American and European Constitutionalism Compared: A Report from the UNIDEM Conference in Göttingen, 23-24 May, 2003

By Morag Goodwin and Peer Zumbansen

A. Spectres

There is currently a considerable amount of soul-searching underway by scholars on both sides of the Atlantic. For the cosmopolitanites of the academic world, the unpleasant disagreements over policy towards Iraq between Old Europe and the New World were not only unsettling but symptomatic of a more deep-seated disagreement between (former) friends. The theme of the Unidem seminar, held at the University of Göttingen on May 23-24, 2003,[1] can be seen as sitting nicely within a desire for an explanation for this tension. Clearly underlying the organization of the conference, choice of themes and the invitation of speakers was the organizer's desire to reach a greater understanding of the difference and similarities between constitutionalism in Europe and in the United States and the reasons for and consequences of these divergences. Thus, although the Iraqi crisis obviously took place long after the theme of the conference had been conceived (and it has to be said that Georg Nolte's conferences appear to have a habit of coming hard on the heels of related dramatic events in the real world, suggesting an almost magical foresight on his part), it should nevertheless be understood as falling within this movement. Where Keohane, for example, sought an explanation at the level of sovereignty[2],

[1] The Unidem Seminar was organized by Professor Georg Nolte of the University of Göttingen, substitute member for Germany to the Venice Commission (http://venice.coe.int/), in cooperation with the Institute of International Law at the University of Göttingen, Yale Law School and the Volkswagen Stiftung. The conference program can be found at: http://www.gwdg.de/~ujvr/institut/veranstaltungen.html)

[2] Robert O. Keohane, 'Ironies of Sovereignty: The European Union and the United States' (2002) 40 *Journal of Common Market Studies* 743, explains the policy disagreements between Europe and the United States in recent years in terms of a fundamentally different understanding of sovereignty – the former apparently moving away from 'the classic conception of sovereignty' that has become so deeply embedded in American thinking.

https://doi.org/10.1017/S2071832200016266 Published online by Cambridge University Press

this seminar was to look at constitutionalism – constitutionalism as representing the fundamental self-conception of a political community – in order to see whether a divergence at this most basic level pointed towards the development of a new relationship between European countries and the US. The topic of the seminar was established with the suspicion that this suspected new transatlantic relationship stemmed from the process of European integration, that European states and their constitutional dynamics were necessarily being transformed in the move towards closer ties with each other; thus, whereas during the Cold War the tendency among scholars on both sides of the Atlantic was to emphasise the common ground with America, there had been a corresponding shift with the diminution of that threat to find common ground with fellow Europeans instead. The primary question to be answered over the two days was whether a distinctly European constitutionalism could be understood to be emerging.

B. Etapes et Etudes de Rapprochement

Five panels were convened, each containing two speakers and two discussants, as entry points to the more general enquiry: 'Freedom of Speech', 'Human Dignity', 'The Protective Function', 'Adjudication' and 'Democracy and International Influences'.

At the core of the first three panels was the agreement among those gathered that at the root of the difference constitutional approach between continental Europe (the United Kingdom was left floating somewhere mid-Atlantic for much of the conference) and the United States was a fundamentally different understanding of *human dignity*. Indeed, human dignity was the underlying, and often explicit, theme of the first day's discussions. The most obvious difference, as brought out by Professor Bognetti in his paper, relates to what he identified as a neo-liberal conception of human dignity at work in the United States, which provides only a minimum level of protection for social values through social security, labour law and universal health care provision. Thus, even the Warren Court in its seminal reading of the equal protection clause in *Brown v. Board of Education* was not concerned with the offended dignity of those subject to racial segregation but rather with discrimination by the law.[3] In contrast, the constitutions of Europe's social welfare states either specifically provide for social services[4] or the social welfare function of the

[3] Giovanni Bognetti (University of Milano), 'The Concept of Human Dignity in European and American Constitutionalism'.

[4] For example, where the German Constitution has a general clause laying down the social nature of the state (Articles 20 and 28), those of France (Article 34) and Italy have specific clauses (in Italy's case sev-

state is read into the constitution, whether written or unwritten. However, Bognetti warned that the more developed use of human dignity and the more humane approach of European constitutionalism more generally should not lead us to make the rash assumption that Europe can claim a higher degree of civilisation than America; the yardstick of human dignity should not, according to Bognetti, be our only measure as other features of a system may compensate, such as efficiency.

One issue that came to the fore in the discussions of human dignity was that of bioethics and bioengineering and the threat that these new technologies pose to our understanding of human dignity.[5] Professor Dieter Grimm, former Judge at Germany's *Bundesverfassungsgericht* (Federal Constitutional Court - FCC), made the comment that although Article 1(1) *Grundgesetz* (German Constitution – Basic Law) had admittedly never helped to decide a case before the FCC, its impact on the understanding of the substantive manifestations of human dignity in the articles that followed had been, in his experience, fundamental; moreover, as he saw it, the most important battleground for human dignity before the German Constitutional Court is yet to come: the substantive manifestations of human dignity will not be of assistance on the question of bioethics and he foresees appeal in such cases to the abstract principle contained in Article 1(1).

Professor James Whitman (Yale) presented a fascinating account of the social foundations of 'human dignity' in the US and continental Europe. Controversially, he explicitly rejected the belief of most Europeans that their understanding of human dignity is directly traceable from Kant and a reaction against the horrors of fascism. Rather, Whitman used the social history of punishment to explain why American justice is so much harsher, why, in fact, in direct contradiction to notions prevalent in Europe, American punishment is deliberately degrading. By tracing the social history of punishment in continental Europe since the French Revolution, he concluded that high-status punishments (punishments reserved for persons of high-status in the *ancien regime*) have gradually replaced the range of punishments applied to the meaner sorts, such as whipping, forced labour, and hanging as a means of execution. Mutilation, whipping, forced labour, public humiliation, grotesque uniforms and, recently, execution have all been abolished in Europe. In contrast,

eral clauses, for example, Article 3, stating that all citizens enjoy "social dignity" and Article 32 providing for health care as a fundamental right and the free provision of health care in the attainment of that right; Article 36 ("Wages") perhaps most clearly illustrates the differing approach of Europe to the constitutional protection of human dignity).

[5] For a thoughtful comment on the impact of bioengineering on the individuality of the human being, see Slavoj Zizek, 'Bring me my Philips Mental Jacket', *London Review of Books*, Vol. 25, 22 May 2003; available on-line at: http://www.lrb.co.uk/v25/n10/zize01_.html

Whitman alleges that in the Anglo-American world[6], it was the 'low-status punishments' that were generalised – a levelling down, rather than a levelling up in the move in both patterns to equal treatment. While an interesting thesis, it would also have been interesting to have heard an explanation for why this difference might have occurred. Moreover, later in the conference, Professor Rosenfeld made the observation that examining human dignity through the treatment of prisoners appeared to exclude an understanding of human dignity through the perspective of freedom. He did not elaborate but it may have been interesting to speculate on whether one of the differences in our conceptions of human dignity is that while the European tradition understands freedom (or perhaps autonomy) to be fundamental to human dignity, it is not exclusively understood as freedom and is thus to be (especially) applied to those who have forfeited theirs.

Moreover, the European pattern identified by Whitman, of guaranteeing norms of respect for historically low-status people, makes itself felt in other areas besides criminal punishment. It can provide at least a partial explanation of the quite dramatic differences between Europe and the US as to the acceptable boundaries to freedom of speech. According to Whitman, the Roman law concept of *injuria* is alien to the US legal system, so that where 'personal honour' is a protected legal concept in continental Europe it knows no equivalent in the United States. The impact of this difference for different conceptions of freedom of speech are obvious. However, the explanation is not water-tight; as Professor Schauer's paper noted, the First Amendment is quite exceptional in terms of its extremity.[7] Other common-law systems may not share the concept of *injuria* but have been able to find boundaries to speech within their own traditions. While the United Kingdom, for example, may not have the restrictions imposed by the law of *Beleidigung* in Germany, hate speech is prohibited through the charge of incitement to racial hatred.

In his comment on Professor Bognetti's and Professor Whitman's papers, Professor Eyal Benvenisti (Tel Aviv) argued for a comprehensive interpretation of human dignity comprising also a firm understanding and critique of the notion of equality. In Benvenisti's view, there is a close connection between what he identified as Europe's sympathy with Courts intervening in times of trouble, i.e. in cases of in-

[6] It is perhaps possible to suggest, as Whitman does, that the United Kingdom was closer to the US model until recently; however, it should be pointed out that the standards demanded by the European Convention on Human Rights has brought Britain into line, perhaps grudgingly, with its European partners.

[7] The almost impossibly high standard of 'intentional falsity' for the law of defamation set down in *New York Times Co. v. Sullivan* [376 U.S. 264 (1964)], a standard extended from public officials to public figures in *Curtis Publishing Co. v. Butts* [388 U.S. 130 (1967)], saw the US stake out a position previously unknown in common law tradition.

tolerable social needs or other market excesses, and a less developed, integrationist and equality-based interpretation of human dignity. Were one to interpret human dignity against the background of market failure and a political commitment to market regulation, however, human dignity could not even be fully understood and assessed without its component of market regulation. This argument also provided the baseline for Professor Benvenisti's second observation regarding what he called the citizen/non-citizen differentiation at work in U.S. American fundamental rights jurisprudence. According to Benvenisti, the crucial line of division between those that eventually benefit from social protection through law and those that find themselves left out, is built on the underlying conception of citizenship and informed by the choice between inclusion and exclusion. While this observation drew important attention to a fundamental issue underlying today's rules of law in light of ever more disaggregated social bodies with an ever growing diversity in socially, economically and culturally, it was nevertheless accepted on the broad basis in which it had been presented. In his reply, Professor Bognetti's recalled 'Alexander Bickel's famous book on the 14th amendment"[8] and pointed to the work by Louis Henkin which he identified as making important contributions to what Professor Bognetti labelled as 'making the legal order more humane'.[9] He voiced some scepticism to Professor Benvenisti's assessment arguing that the notion of citizenship (and the connected dynamics of inclusion and exclusion) were less powerful in American Law which he saw to be more focused on the notion of due process than on that of citizenship.

The good judgement of Georg Nolte in bringing together speakers and their congenial commentators was apparent also in the second comment on Bognetti and Whitman. The commentator, Professor Hugh Corder from the University of Capetown, took the audience on a short, but well guided and informative trip down the current state of constitutional law in South Africa. Professor Corder reflected on Professor Whitman's observation of the U.S. being a 'harsh place' and went on to conclude that, indeed, the interests of a person 'qua person' might have better chances for protection in Europe than in the U.S. But, as the conference host, Georg Nolte, had highlighted in his opening remarks, it would clearly be misguiding to interpret Europe's greater emphasis on human dignity as following from an inherently deeper appreciation of human dignity in Europe than in the U.S. Instead, an explanation might be found in the highly specialized constitutional courts in Europe and their growing sophistication in fundamental rights jurisprudence. Pro-

[8] See Alexander M. Bickel, *The Morality of Consent* (1975); see also Alexander M. Bickel, "Citizenship in the American Constitution", 15 Arizona L. Rev. 369 (1973); *ibid.*, The Original Understanding and the Segregation Decision, 69 Harv. L. Rev. 1 (1955).

[9] See, e.g., Louis Henkin, *Age of Rights* (1996).

fessor Corder underlined the ongoing differentiation in constitutional jurisprudence against the lasting challenge of legally confronting the 'total negation of human dignity' which characterized the Apartheid system. When drafting the South African Constitution, the drafters built on the experience that informed Canada's Charter of 1982 as well as the German *Grundgesetz* of 1949, which – on that day, 23 May – celebrated its 54th birthday (as was pointed out by Professor Dieter Grimm in his paper). The seemingly unending task of 'coming to terms with the past' must be, according to Corder, understood as a particularly strong influence in the South African lawyers' intensive exploration of the depths and hidden agendas in constitutional law. Corder described the notion of human dignity as a forward looking concept in constant development. The current 'expansion', as described by Professor Corder, of South Africa's constitutional law into more and more areas of private law, family and cohabitation law, but also the further elaboration and demarcation of socio-economic rights does, indeed, read like the ordinary if overwhelming constitutional challenge to many contemporary (post-) modern constitutional orders. The debate over the 'horizontal effect' of fundamental rights, i.e. the application of fundamental rights in the area formerly assessed as 'private' is but a clear sign of the ongoing search for a better assessment to today's challenges to freedom and equality.[10]

C. State versus Society – (Constitutional) Politics versus the Market?

Like a well composed book, the second section of the conference built on the work and discussions of the previous day. The discussion so far had illuminated the obviously different attitudes to freedom of speech and human dignity on either side of the Atlantic and not by complete coincidence the notion of horizontal rights emerged as both a possible lens through which to look at these issues but also as an increasingly important dimension in constitutional jurisprudence it its own right. The seminar worked itself through a learning process from seeing fundamental rights as exclusively directed against the state to understanding them in their other dimensions, i.e. as rights to services from the state and in regard to their horizontal interpretation. Emerging from the Seminar discussion was the understanding that the constitution in the United States, and the rights embedded in it, are understood

[10] See, e.g., from the German debate the comprehensive studies *Ruffert*, Vorrang der Verfassung und Eigenständigkeit des Privatrechts, 2001; *Bäuerle*, Vertragsfreiheit und Grundgesetz. Normativität und Faktizität individueller Vertragsfreiheit in verfassungsrechtlicher Perspektive, 2001; see the review of these volumes by *Karl-Heinz Ladeur* in: 1 Annual of German & European Law (Russell Miller/Peer Zumbansen eds., *forthcoming* 2003); for the most recent cases of 'horizontal effect' in German constitutional law, see the case note by *Zumbansen*, Private Contracts, Public Values and the Colliding Worlds of Family and Market, 11 (2003) Feminist Legal Studies 74-87.

primarily as protecting citizens from their government and not from one another. From the panel examining the protective function of the State (Professors Grimm and Michelman), it became clear that the European constitutional tradition, as examined through the jurisprudence of the ECtHR, requires the State to protect the vulnerable from abuse by third parties. The paper by Professor Dieter Grimm started out with a look at the US Supreme Court's case in *DeShaney v. Winnebago County*[11] in order to highlight the fundamentally different approach taken by Germany's Federal Constitutional Court, on which Grimm had served a full term of twelve years until 2000. The cases addressed by Professor Grimm included the first abortion case in BVerfGE 39, 1 of 1975, in which the Court had built on the doctrine developed in the Court's famous *Lüth*-decision of 1958 (BVerfGE 7, 198)[12] according to which the fundamental rights of the *Grundgesetz* form an objective value order that radiate into all areas of law, public and private. The most important step made by the Court in *Lüth* towards a strong constitutional review was to set up a standard of control by which the Court would not assume the role of the final case reviewer but, instead, assess solely whether or not the lower Courts, when rendering their decision, had taken into account the constitutional relevance of the fundamental rights in a concrete case. This eventually gave a particular direction in fundamental rights interpretation which would henceforth be executed on the assumption that they are not only negative rights against the state but form a comprehensive order which eventually demands their horizontal application. The referral to fundamental rights standard in normal, *i.e.* non-constitutional cases would be guided by the doctrine according to which the fundamental rights and the values embodied in them radiate into, say, private law through general clauses such as Section 242 of the *Bürgerliches Gesetzbuch* (German Civil Code). The importance of the Court's abortion-decision in 1975 was widely acknowledged to lie in the Court's holding that the Law demanded the state to protect the unborn life - against the unlawful act by the mother. This case sparked a debate that lasted more than a decade and finally fused into the Court's second abortion decision in BVerfGE 88, 203, where the Court further differentiated the standards by which to assess the right of the woman to a legal abortion.[13] Both cases are but important spotlights on a wider development of German constitutional jurisprudence which Professor Grimm explained with examples taken also from other areas such as Telecommunications

[11] 489 U.S. 189 (1989)

[12] See on the history of the Lüth-case and its influence on the Federal Republic's early Case law: Elena Barnert/Natascha Doll, *Conference Impressions:* The Persisting Riddle of Fundamental Rights Jurisprudence and the Role of the Constitutional Court in a Democratic State in: 4 *German Law Journal* No. 3 (1 March 2003), available at: http://www.germanlawjournal.com/past_issues.php?id=248 .

[13] See the Analysis of both cases with a concluding comparative perspective on US law by *Dederer*, in: Menzel (ed.), *Verfassungsrechtsprechung* 242-253 (2000)

Law. In this field, Professor Grimm pointed to the continuously strong background of a state centred approach to law, which informed the Court's recognition of various 'duties of the state to protect'. With the rise and further consolidation of the German post-war welfare state, the Court found itself again and again in the midst of conflicting rights and values, taking refuge here in what would soon become a revolution in constitutional methodology: balancing (*Abwägung*). The weighing of interests and values, while often placing the Court in the most awkward position vis-à-vis the legislative, eventually drew the Court into a never-ending spiral of constitutional balancing. While this has certainly provoked a challenging critique as to the questionable methodological basis of this jurisprudence[14], the balancing method remains – until today – a widely used approach in assessing the role and dimension of different and/ or conflicting rights. While this story needs to be told to today's law students who – to the teacher's repeated frustration – find it disappointingly easy to readily accept the Court's notion of a value order, left in the interpretive domain of the Court, the participants at the Seminar in Göttingen followed the telling with curious but informed attention. Their attention was rewarded with the story's important message offered towards the end of Professor Grimm's paper: after setting the stage for the Federal Constitutional Court's fundamental rights jurisprudence as it had evolved since the Court's founding in 1951[15], he sketched the horizon of the Court's (and the law's) future challenges. By picking up the notion of human dignity, Professor Grimm underlined the drastic challenge presented by technological advances, in particular in the field of biotechnology. These advances would most likely place the Court in the painful position of needing to elucidate a meaning of human dignity in cases which – at their very core – involve only that very notion. The path taken by the Court to date, whose role is widely seen as being exemplary in shaping the German democratic political system, will not make its task in Grimm's view an easy one.

The two cases presented by Professor Michelman (Harvard) in his paper, *Z and Others v. the United Kingdom*[16] and *DeShaney*, formed the perfect basis on which to further illustrate and explore the differences in approach between the 'European'

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[14] See, e.g., *Ladeur*, Gesetzesinterpretation, "Richterrecht" und Konventionsbildung in kognitivistischer Perspektive, Archiv für Rechts- und Sozialphilosophie 1991, 176-194; see already *Ladeur*, "Abwägung" - ein neues Rechtsparadigma? Von der Einheit der Rechtsordnung zur Pluralität der Rechtsdiskurse, ARSP 1983, 463-483.

[15] See the reminisces by Gerhard Casper at the occasion of the Court's 50th Birthday celebration: The Karlsruhe Republic, in: 2 *German Law Journal* No. 18 (1 December 2001), available at: http://www.germanlawjournal.com/past_issues.php?id=111.

[16] Judgement of the Court, 10th May 2001. Available at: http://hudoc.echr.coe.int/hudoc/ViewRoot.asp?Item=1&Action=Html&X=528150102&Notice=0&Noticemode=&RelatedMode=0

https://doi.org/10.1017/S2071832200016266 Published online by Cambridge University Press

and the US constitutionalism. Whereas in the Case of Z and her siblings, the failure of the local social services to protect them from gross parental neglect was found by the Strasbourg Court to constitute a violation of Article 3 ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment"), the death of a little boy in Winnebago County at the hands of his father – an abusive relationship of which the authorities were fully aware – was not deemed by the Rehnquist Court to have violated constitutional provisions. In an interesting exchange which illustrated how deep the ideological differences lie, Professor Jowell (London) expressed the opinion that *X and Others v. Bedfordshire County Council*[17] should be understood as the product of a particular composition of the House of Lords and wondered whether the *DeShaney* decision could be similarly understood as reflecting a particular Court at a particular moment. This question aimed at further elucidation of Professor Michelman's description of the Deshaney case being deeply embedded in US constitutionalism. In response, Professor Michelman agreed that the Warren Court would most probably have decided the case differently, but not because of a belief that the protective function of the State could be read as positivised through the constitution, but rather via classic tort liability (the State had intervened by placing the boy in the custody of his father). Indeed, according to Professor Michelman, the Warren Court had many opportunities to establish a protective function, yet it felt unable to do so.

D. Freedom of Speech and the Role of Public Deliberation in a Democratic State

In terms of freedom of speech, it was suggested by more than one scholar present that one reason for the difference in approach between Europe and the US was one of trust in the role of government, a motto so clearly exposed in Professor Grimm's earlier paper and underlined further by Professor Lorraine Weinrib (University of Toronto) in her comment explaining the Canadian approach to freedom of speech. She suggested that the US distrust of Government was deeply-rooted in the revolution against what was seen as an abuse of power by the British. According to Professor Weinrib, Canada has been much more influenced by the post-war European approach than its powerful southern neighbour, a point she illustrated by noting that 40% of cases before the Canadian Constitutional Court, including all the most important cases, are abstract review brought by the authorities themselves; Weinrib

[17] [1995] 3 All England Law Reports 353. In the siblings' case before the House of Lords, it was held that local authorities could not be sued for negligence or for breach of statutory duty in respect of the discharge of their functions concerning the welfare of children. This precedent was overturned at Strasbourg.

https://doi.org/10.1017/S2071832200016266 Published online by Cambridge University Press

suggested that this demonstrates that the Canadian government does not see itself, nor is it seen by its citizens, to be in opposition to the citizenry.

E. Adjudication

Since the rise of the Legal Realist Critique – be it German, French or American – it is conventional wisdom that law is what the courts will do. The papers presented at the Seminar all made it more than clear that the role of the Courts in the process of constitutionalization was crucial. While the issue of the 'counter majoritarian difficulty' repeatedly clouded the rising enthusiasm about the constitutional courts' leading roles in Western societies in shaping democracy, the general interest seemed more focused on the more intricate question of how to best rephrase the original separation-of-powers question so as to adequately reflect the respective particularities in individual countries' experiences with strong courts. In the light of Georg Nolte's opening observation that while in the US the *Warren Court* today often is instrumentalized as an example of judicial activism and a wide reaching intervention into the domain of the legislature, Europe's Warren Court Era has not yet finished. But, if these differences are not necessarily so much in nature than in time and due to a lack of historical synchronicity, the Warren Court Era in Europe might finish soon, cautioned Nolte in his opening remarks. He also provided however an alternative interpretation which would suggest the era of, say, the ECtHR's activism as not coming to an end in the near future, not least because the political systems in many European states are able to accept and cope with a more 'paternalistic' form of judicial control.[18] Nolte's intriguing suggestion as to why the counter majoritarian difficulty might play a less prominent role in European constitutional discourse consisted in a closer look at the already mentioned balancing approach informing the jurisprudence of major European courts. If the court adheres to a methodological device allowing the judges to develop the rights to be balanced against the concrete context in which they are seen to arise and if the judges can make a case of a certain conflict resolution following from the adequate balancing chosen in a particular case, this very method – open and flexible in its core approach –allows the Court to adapt its jurisprudence to new legal (and political) insights.

[18] See, for a comprehensive analysis of the ECtHR's jurisprudence 2001/2002 the report by Florian Hoffmann in: 1 Annual of German & European Law (Russell Miller/Peer Zumbansen eds. forthcoming 2003), see here also the reports on the Jurisprudence by the *Bundesverfassungsgericht* by Felix Müller, that of the German Länder Constitutional Courts (*Landesverfassungsgerichte*) by Christian von Coelln and on that of the European Court of Justice by Dominik Hanf (all in the *Annual*).

https://doi.org/10.1017/S2071832200016266 Published online by Cambridge University Press

These issues arose again in the context of the paper presented by Professor Jeffrey Jowell from University College, London, and a member of the Venice Commission. If one of the main questions of the Seminar's proceedings was whether a distinctive brand of European constitutionalism was in fact emerging, the case of the United Kingdom is of particular interest. Professor Jowell elucidated the effect on judicial review of the incorporation of the ECHR into British law as the 1998 *Human Rights Act*. The Act grants courts the power for the first time outside the scope of European Community law to review legislation for the compatibility with the rights laid down therein.[19] While the courts may not strike legislation down, and thus the supremacy of Parliament is maintained, they can issue a declaration of incompatibility. Jowell noted that such was the authority of such declarations that the failure of the Government to use a special fast- track procedure to amend legislation in line with the courts' decisions would defy constitutional expectations and thus the current Government has been assiduous in doing so. One might wonder whether a future Conservative Government would be so minded. Nonetheless, the influence of European values and concepts on the UK is clear, both substantively and in enhancing the scope of judicial review of UK courts. That the Human Rights Act requires the courts to take judgements of the Strasbourg Court into account when interpreting the Act and considering the scope of a right sees this influence as continuous. Professor Errera had indeed earlier suggested that the Strasbourg Court acted as a surrogate for review of legislation for compatibility with the Convention in those countries in which judicial review was underdeveloped, such as Britain or France. With the constitutional borrowing of the UK in mind – a demonstration of the way in which European countries are slowly converging – Jowell noted the paradox that although much of the jurisprudence of the UK and other jurisdictions was inspired by the Warren Court, the US Supreme Court appears unwilling to engage in this sharing of constitutional practice.

F. From the Inside Looking Out

This isolationist tendency always at work in the United States was the subject of the paper by Professor Rubenfeld from Yale Law School, presented in the last of the Seminar's sessions: Democracy and International Influences. In what was quickly recognized as a controversial account stimulating engaged comments and debate, Professor Rubenfeld drew a line of separation between two different approaches of

[19] Britain's accession to the European Community in 1972 and the Community's incorporation of the jurisprudence of the ECHR in the mid-1970s allowed UK courts to review UK statutes for compatibility with those rights within the scope of Community competence.

constitutionalism. While the European ('or international') constitutionalism derived from the basic assumption that there are – prepolitically – universal rights and principles which will in due course be administered, interpreted and promoted by legal experts on Court benches, Rubenfeld defined the US approach to constitutional law "as embodying a particular nation's fundamental, democratically self-given legal and political commitments." At this definition, one was hardly prepared for the real thrust of his argument, which consisted in repudiating – in the name of democracy and a nation's political commitment – the international fundamental rights adjudication that Professor Rubenfeld found to be so readily accepted in Europe. Instead, he argued, the very embeddedness of constitutional law in a particular nation's political system made it necessary to accept only that nation's politicians and judges as being able to preside over conflicts arising from constitutional law. It is almost ironical with how much ease Rubenfeld could draw on the whole Seminar's prior debate to underline his thesis of the allegedly undemocratic tendency in Europe to readily delegate the resolution of constitutional conflict to Courts, that is to bodies with questionable democratic legitimation. The very fact that European states have 'internalized the ideology of "international human rights", would explain, according to Rubenfeld, why in Europe no- one would have sleepless nights over visions of the counter majoritarian difficulty. This juxtaposition of international law and democracy served its purpose well: even when reading this week's *Economist* (31 May 2003, pp. 14, 27) on the persisting struggle to produce a Draft Constitution for the EU, one remembers Professor Rubenfeld's earnest reminder that one ought to be cautious about institutions claiming democratic legitimacy when, in fact, their understanding of democracy (and of themselves) is informed by the very institutional process they are engaged in, not by democracy itself. The fallacies offer themselves in such abundance that it is no wonder that (and why) Professor Rubenfeld proved to be a perfect placement in the Seminar programme: speaking in the afternoon session after lunch and following a very engaged presentation by Judge Lech Garlicki from the European Court of Human Rights, Rubenfeld did not have to fear any loss of attention regarding his paper. The experience of listening to Professor Rubenfeld explaining that the US was committed to democratic self-government while the European states apparently continued to carry some heavy historical burden from their monarchical times making them 'considerably less democratic then American democracy', was taken by many as a wake-up call to defend their European constitutional pride. But when Professor Rubenfeld, later in his paper, pointed out that Latin American countries, if not Europeans, were aware of the fact that international law posed a threat to democratic self-rule, an observation connected with an allusion to the doings of the WTO, the IMF and the World Bank, one would like to imagine him engaging in a discussion with protesters in Seattle, Prague, Davos or in Evian. The reduction (or, in Rubenfeld's view: the absorption) of international law to issues of international competitiveness and growth spurred the critique of those participants in the Semi-

nar that wish to defend international law against both economist reductionism and the so-defined democratic critique. From the wide range of anti-globalisation critique it is surely an interesting proposition to choose international law in order to highlight its very anti-democratic basis. In Rubenfeld's words: "The question of democracy's preconditions is difficult and much belaboured. Whether markets ought to precede democratization or democratization markets, in developing countries, is a particular instance of this debate." Indeed. But what needs to be added, one might suggest, is to return this bleak perspective and use it as a torch to explore the current status of national democracy. The latter is not a given asset, but needs to be continuously assessed and affirmed. This banality deserves to be mentioned in light of the fact that well-informed scepticism towards international law , "government without governance" and other formulas is running the danger of delivering itself to ineffectiveness if all it does is to petrify a living and highly fragile system in the name of defending it against the power of the market. While this perspective suggests a connection back to legal critique on the national level, a path not openly recognized by Professor Rubenfeld, its other focus is quite provocative as such. The US's very treatment of International Law, be it in the Security Council[20] or in The Hague[21], and its unilateralist engagement, backed by a "coalition of the willing", does cast some difficult light on the thesis of democratic self-rule underlying the basis of constitutional law – in the American sense.

Rubenfeld's first commentator, Professor Armin von Bogdandy, Director at the Max Planck Institute of International Law, was thus "very puzzled". His comment targeted the cleavage and opposition suggested by Rubenfeld between international law and democracy and pointed to an alternative interpretation of the concept of democracy. Indeed, it was in von Bogdandy's comment that the idea of a *concept* of democracy received further treatment, thereby reappropriating democracy as a challenge of theoretical inquiry and critique, not a mere stool to sit on. Professor von Bogdandy used the image of an interconnected, international world to point to the fact that we can no longer comfortably rely on our national achievements in democratic governance and close our eyes to the influence that our political and economic, but also cultural and legal system has on other countries, just as these other systems influence our respective assessment of rights and duties. The interconnectedness of systems on the international scale feeds, *inter alia*, into the formation and creation of international and supra-national bodies, instances, insti-

[20] See the analysis of the US policy with regard to Iraq and the fight over another resolution: Craig Scott, Iraq and the Serious Word Games: Language, Violence and Responsibility in the Security Council in: 3 *German Law Journal* No. 11 (1 November 2002), available at: http://www.germanlawjournal.com

[21] See the so-called Freiburg Lawyers' Declaration by Kai Ambos et al., in: 4 *German Law Journal* No. 3 (1 March 2003), available at: http://www.germanlawjournal.com

tutions and procedures. To negate the democratic challenge that lies in these processes by ridiculing international law by the use of the term "ideology of international human rights law", would be – according to Professor von Bogdandy – equalling Carl Schmitt's treatment of the Weimar Republic, the fragile parliamentary system of which Schmitt so masterfully played down against the imagery of an, if ever actually historically existing, ideal of parliamentary democracy.[22] But while democratic theory remains attracted to the allegedly exclusive conception of democracy as the identity of the governing and the governed, the persistent challenge to democratic theory lies in the question of how to produce rules and procedures that allow for democratic self-rule, without essentialist pre-conceptions determining which are true and right examples of democracy.

Professor Onuma, University of Tokyo/University of Cambridge, made it clear at the outset that he was not only provoked but disturbed by Professor Rubenfeld's paper. Onuma recounted the story told by Rubenfeld of US isolationism and constitutional law as embedded in the Nation's political system in the light (or: the shadow) of numerous occasions in which the US had indeed intervened in other countries in the name of democracy. In addition to this, in his view, telling contradiction between theory and practice, Professor Onuma grasped the opportunity to reemphasize what Professor von Bogdandy had mentioned with regard to the changing landscape of political actors that the legal system has to come to grips with. The emergence of non-state or non-governmental actors and their vital role in deepening and otherwise sophisticating the agenda of many of today's international conventions, as well as their distinct role in the international scandalization of human rights violations, makes them an important factor in considering any of today's reflections on democracy and international law. The fact that there are certainly also some disturbing examples of powerful and unaccountable NGOs among the huge number in today's system, can – according to Professor Onuma – not account for a general discrediting of NGOs as representative of a fundamentally changing reality of political actors.

The debates during the two days served the participants well in staking out future realms of discussions and avenues of research. The very nature of the topic allowed the participants to explore constitutional law from many perspectives and to engage in a comprehensive exploration of the discipline's methodological, historical and political self-understanding. That a distinctive and unashamed brand of European constitutionalism is understood to be emerging both from Brussels/ Luxembourg and Strasbourg does indeed provide an interesting and convincing account of the worrying divergence between the Old and the New World. It is conferences such as this which, in making clearer the differences, point the way to accommoda-

[22] *Schmitt*, Die geistesgeschichtliche Lage des heutigen Parlamentarismus (1926), 7th Ed. 1991.

tion and understanding. Let us all hope that the anticipated collection of papers from the conference will be (shortly) on the reading lists of Presidents, Prime Ministers and Chancellors on both sides of the Atlantic.

https://doi.org/10.1017/S2071832200016266 Published online by Cambridge University Press