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**Fingerposts and Armsäulen:  
Comparative legal history's manifold itineraries to legal culture**

Alain Wijffels

No French conference without *La synthèse*. The reader who wishes to take a short cut to these Proceedings may be advised to peruse the summaries provided by the authors, which will offer a far more reliable guide than the following concluding remarks. The point of the latter is no more than an interim stock-taking, checking how the separate itineraries followed by the contributors in different jurisdictions, at different times of history and in different areas of the law, may indicate how pervasive evidence of legal culture is along the way, and yet how elusive legal culture remains as a set destination of the journey – a collective journey in this case, but along diverse paths.

The concept of legal culture is controversial, but few will gainsay that where there is law, there is also some form of legal culture. The formation of law itself probably requires a degree of legal culture, for it supposes that a social actor states that a pre-existing or self-made norm is acknowledged and defined as law. Beyond that, there is no unanimity, nor even anything such as a *communis opinio*, as how to define that legal culture. In so far as there may be some common wisdom on the matter, the consensus would be that legal cultures vary. There may be different national legal cultures, and some of those national cultures may share a common legal culture, but within and beyond jurisdictions, legal cultures may be differentiated by other standards. The legal profession may have its own legal culture and within the legal profession in a broad sense, these cultures may vary, depending on the professional group involved: advocates, judges, magistrates for the prosecution, criminal lawyers, divorce lawyers, employment lawyers, tax lawyers, notaries... academics, law graduates employed in business, in the civil service... all may share some common legal culture, but at the same time each group reflects a more specific legal culture particular to its members' occupation and area of specialisation. Nor should legal culture be restricted to law graduates and legal professionals. Lawmakers with a different background operate necessarily on principles, values and assumptions which qualify as a legal culture. In our democratic age, where all citizens are called to elect the primary lawmakers, some insight of the law-making process and fundamental legal mechanisms is supposed to be universally shared, and such insight arguably presupposes at least some basic legal culture.

When the European Chair was revived at the Collège de France, the move was at least partly inspired by a concern about the process of European integration started after the Second World War. That concern was reflected in the central theme of the Chair's lectures in 2016-2017, which focused on legal studies<sup>1</sup>. The thread of the lectures was a quest for a European legal culture – with the backdrop of Brexit and other anti-European movements within the European Union –, since, whether the Union is to make further progress or, in the worst-case scenario advocated by its detractors, if it were to disintegrate, a shared legal culture may be expected to remain. Even if one would take into consideration the possibility of a radical decline of the rule of law, which has been a foundational feature of European legal and political culture since its Medieval origins, it seems unlikely that the most sophisticated totalitarian regime would be able to eradicate legal culture altogether, precisely because it can be so elusive. The argument is not one of wishful thinking, but a traditional device of an argumentation *ex absurdo* – a form of argumentation which, incidentally, is also part of the Western legal culture.

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<sup>1</sup> <https://www.college-de-france.fr/site/alain-wijffels/index.htm>

Legal culture proved too elusive to be precisely defined and circumscribed. During the European Chair's last lecture, a cautious step was made in order to identify at least one characteristic feature of how a legal culture works. The key phrase was that, in French, of *connivence*. *Connivence* was understood here as the ability to communicate implicitly. No such implicit understanding is possible unless the actors of the communication have, directly or indirectly, interacted within a network which establishes the references necessary for both explicit and implicit communication within more or less established (though flexible and evolutive) parameters. The intensity of that preliminary (and continuing) interaction may be expected to be reflected in the density of the shared culture. That simple observation also explains the earlier remark on the diversity and overlapping of legal cultures.

The concept of legal culture seems to be more prominent in legal studies today than, say, half a century ago. At least two factors may contribute to explain why the concept has achieved more prominence. In the first place, within the general jurisprudence underlying any legal scholarship and legal practice, a relative decline or crisis of legal positivism. In the second place, partly beyond the province of legal studies, the growing focus on multi-normativity, particularly in the context of public governance.

### **Legal culture and the foundering of legal positivism**

The "foundering" referred to is very relative. A glance at the statute books – whether of national or infra-national jurisdictions, or of the European Union itself – shows that the production of statutes, still the epitome of positive law in the European tradition, is ever-increasing. More alarmingly perhaps, is that because or in spite of that increase in the volume of statutory texts, legal writings and legal education remain on the whole subordinated to those texts which they attempt to shadow as closely as possible. Critical voices may point out that much of that statute law, including new or revised codifications, no longer follows any coherent general system, that the various areas of the law have thus become more and more fragmented, and that the normative quality of the statutory texts has lost its crispness. All these points of criticism are but symptoms of the gradual abandonment of the classical canons which came to prevail in the eighteenth century's 'rational jurisprudence', both in terms of systematisation and formulation of legal rules, and which were subsequently to some extent worked out in late-eighteenth century and early-nineteenth century codes. Even then, legal methods could have taken a very different path from the one that nineteenth-century positivism adopted later on, whether as a statutory positivism as in France, a doctrinal positivism as in Germany, or a judicial positivism as in England (albeit such generalizations ought of course to be nuanced). Today, such national characterizations have somewhat faded and each national jurisdiction has developed a mixture of those forms of positivism. However, in many areas of the law, the scholarly and judicial cultures themselves, and to some degree the statutory law-making culture, remain distinctly national.

So far, Western jurisprudence has not produced a movement tending to a new systematisation of the law, nor to a new general theory, as occurred in the sixteenth century when legal humanists and then the scholars who worked out a synthesis of the scholastic and humanist legal methods eventually established a matrix of systematisation based on subject-matter, and, in the early-seventeenth-century, when jurists-theologians (or jurists well acquainted with the Second Scholastics) worked out general theories within the framework of legal jurisprudence ordered by subject-matter. Today, the very principles of early-modern systematisation (e.g. the distinction between private and public law) and the very values of the general theories (e.g. the rational, equal and self-sufficient parties in contract law) are no longer generally accepted, but no consensual alternative has emerged, and lawyers live on and continue to be educated and to work with those inadequate worn-out instruments of the past. Yet, that inadequacy has also been the source of a repeated uneasiness in legal methods. One striking example has been the fate of the project of a European civil code, which had gathered some momentum by the end of the twentieth century. As drafts and proposals for such a codification were becoming more specific, a growing number of lawyers, even among those sympathetic to a greater harmonisation of European private law, became aware that a European civil code would not necessarily consolidate the development of European private law, which had effectively become a

subject of legal scholarship in its own right, but might even thwart its development. It was a moment when arguments referring to legal culture came to the foreground: national legal cultures, it was asserted, are still too diverging when it comes to construe and apply statutory law, and one could anticipate that in different national jurisdictions, judges and practitioners would approach such a uniform code in irredeemably different ways. No European codification could be successfully implemented, the argument ran, unless the legal profession throughout the European Union would also share a greater degree of legal culture in that respect. The discussion went on by addressing the question, how such a more adequate legal culture could be fostered. Arguably, that was in a 'classically' defined area of the law which had produced high-profile national civil codes to which national legal professionals were attached as interest groups or because such codes are still, in context, very much part of the legal professionals' cultural identity. Yet, around the same time, a different scenario unfolded in the area of constitutional law. In 2005, the draft project of a European constitution stirred political debates, in particular in the countries where the text was submitted to a referendum. After negative popular votes in France and The Netherlands, the project was abandoned. The project of a European civil code, though not directly associated to the constitutional project, has been somewhat in abeyance ever since, as if a collateral victim of the draft constitution's rejection. The debates around the draft constitution betrayed wide divergences between different countries, as both the political class and the population entertained in each country different expectations towards such a constitution, at least to some extent because the perception of the part played by a (written) constitution's in each country differs. Such differences are determined by political practice and constitutional conventions, reports thereof in the media, and also sometimes more generally by political and constitutional information (if any) provided in school education and through social media on the specific historical constitutional tradition of each country. The perception changes also with time: in countries which were ruled by undemocratic regimes during whole periods of the twentieth century, generations which experienced directly such regimes had a different outlook on the merits of a constitution in a democratic context than the generations which came of age at a time when the democracies had been in place for several years. The national experience may also play in a role in different ways: in France, for example, the generation which had witnessed the dysfunctional features of the Fourth Republic may have been for a while more favourable to the Fifth Republic's attempts to curtail the *regime d'assemblée*, but such attitudes are bound to shift with time. The fact remains that the symbolic value attributed to a constitution varies a great deal from one country to another, and politicians and the electorate inevitably tend to regard a foreign (or, in the case of the 2005 draft, a European) constitution by the standards of their perception of their own national constitution. Such experiences, during the first years of the twenty-first century, have only enhanced among legal and political scholars the importance of the 'cultural context' beyond the texts of positive law.

### **Legal culture and the rise of multi-normativity**

Again, the rise of multi-normativity in recent times is very relative. It has certainly received more attention in recent scholarship, and there is undoubtedly a link with the decline of positivism. One of the effects of legal positivism is to appropriate concurrent forms of normativity and to domesticate them as legal norms. Strategies may vary over time: during the Second Middle Ages, civil and canon law scholarship filtered some of the prevailing social normativities and reshaped them under the label of customs; by the beginning of the nineteenth century, the ideologically more progressive or revolutionary forms of positivistic scholarship tended to marginalise as much as possible customs, or to recuperate them as the product of legal-professional actors. Late-Medieval and early-modern constructs of divine law and natural law were also strategies which, for centuries, enabled lawyers to accommodate and incorporate heterogeneous norms within the ambit of legal scholarship.

In Modern Times, as primary legislation progressively lost its grip over ever more complex social relations, one strategy, which itself has been applied according to different patterns, has been to multiply the levels of statute law and statutory instruments. The binding force of various forms of statute law has also been differentiated. Even those accommodations proved insufficient, and in those jurisdictions where positive enactment and codes are still supposed to dominate the legal landscape,

case law and legal writings are gradually acknowledged, at least in practice, a much stronger authority than nineteenth-century logistic approaches were willing to concede. The law itself has thus become a complex field of multi-normativity. However, the main challenge since the nineteenth century to legal normativity has come from outside the proper field of legal studies. The development of social sciences seems to have decisively inoculated the growing body of normative systems governed by those sciences against their annexation by jurisprudence. As a result, legal professionals are by now more and more often exposed to interaction with social scientists, whether at the stage of law making or at the stage of law implementation. Mainstream jurisprudence has only to a limited degree developed an adequate interdisciplinary methodology in order to optimize such interaction. Alternative forms of management and resolution of conflicts of interests often represent a shift from the normative paradigm supposed to govern dispute resolution in the classic legal sense, partly because those forms depend increasingly more frequently on the expertise of non-lawyers.

### **Positive law, multi-normativity and public governance**

The demise of positive statute law as the supreme (or even exclusive) legal norm and the rise of concurrent non-legal normativities formulated by social sciences are part of a struggle aiming at capturing the most effective norms which will assist good governance, i.e. give the strongest degree of legitimacy to public governance. The nineteenth-century *Kampf ums Recht* could at the time still be regarded as a wrangle for control over political governance, but since then, the normative models of social sciences have become decisive in the political decision-making process. Therefore, interest groups have become more interested in controlling that stage of public governance which will determine how, downstream, decisions will be translated into statutory texts. The lawyers' marginalisation has not been absolute. The rise of human rights, for example, shows how jurisprudence has fought back to maintain a claim on public governance at the initial stages of the political debate. Yet, there is little doubt that lawyers as a professional and social group have more than in the past to deal with arguments and reasoning based on different normative models which rely on complex systems of specialised scholarship. (Once again, this is not entirely a new phenomenon, as already in the Middle Ages, lawyers were confronted in public governance with the competition of, among others, theologians). As a consequence, the multi-normativity lawyers are dealing with has practical effects not only within the province of the lawyers' habitual areas of work, but in the open field of governance. In that context, legal normativity and jurisprudence can no longer claim to appropriate and redefine the concurrent normativities in legal terms.

All that has been said so far on legal positivism, multi-normativity and the lawyers' position in public governance ought to be differentiated. In some special areas, such as economic and social welfare governance, the interface between lawyers and their counterparts from social sciences often appears to operate more smoothly. Much depends, in any area of expertise, to what extent lawyers are familiar with (or educated in) the other sciences. The implication is that these lawyers can share not only specific skills and expertise, but also the 'culture' of competing professional groups.

### **Legal culture and comparative legal history**

Little wonder, then, that comparative lawyers have developed a sustained interest for legal culture, as a partly meta-juristic dimension of any legal system. Legal culture allows to address features and mechanisms of a legal system other than its rules and procedures. It deals with the preconceptions of legal methods, whether applied in scholarly works or in forensic arguments, or any other practical legal reasoning. Legal culture has its conservative side, which tends to reinforce conventional legal arguments, but also its progressive edge, which gives it the flexibility to test the limits of unconventional and innovative lines of arguments. Most lawyers need several years of education, training and practice in order to acquire such a legal culture. That explains why any legal culture has inevitably a distinctiveness, which is what comparative lawyer seek to identify, for without the distinctiveness of a tradition, there may be little scope for comparison.

Lawyers' and comparatists' revived interest for legal culture has also been reflected in legal historiography. Legal historians have adjusted their approach to legal culture by adopting many of the issues of interest developed by their fellow lawyers in recent years. In addition, legal history can contribute with long-term perspectives which are deemed necessary to identify and characterize legal cultures. Inevitably, issues on common legal cultures, for example in Europe, require an intensive comparative approach. In legal historiography, no narrative on a European legal culture is conceivable without a long-term (i.e., multi-secular) comparative perspective. Comparative law and comparative legal history not only aim at describing and understanding transnational legal cultures, they also contribute to develop such shared legal cultures, if only in a modest way, because of the interaction between scholars from different cultural backgrounds which comparative studies entail.

### **Beyond particular traditions**

Particular traditions are, very much in the same way as common traditions, ideological constructs, although the actors who claim to represent them are often more inclined to claim that contrary to the artificiality and remoteness of common cultural models, particular cultures have a greater strength and legitimacy because of their alleged proximity and innate or natural origins. Comparative lawyers and comparative legal historians should always bear in mind that common legal features cannot be conceived independently from pre-established particular cultures, and that the tension inherent to the coexistence of particular laws and a common law reflects fundamental conflicts of interest. Comparative studies are therefore necessarily a form of *Interessenjurisprudenz*, and comparative scholarship requires first of all that the interests at stake are identified. Any culture – including a legal culture – plays a strong legitimising role for the community which conjures it up. Such an explicit reference to the community's culture occurs internally, usually as a means of consolidating and developing that culture, or towards foreign actors, usually in order to differentiate or to exclude those foreign actors from one's own business. Comparative studies face the task of identifying similar, shared or common features which may reflect a conscious or unconscious culture transcending the particular cultures, while retaining those particular cultures as the building stones of what may end up being identified as a common culture.

That, essentially, was the exercise which the contributors to the present collection of essays were called to embark upon. The result is somewhat complex, because the contributors' expertise not only focuses on different periods and jurisdictions, but also on different areas (hence also interest groups) of legal scholarship. The thread which links all contributions is their ability to transcend particular traditions without neutralising or subordinating those traditions to some superior common normative model. At least two essential (and connected) features emerge from this small kaleidoscope. The first feature is that of the living particular roots of any common culture: a common culture cannot survive as such without it being constantly or recurrently fed by its particular foundations. A common culture may in turn feed its particular components, but it is not obvious that such a reciprocity is essential for the development of the particular traditions. The second feature is, at least within the European context on which the contributions focus, the insistence on a fairly large degree of autonomy or, in terms of governance, of self-government, on behalf of the actors of particular traditions.

The emphasis on particular roots reminds us that the handling of multi-normativity has always been a political struggle, which legal science endeavours to channel in peaceful ways. The story of Pillius called to teach at Modena (Emanuele Conte), where he was able to address issues of customary law which the Bolognese academic curriculum shunned, and his creative use of Roman law notions in order to manage a conflict of bourgeois and ecclesiastical interests was the beginning of a distinction – that of the 'double ownership' – which as a general framework, would accommodate for centuries the diversity of real estate status in Europe. Pillius' device shows on the one hand how legal science based on Roman law texts was instrumental in bringing contemporary conflicts of interests within the reasoning categories of civil law scholarship, but on the other hand how introducing heterogenous norms and their practical demands into the scholarly discourse affected the normative standards of

legal science itself, as the *duplex dominium* became a standard concept of civil law. The adoption of the *duplex dominium* in civil law scholarship was explicit, but as in most cases, particular legal traditions did not develop systematically a body of scholarship such as that of the canonical texts of reference studied in the universities, including a growing body of texts comprising the commentaries on the canonical texts. The converse effect, i.e. the incorporation of civil law scholarship into particular legal learning, is often far less documented at the earlier stages of Medieval developments. The English common lawyers nonetheless developed precociously their own distinct legal-professional culture, capable of borrowing just as creatively principles drawn from scholastic philosophy and its implementations in Roman-canonical procedure. The example of the principle requiring from witnesses to give evidence on knowledge they had acquired through the use of their senses proved to be much more complex than a so-called legal transplant, because it had to be adjusted to the trial by jury (which was not a feature of the Roman-canonical matrix of procedural law) in such a way as to preserve in so far as possible the jury's unchallenged prerogative in appreciating facts and their proofs (Yves Mausen). The Holy Roman Empire in early-modern times is perhaps the best example of a complex unity where civil law was both an authority of positive law and the matrix of a common legal culture, as both imperial and territorial institutions were staffed by graduates of the law faculties. Moreover, there were strong links between the law faculties and legal practice, both *in foris* and *in curiis*. Yet, for all the pervading influence of the Romanist legal culture during centuries, the territorial laws proved irreducible. The political vigour of the *Reichsstände* counterbalanced the academic legal culture of most administrators, even at the level of the territories. The dialogue between Academia and territorial administrators and law makers – precisely because they shared a common legal culture – facilitated a degree of flexibility in their interface. Thus, per se non-normative texts such as learned opinions delivered on issues stemming from administrative and forensic practice could in the long term be turned into authoritative texts of positive law, at least in the field of commercial relations (Anja Amend-Traut). Early-modern German practice in that respect continued the Medieval tradition which originated with the Italian *consilia* and contributed much to ensure that legal learning remained attuned to the needs of the social reality, and to the particular normative references which continued to develop in the different territories. In Scandinavian countries, law and justice were to a large extent developed by local actors who were on the whole neither educated nor strongly influenced by learned lawyers. The latter's ascendancy was comparatively late and limited, even at the level of the royal government. The long-term result was a legal and political culture which reflected particular interests: assemblies ensured that the 'law of the land' remained essentially regional in character, royal policies that national law was compatible with the particular cultures of the country (Mia Korpiola). Such developments should not be dismissed as marginal, under the pretext that they occurred in regions peripheral to Western Europe. The notion of periphery itself is now regarded as relative, as such so-called legal peripheries can be identified even in central regions of Western Europe (e.g. Switzerland) or in fault-line regions between the main political actors in Western Europe (e.g. the Spanish, later Austrian Netherlands, including the territories annexed or permanently occupied by their neighbours). The Scandinavian countries illustrate how legal pluralism can also be managed by particular statutory devices which reflect a sufficiently shared integrated legal culture of those complex polities. The trans-border nature of trade is a source of controversy for legal historians. The controversy, often narrowed down to the issue of the existence of a general *lex mercatoria* in late-Medieval and early-modern times, is complicated by the diversity of networks of trade in Europe. The argument for common trans-border developments is more forcefully put forward for maritime trade and for specific instruments of trade, but is nevertheless put to the test because of the apparently increasing importance of commercial statutes and regulations introduced by territorial jurisdictions during the last centuries of the Ancien Régime. Much research is still required in order to understand more precisely how, from one polity to another, that statutory law reflected or not the interests and practice of the polity's merchant communities. Early-modern litigation, a prime historical source for historians of commercial law, also begs the question to what extent merchants were able to integrate legal and procedural risks in their calculations of commercial ventures. This is a field where merchants and lawyers often interacted, but obviously from different normative vantage points and cultures. Yet, the evidence is that the interaction was regularly one which tried to work out an interface acceptable to both sides. Commercial litigation involving lawyers, after all, took in most cases the form of conflicting interests

between members of the same or different merchant communities, which was then mirrored in the role which legal counsel had to assume on each side on behalf of their client. In doing so, legal practitioners had to gain some insight in the particular culture of both their client and their opponent (Luisa Brunori).

Eighteenth-century and nineteenth-century voting designs for collegiate courts were primarily a concern for lawyers. The designs may be viewed in a long tradition tending to ensure an objective, in the sense of: non-arbitrary, judicial decision-making process – not unlike, for example, the attempts, in Medieval scholastic jurisprudence, to work out an arithmetic model for adding up the fractions of a full proof. The designs for a long time belonged to the particular ‘style’ of a court, and a style of proceeding was in many regards a reliable indicator of the court’s own procedural culture. The reference, during the French Revolution, to Condorcet’s insights as a mathematician and scientist, reflect in some ways the willingness of lawmakers at the time to transcend not only particular models (an ambition which stood high in the priorities of the French revolutionary politicians), but also to introduce mathematical-scientific principles in legal reasoning – in this case for a very specific issue, but the eighteenth-century Law of Reason (or Natural law) provides plenty more examples of such borrowing from ‘natural laws’ as a model normativity for enlightened law reforms. The scientific and rational model of thinking also characterised the ongoing discussion on the issue during the following century (Wolfgang Ernst).

The history of comparative law mirrors some of the lawyers’ own cultural biases. As with legal history, comparative law has in the past reflected scholarly and ideologically inspired prejudices. Eurocentrism has by now largely been debunked, but within Europe, a ‘Great Powers’ mentality (supported by the acquaintance with those powers’ languages as main cultural vectors) only gives way gradually. A cursory look at the main textbooks on comparative law easily shows that until the last decades of the twentieth century, apart from England, France and Germany, other jurisdictions were allowed to play at best a cameo role on specific topics. Until recently, also, any emphasis on particular legal traditions was deemed somewhat at odds with the prevailing, apparently progressive, trend towards Europeanisation. Other factors have in some cases aggravated the marginalisation of a jurisdiction’s standing in comparative studies: that was arguably the case with Spain until the country was emancipated from the Franco regime. Even then, it took a new generation of Spanish legal scholars to catch up internationally with the state of the art and fresh concepts in legal studies. One of the consequences of the long-term relative eclipse of Spanish law in mainstream comparative studies has been its rather cursory categorisation in the legal ‘family’ lead by French law – especially under the system of a taxonomy governed by private law criteria. In domestic Spanish politics, the last few decades have witnessed (as in other European countries) a revival of regional cultures. The view on Spanish legal history has accordingly refocused on the relationship between the national legal tradition and the regional traditions. The latter had not been obfuscated as in other national jurisdictions where the model of a centralised unitary state prevailed, and thus the tradition of ‘foral laws’ has enjoyed a much greater degree of continuity. Whereas the phrase has sometimes been misunderstood, possibly under influence of a bygone legistic-positivistic approach, as a form of customary law (a phrase which in turn was used to refer in a very reductive sense to what was in fact a complex non-statutory normativity), more recent Spanish historiography has highlighted the multi-normativity encompassed by those foral laws. In that respect, the tradition of the Spanish civil code has been significantly different from the original concept of the French civil code (Aniceto Masferrer). In more recent times, however, the latter has undergone, directly or indirectly, influences which no longer make it possible to see it as the legal figurehead of a state conceived as a *république une et indivisible* (see art. 75 of the French constitution and, in the twenty-first century, the inclusion of Book V of the code).

Private law and civil codes are no longer the privileged yardstick, in comparative studies, for categorising or typifying legal systems. Constitutions, once seen as the hallmark of a national political system, have benefited from the stronger position developed by public lawyers in legal scholarship and legal thinking. That development has also fostered a distinct literature on comparative constitutional law, with focuses on both practical constitutional mechanisms (e.g. the workings of



constitutional courts) and the theoretical foundations of modern constitutionalism. In post-war Europe, the growing emphasis on the rule of law, human rights and democratic values has also favoured the emergence of concepts such as ‘common constitutional traditions’ or ‘constitutional heritage’. These concepts play a key role in European integration, but they cannot work as exclusively legal principles, for both the components and the resulting construct of the common traditions and the heritage also have to take into account political interaction and conventions. Constitutional law scholarship and comparative constitutional law take into account that partly heterogeneous multi-normativity (Luigi Lacché). While constitutional law has been for at least some two centuries an established branch of legal scholarship, which is largely understood along the same lines in European countries, the concept of public law does not have the same resonance and scope. England, in particular, has only comparatively recently developed an administrative law in its own right, and not altogether on the same foundations as on the continent, where the French administrative law tradition was material in the early developments of community law. When it started developing its administrative law, the United Kingdom appears to have been more influenced by the state of the art in the United States, partly perhaps because of the shared common law background, partly also no doubt because of a perceived common culture with regard to remedies in relations involving public authorities. Whereas the German concept of *Staatsrecht* easily dovetails with the French concept of *l’État* at the heart of its public law, the notion of state is much more foreign to the English lawyer. Yet, it is remarkable that the development of modern English administrative law was not decisively determined by either the historical pattern of the common law through judicial decisions, or (as in some branches of the law created since the nineteenth century) by parliamentary legislation, but rather by legal writers, admittedly also active in commissions which acted as catalysts in that development (John Bell).

A second recurrent theme in several contributions is that of self-governance. Self-governance has been over the centuries an essential feature of the ideal of good governance. It asserts the political identity and autonomy of a self-styled community, whether in relation to other, independent communities, or towards political actors who may claim some overlordship over the communities asserting their autonomy. From the beginning, a fundamental purpose of Western legal science has been to regulate such relations. In that sense, too, the Roman-canonical law developed in the Second Middle Ages was primarily a science or art of public governance. The phrase *ius commune* referred originally to a technical device of complex public governance, and its later use by historiography for referring to the art of governance is somewhat a misnomer, as it tends to reduce that art to a system of positive law. The Medieval legal science developed in Italian universities, in the Church and in the city-states established a system of governance based on the rule of law, which was conceived as a practical means for exercising political power according to standards of justice. Justice (together with requirements of efficiency) has traditionally been seen as a necessary quality of governance in order to maintain its legitimacy. Self-governance, in that tradition, has therefore been advocated by promising more efficient and better justice. ‘Justice’ as a principle of governance should be understood as the substantive justice of the polity’s ruling authorities, and is therefore relative, as it will primarily protect the interest groups which participate to the government system. Medieval jurisprudence, however, picked up the notion of general interest (or common welfare) as a test for preventing public governance from favouring exclusively particular interests. The adaptation of Roman law science by Pillius at Modena is a prime example of the early civil lawyers’ successful strategies in assisting the municipal authorities in managing a conflict of economic and interests (expressed through the control over land) in such a way that, while remaining within the rule of law, the device of double ownership could appear both efficient and fair to the town’s citizenship (Conte). In early-modern times, the late-Medieval ideal of *buon governo* was pursued through the concept of *gutes Regiment* in the Holy Roman Empire. By that time, proto-positivistic trends had already eroded jurisprudence as an art of governance, so that legal scholars attempted to work out the complex edifice of the Empire and its increasingly autonomous territories in a doctrinal *ius publicum sacri Romani imperii*. Fundamental principles of good governance nevertheless lived on, witness for example the requirement of offering an equivalent domestic appellate jurisdiction when a territory was granted a privilege *de non appellando*. The Empire’s public law was to a large extent a law which was intended to regulate and harmonise the governance of the empire and the largely self-governing principalities

and other polities. Roman law scholarship was a strong ingredient of the common legal culture which helped to oil the clock-work of the imperial mechanism (Amend-Traut). In other complex polities, such as Spain, in spite of a strong academic Roman law culture, the particular culture underpinning regional autonomy may have hampered a development of a common public law on the same scale (Masferrer). Developments of commercial law in the Holy Roman Empire are a reminder that not only territories, but also social groups were vying for a degree of self-governance. Merchants had their own agenda, and could in spite of fierce competition form associations which helped them to reinforce their position, but such association required some corporate governance. The complexity is illustrated in the case of the Hanse, which associated merchant cities, some of which enjoyed themselves a large degree of autonomy within the Empire, while others were ruled by a territorial prince; the Hanse itself acted through its own collective institutions (of which the Hanseatic Diet was the most important), both for its domestic governance as for its external affairs. Most merchant associations were far less developed and of a more temporary nature. Their interest in self-governance and autonomy constantly had to be adjusted to the need to compromise with other actors, often public authorities, in order to obtain access to markets, protection during their journeys, and at times assistance in dispute resolution. Their self-governance was strongly marked by their own mercantile culture, yet they also appear to have borrowed principles from the art of governance and political philosophy. Thus, among the virtues (in the sense of: values giving strength and legitimacy to the governance) emphasised in writing on commercial policies, temperance becomes a recurrent topos (Amend-Traut, Brunori). In Ancona, the late-Medieval and sixteenth-century interior and exterior decoration of the Merchants' *Loggia* emphasise very much the same virtues traditionally found a allegorical figures on public buildings which were the seat of municipal governance.

Roman-canonical legal scholarship was not the only matrix of public governance in Europe. In Nordic countries, where the influence of civil law scholarship was slow and limited, secular governance was largely managed by laymen who were familiar with customs and practices of their community. Perhaps to some extent inspired by the (Roman law based) techniques of Church governance, the kings accumulated a series of enactments which created the Scandinavian countries' own culture and brand of self-governance (Korpiola). In England, civil and canon lawyers succeeded until the early seventeenth century to carve out niches in the Church, in some areas of the royal administration, and in a few courts of justice. Common lawyers developed nonetheless a sufficiently strong position at an early stage and were able, via the Inns of Court, to monopolise access to the main royal courts. They also developed a legal system which proved by and large resilient to civil law influences. In later centuries, the common law became a centre piece of English particularism and of the English cultural and political identity and self-consciousness. For the administration of justice in particular, English history shows an alternative pattern to the Western European reliance on law graduates, but also to the Nordic pattern of laymen, as the growth of the common law depended on an established corps of lawyers and judges sharing the same practical training and professional experience. Occasional borrowings from the civil law could be absorbed in the common law system without retaining a civil law distinctiveness (Mausen). The specific features of the English administrative law developed during the twentieth century may be regarded, foreign influences notwithstanding, as another example of the English lawyers' will to work out remedies more in tune with the particular tradition, hence the tradition of self-governance, of the English system of governance and justice. Perhaps strengthened by the English culture associated with the Reformation's implementation, in many areas of public interest, contrary to the tradition in some Roman-Catholic countries, local authorities were in charge, reinforcing the culture of self-government in domestic policies (Bell). Even in Modern Times, corporate forms of self-governance remain strong in England within the legal profession. The legal profession, for example, has retained comparatively more control over procedural reforms than in many continental jurisdictions. On the continent, national codifications may have curtailed the Ancien Régime's judicial propensity for developing and maintaining the particular style of each court, and the call for equal treatment and uniformity has been stronger. Diverging practices within the same jurisdiction on voting designs of collegiate courts could now probably be less acceptable than they have been in the past (Ernst).

Self-governance has become an obligatory topic of multi-governance, a central theme in modern constitutionalism and comparative constitutional studies (Lacché). Because self-governance is rooted in particular political cultures, it is fertile ground for a comparative approach, as it provides material for both the diversity of self-governance arrangements in complex polities and the mixture of heterogenous normative models which govern such arrangements.

### Eschatocol

The eschatocol of the proceedings of a conference exploring such themes can be no more than a signpost. The fingerpost is a tempting metaphor for comparative legal history, for it is still used today as a sign-post in England, as if an expression of the continuing tradition of the English common law, while its continental equivalents, such as the German *Armsäule*, typical of the Ancien Régime landscape, seem mostly to have disappeared, except as mock-historical revivals – however, such a cliché may also be worth challenging. Fingerposts and *Armsäulen* (and possibly other similar signs with distinctive names in other countries) appear at crossroads. That is exactly what a conference such as this one has been: scholars from different horizons who meet for a brief moment and exchange their views and experiences on shared interests, leave through their contributions in the conference's proceedings their signposts – each configured according to their own scholarly tradition – and resume their own journeys in different directions. As all their signposts lead the way, along different paths, to that *terra incognita* of legal culture, that promised land may at times appear to be more of utopia than a real-life journey's end.

Comparative legal history may assist as a travel-guide to such utopia. A time in history comes when the characteristic *connivence* of a culture is being lost. It then becomes necessary, for example, to provide edited version of Thomas More's *Utopia* which explain the implicit references, connotations, puns that were at the time recognisable to the educated reader, but no longer in our days because the necessary interaction has died out. What we call customary law, or less aggressively customs, *consuetudo*, does not have the same significance in different jurisdictions, and does not have the same meaning in the same country or language over the centuries. Different societies, today and in the past, have different ways of dealing with what is now fashionable to refer to as multi-normativity. In Medieval France, the use of *consuetudo* by learned lawyers was a way of appropriating, in their own interest but also on behalf of the Church or the Monarchy, whichever interest they served, the normativity of communities competing for their own share of self-governance. By early-modern times, the appropriation had been sufficiently successful so that French legal professionals were the main social actors who could ensure the survival and even the further development of customary law. By the nineteenth century, the legal profession had sufficiently appropriated the *Code Napoléon* so that it could jettison customary law as a redundant category of legal authorities. *La coutume*, in each case, carried a different meaning and different connotations. The professional, social and scholarly strategies behind those shifting semantics were not necessarily made explicit in scholarly writings. Transferred to other jurisdictions in different periods, the strategies evolved differently, as recorded by several contributors to these proceedings. In order to recapture at least a glimpse of the legal cultures those largely implicit messages conveyed, comparative legal history needs to re-enter into the minds and mentalities of each era and each community. Beyond that formidable task of erudition lies the not less daunting challenge of establishing where a *connivence* stands on a spectrum of particular and common traditions.