg and in Luxemburg have to accept the open texture of the rights that are articulated in the Conventions whose meanings they authoritatively decide upon. Precisely the transnational background of the Conventions and the multiple ways in which they *could* be interpreted demand detailed research into the national context of the cases brought before the courts, taking into account that the

verdict must be acceptable for all the Member States since they will have to implement the decision within their own jurisdiction. This in fact precludes rigid interpretation-techniques and implies that, especially at a transnational level, human rights can be used as trump cards to ward off the imposition of petrified mono-cultural codes of interpretation.<sup>47</sup> It may seem that using human rights as trump cards affects only the vertical relationship between state and individual. Their impact, however, will have consequences beyond this verticality. By disallowing mono-cultural interpretation they open up a space in which a European citizenship can constitute itself between individuals with a multiplicity of shifting cultural orientations. The idea of a trump card is not just to limit governmental interventions but at the same time to establish the public spaces in which people can interact without being forced to identify with some dominant or minority code of interpretation (whether from a government, industrial stakeholders or fundamentalist cultural groupings). If human rights are understood in this way they can form the subversive germ of freedom that facilitates intercultural communication. They can function as preconditions for an intercultural European society that does not thrive on unification but on integration: on accommodation rather than implementation, on finely attuned interpretations of legal norms rather than bureaucratic enforcement of mechanically interpreted legal rules. Human rights can thus form a counterveiling power against the instrumentalism of the European legal order that threatens to shrivel European integration to the level of unshared technical legal rules, incapable of creating shared norms in the life-worlds of its people.<sup>48</sup> This counterveiling power presumes an independent position of the European Courts as they

determine the meaning of these rights, allowing for them to function as preconditions of the intercultural dimension of Europe, without which no internal market or area of freedom, security and justice can be successfully sustained.<sup>49</sup>

For the Courts to attain the required level of sensitivity to national context and transnational applicability, comparative law can be of primary importance, if practiced as a discipline that goes beyond 'comparison by mere juxtaposition'. In this light it is interesting to read the inaugural lecture of Fijnaut *The European Union: a pleasure garden for (criminal) comparative law* and his contribution on 'Comparative law and (the science of) criminal law: some methodological considerations' for the Dutch Society for Comparative Law. In both he pleads for methodical pluralism and against the dominant mono-disciplinary approach, which he attributes not only to lack of good intentions but also to the lack of researchers with an interdisciplinary educational background. Referring to the ambitions of the EU in terms of the third pillar and the creation of an area of freedom, security and justice, he proposes an ambitious, richly embedded interdisciplinary research-program on comparative law that should help localize issues that can and should be solved on a transnational level. Most interesting are the components that he enumerates for the education and training of comparative lawyers: practical matters like the command of different languages; initiation into the history, principles and purposes of comparative law (beyond the investigation of the formal, dogmatic positions) by reading primary texts and examination of large (inter)national research-programs; training in methodological issues by the study of,

participation in and implementation of existing research-programs; study of the different legal systems of the EU (including the different dealings with policy-implementation) and study of the political implications. If these types of researchers start comparing the way human rights function in different Member States and the way these interpretations can and should cohere as interpretations of the same legal norms,<sup>50</sup> the inherently plural character of the European democracy can be protected and advanced in a way that could never be accomplished by ‘comparison by mere juxtaposition’.

## 7 Conclusions

Human rights do not function as preconditions for the intercultural dimension of Europe if they are exclusively understood as trump cards to protect individual citizens against government interventions. To create room for the fundamental process of intercultural exchange a more complex conception of human rights must be developed, that correlates these rights with the relational conception of the democratic constitutional state. The balance of powers that is constitutive for this type of democracy presumes an independent judiciary that ultimately determines the meaning of these rights, in a never-ending process of case by case decisions. At this point comparative law can be of crucial importance. If comparative law engenders an intelligent set of tools for what Mireille Delmas-Marty calls *thinking multiplicity*,

human rights could very well play the role of a constitution that respects and stimulates diversity *while* reconstructing time and again a shared space of freedom, security and justice.

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<sup>2</sup> Citizenship, though indirectly linked to the territorium, is in the first place connected with the concept of nationality. Cf. De Kerchove, 'L'espace judiciaire pénal européen après Amsterdam et le sommet de Tampere', in De Kerchove et Weyembergh 2000, p. 4.

<sup>3</sup> About the rise of 'Europe' see Koschaker 1997, p. 1-7. Also Immink 1958, p. 9-26 who speaks of 'the making of Europe' as a proces in which Roman, Christian and Germanic continuities and transformations have each played their specific roles. Immink 1958, p. 13, speaks of 'its [Europe's, mh] non-geographical, ideological value'.

<sup>4</sup> Cf. Berman 1983.

<sup>5</sup> While for instance Castells 1997, p. 6 and p. 270 seems to regard national identities exclusively as the result of imposed homogeneity, I prefer to acknowledge the 'caractère mixte' of national identities. I consider national identities as the evershifting results of both shared lifeforms and succesfull attempts at imposing a national 'Weltbild' (by means of education and/or ritual confirmation of national 'traditions'). Cf. also Buruma 1993 who refers to Eric Hobsbawn's sharp insights into the artificial character of many 'traditions' - thereby putting the heritage of the German Romantic philosopher Herder ('Volksgeist') into a more realistic perspective.

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<sup>6</sup> Putting Europe on the map - to use the managerial jargon of today's 'big men' - demands the (re)construction of Europe as a legal, political and economic subject in international law, global politics and the global market. What is interesting in the light of 'rechtsstaat' and human rights is the way these three aspects of the European subject are interrelated: are we talking about 'Realpolitik', about naïve idealistic ambitions or about the survival of the (economically) fittest? See par. 5 below for an outline of my own position.

<sup>7</sup> The institutionalization of the EU is rather *sui generis*: competences like legislation and government are distributed amongst Parliament (art. 192 TEC), Council (art. 202 TEC) and the Commission (art. 211 TEC) in ways that diverge from most national checks & balances.

<sup>8</sup> About the idea of comparative law as a 'source of law' in the dogmatic sense see Kiikeri 2001, p. 6.

<sup>9</sup> In the debates on multiculturalism 'identity' is a recurring issue. See for instance Charles Taylor 1995 and Descombes 1994 on the question if and how identity presumes diversity. This debate is relevant for the conceptualization of a European identity, for a durable European Integration and for the protection and ongoing (re)construction of a common European heritage.

<sup>10</sup> The most important issue within legal theory on the sources of the law is whether only formal sources should be recognized (treaties, laws, judicial precedent) or also informal sources (doctrine and principles). This matter is connected with the controversies between positivist and natural law interpretation of the relations between law, ethics and political power. It is not my intention to elaborate these matters within the context of this paper, but they are connected. See Hart 1994, Dworkin 1991, and for a survey of primary texts in French Goyard-Fabre and Sève 1993 1993, p. 73-127. Compare also the position of Habermas 1994.

<sup>11</sup> Muir Watt 2000, discusses the subversive nature of comparative law that undermines the positivist tendency to petrify the law into a system of rules that depends entirely on the authority of the state. While being subversive comparative law, in the mean time, contributes to another - in the long run - more effective and legitimate conceptualization of law, cf. par. 4 below.

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<sup>12</sup> Cf. the family-resemblance of Wittgenstein 1953, par. 67: the different interpretations of a written rule by different people in the course of time will have to cohere somehow, to be conceptualized as interpretations of this rule. However in the long run this coherence cannot imply more than a family-resemblance.

<sup>13</sup> Nelken 2000 (reference in Alldridge and Brants 2001, p. 2).

<sup>14</sup> Van Binsbergen 1999.

<sup>15</sup> He refers to Tyler's *Primitive culture* from 1871 where culture is described for the first time in counterpoint to nature: instead of culture in the sense of the 'higher and public forms of human accomplishments' - like the arts and the sciences - Tyler uses culture to denote all aspects of human beings in society that are not natural endowments. For a thorough criticism of the nature-culture division and a coherent proposition to reconceptualize 'natures' and 'culture' Latour 1999. For a profound epistemological study of the foundations of the natural and the social sciences Glastra van Loon 1987.

<sup>16</sup> Kloos 1988, Geertz 1983.

<sup>17</sup> Van Binsbergen 1999, p. 35.

<sup>18</sup> Compare also the conceptualization of 'roles' by Plessner (Redeker 1995, p. 197-212), of 'mind' and 'self' by Mead (1934) 1959 and the conceptualization of 'soi-même comme un autre' by Ricoeur 1990. This conceptualization of 'role-taking' cannot be equalized to for instance Parsons' idea of social roles.

<sup>19</sup> Van Brakel 1998.

<sup>20</sup> Caminha 2000, p.11 [translation from the Dutch mh].

<sup>21</sup> The importance of (economic) exchange for the advance of a process of (intercultural) communication is relevant for the relation between the development of the internal economic market and intercultural - European - integration. In his stress on first contacts however, Van Brakel demonstrates the importance of a shared Umwelt - which is not a necessary component of modern economic markets.

<sup>22</sup> Van Brakel 1998, p. 9, referring to D. Davidson, 'Meaning, truth, and evidence', in: R.B. Barrett and R.F. Gibson (eds.), *Perspectives on Quine*, Oxford: Blackwell, p. 68-79. The formulation comes very



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close to Mead's description of the constitution of the self in terms of the 'generalized other', cf. Mead (1934) 1959, p. 175. The relevance of the Umwelt seems to indicate that the relationships between humans and things must be considered partly as mutually constitutive. Especially in case of divergent conceptions of technologies it could be important that comparative law is used to translate for instance the different national (interpretations of) intellectual rights and of legal regulations in the sphere of health-care and safety. To do this comparative lawyers should take the risk of sharing different Umwelt's.

<sup>23</sup> Van Brakel 1998, p. 11 [translation mh].

<sup>24</sup> This kind of instrumentalist attitude towards culture and tradition plays a similar role in debates about harmonizing criminal law within the EU.

<sup>25</sup> Van Brakel 1998, p. 37 [translation mh].

<sup>26</sup> Van Brakel 1998, p. 67 [translation mh]. Cf. Wittgenstein (1953) 1992, par. 208, as in Glock 1999 in *A Wittgenstein Dictionary* onder 'rule-following', p. 324: "The crucial point for the change in Wittgenstein's conception of linguistic rules is that there is a difference between following a rule and merely acting in accordance with a rule", and Glock 1999, p. 168: "(..) Wittgenstein does show that the identity of an object with itself does not provide us with an absolute paradigm of what counts as 'doing the same' in RULE-FOLLOWING. What counts as doing the same is determined only relative to the rule, and hence the notion of doing the same cannot provide an independent standard: whether my saying '6' after '2,4' counts as doing the same depends on whether I follow the series  $y=2x$  or the series  $y=x^2$ . There is no single, context-free or purpose-independent way of determining what counts as doing the same". Cf. Winch 1958, Glastra van Loon 1987 passim and Hildebrandt 2002, par. 1.3. Compare Legrand 1999, p. 82 where he speaks of 'transduction'. If one conceptualizes rules in a Wittgensteinian way transduction is inevitable - whether the rule is explicit or implied (as perhaps is the case sometimes in the common law, though often the rule is articulated in restatements and/or by judges in their opinions). Transduction is constitutive of the rule, as the rule is constitutive of the act of transduction.

<sup>27</sup> Van Brakel 1998, p. 70.

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<sup>28</sup> One important aspect of the law is that it cuts through these inherently pluriform and pluralistic life-forms, establishing a reasonable measure of security ('rechtszekerheid') and thereby preventing the potential chaos of meaning that is given with the symbolic constitution of our 'Welt'. Cf. Glastra van Loon 1987 and Hildebrandt 2002. Cf. also Radbruch 1950, p. 169, who points out the importance of the positive law (without being a positivist): 'Die Sicherheit des Rechts fordert Positivität des Rechts: wenn nicht festgestellt werden kann, was gerecht ist, so muss festgesetzt werden, was rechtens sein soll und zwar von einer Stelle, die, was sie festsetzt, auch durchzusetzen in der Lage ist' (onder verwijzing naar Max Rümelin, *Die Rechtssicherheit*, 1924, p.5).

<sup>29</sup> Fijnaut 2000, p. 86-90. See also par. 6 below.

<sup>30</sup> This may lead to what Ricoeur calls a 'hermeneutics of suspicion', because even without invoking Marx, Nietzsche and Freud this manner of practicing comparative law might evoke unexpected new insights into old categories of the law. Cf. Muir Watt 2000, p. 506: 'Le message subversif est donc fort mais très simple: regardons ailleurs, comparons, interrogeons-nous sur les alternatives - pour élargir la perspective traditionnelle, enrichir le discours juridique et lutter contre les habitudes de pensée sclérosantes'.

<sup>31</sup> For the law to maintain its function of establishing security and justice the identification of equality is crucial (which cases are considered equivalent in the context of a concrete issue), and therefore law is rule-governed. This however does not imply that legal rules are articulated in statutes. We must not 'get away from rules' - as one of the speakers on the congress suggested - but get away from the Kelsian perception of rules.

<sup>32</sup> Delmas-Marty 1986 *Le flou du droit*, Avant-propos: 'Mobile et flou - 'fluent' - il [le droit, mm] n'impose pas un ordre juridique unique et immuable, mais il ne permet pas n'importe quoi et refuse le hasard par inadvertance. On pourrait dire qu'il ordonne le multiple en délimitant les 'états possible' du

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droit pénal et de la politique criminelle'. Compare idem 1994 *Pour un droit commun*, p. 121-203 'Penser le multiple'.

<sup>33</sup> About the complicated relations between the EU and the ECHR see Bribosia, 'Quelle charte des droits fondamentaux pour l'Union européen?', in De Kerchove and Weyembergh 2000, p. 19-54 and Olivier De Schutter, 'Le rôle de la Cour de justice des Communautés européennes dans l'espace judiciaire pénal européen', in De Kerchove and Weyembergh 2000, p. 55-76. Meanwhile art. 6 of the TEU states amongst other things that the Union shall respect the rights of the ECHR and above that the Union has agreed on a 'Charter of fundamental rights of the European Union'. But the legal status of this instrument is not clear, cf. Steiner and Alston 2000, p. 790-791. In this paper I will not move into the intricacies of these issues. Instead I focus on the constitutive relationship between human rights and 'rechtsstaat' and on the relevance of comparative law as a source of law in the field of human rights.

<sup>34</sup> Compare the way Kekes 1993 distinguishes three ways of dealing with value-pluralism: monistic, relativistic and pluralistic.

<sup>35</sup> For a nice survey on the topic of human rights (1497 pages) see Steiner and Alston 2000 (*International Human Rights in Context. Law Politics Morals - Text and Materials*). On the issue of universalism and cultural relativism see p. 323-554.

<sup>36</sup> Launay, 'Montesquieu: The spector of despotism and the origins of comparative law', in: Riles 2001, p. 22-40. The term 'rechtsstaat' stems from the 19<sup>th</sup> century discourse on the relation between state and law, see Chevallier 1994 and Hildebrandt 2002 chapter 6. Nevertheless Montesquieu's observations are at the core of the idea of the 'rechtsstaat', cf. Chevallier 1994, p. 55: "Au coeur de l'Etat de droit, il y a donc fondamentalement l'idée de limitation du pouvoir, par le triple jeu de la protection de libertés individuelles, de l'assujettissement à la Nation et de l'assignation d'un domaine restreint de compétences: la structuration de l'ordre juridique n'est qu'un moyen d'assurer et de garantir cette limitation, à travers les mécanismes de production du droit".

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<sup>37</sup> Of course Montesquieu did not use the term culture. He related a republican government to a society focused on virtue (lack of which leads to anarchy or oligarchy), a monarchical government to a society focused on honor and on adherence to the law (lack of which leads to a despotism) and a despotic government to a society focused on fear and the arbitrary. Interesting is Robert Launay's extension of Mandeville's famous *Fable of the Bees* from 1714 into Montesquieu's scheme: while Mandeville's 'private vices, public virtues' holds true for Montesquieu's monarchy, things would work out differently under despotism where private vices lead to public failings. It is only in the republican system that private virtues lead to public benefits, which of course puts a heavy burden on this type of society. Robert Launay, 'Montesquieu: The specter of despotism and the origins of comparative law', in: Riles 2001, p. 26-29.

<sup>38</sup> Interesting secondary literature on the relevance of Montesquieu's relevance for law and politics Foqué 2000, Foqué and 't Hart 1990, chapter 3, Goyard-Fabre 1973, Schönfeld 1979 and Shklar 1987.

<sup>39</sup> To be fair so did Locke in his second *Treatise of Government* (1690), chapter IX, par. 125. Locke speaks of 'an indifferent judge, with authority to determine all differences according to established law'.

<sup>40</sup> Montesquieu (1748) 1973, I, 1, p. 7: 'Les lois, dans la signification la plus étendue, sont les rapports nécessaires qui dérivent de la nature des choses, et, dans ce sens, tous les êtres ont leurs lois; la divinité a ses lois, le monde matériel a ses lois, les intelligences supérieures ont leurs lois, les bêtes ont leur lois, l'homme a ses lois'. What counts here is the emphasis on a relational order instead of the authority of the state: law is more than the enacted law.

<sup>41</sup> On this relational conception of law, see Foqué and 't Hart 1990 *passim*.

<sup>42</sup> Lefort 1994, p. 45-84. Note the paradox that he acknowledges, *idem* p. 65: "Seconde figure du paradoxe: les droits de l'homme sont énoncés; ils le sont comme des droits qui appartiennent à l'homme; mais, simultanément, l'homme apparaît à travers ses mandataires comme celui dont l'essence est d'énoncer ses droits. Impossible de détacher l'énoncé de l'énonciation, dès lors que nul ne saurait occuper la place, à distance de tous, d'où il aurait autorité pour octroyer ou ratifier des droits". Compare the shift

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from the 17<sup>th</sup> and 18<sup>th</sup> century discourse on 'natural rights' to the discourse on 'human rights' after the second world war, a shift that is related to the problematic position of natural law as from the 19<sup>th</sup> century, cf. Burns Weston, *Encyclopedia Britannica* 1992 (lemma on 'human rights'), cited in Steiner and Alston 2000, p. 324-327.

<sup>43</sup> Habermas 1990 passim, Arendt 1958, chapters II, V and VI.

<sup>44</sup> Cf. Cleiren 1994, p. 25.

<sup>45</sup> See Schönfeld 1979 about the stereotype interpretation of Montesquieu's text on the judges as being 'bouche de la loi, des êtres inanimés', Montesquieu XI, 6. Schönfeld - instead of following this stereotype - refers to the medieval opposition of the *Rex lex animata* versus the *judex lex loquens*.

<sup>46</sup> It goes without saying that the actual realization of these rights cannot - and should not - be enforced or 'arranged' by legal instruments. That way human rights are preconditions and not guarantees of an intercultural society and of a democratic constitutional state.

<sup>47</sup> The notion of rights as trumpcards has been coined by Dworkin 1994, p. xi: 'Individual rights are political trumps held by individuals' and p. xii: 'Legal rights may then be identified as a distinct species of a political right, that is, an institutional right to the decision of a court in its adjudicative function'.

<sup>48</sup> Though in earlier work Habermas conceptualized law as a medium of politics, in *Faktizität und Geltung* he analyses law as mediation of state-power(s) and life-world(s). Compare Van Roermund 1994.

<sup>49</sup> Compare Amartya Sen's remark on the relation between human rights and human needs in Steiner and Alston 2000, p. 269: 'But the connection between rights and needs are not merely instrumental, they are also constitutive. For our conceptualization of economic needs depends on open public debates and discussions, and the guaranteeing of those debates and discussions requires an insistence on political rights'.

<sup>50</sup> See also Glenn 2000, especially Chapter 5, the paragraph on 'European identities' (p. 144-149) and Chapter 10 'Reconciling legal traditions: sustainable diversity in law' (p. 318-339). Also Delmas-Marty 1994.

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