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Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts: Rechtsvergleichende Beiträge zur Rechtsquellen - und Interpretationslehre [Principle and Norm in the Judicial Development of Private Law: A Comparative Inquiry into the Problems of the

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to being anachronistic. It is essential to point out that these farmers were not angry populists, these Anti-Federalists were not progressives, these personality interests were not as notorious as the financial interests of the house of Morgan.

But there is equally a danger, which Brown does not avoid, of reading into that period the acquiescences of today. As indebtedness grows widespread in our economy and money-lending ceases to be a form of villainy, as prosperity spreads to a broader base and corporate power becomes deodorized, the tendency is to study the past complacently, to deny the reality of interests, to reduce political conflicts to the meaningless play of factions. The perils of present-mindedness, when the present happens to be today, are exemplified by Brown's approaches to the economic clauses of the Constitution. It would seem that because they cannot be explained by his frame of reference, they had to be explained away. These clauses had to do with the value of money and the payment of debts—concrete issues of long standing. But Brown dismisses the Constitutional ban on paper money by saying that this medium could still circulate, though not as legal tender! The obligation of contracts clause is minimized by the remark that it applied only retroactively. On the connection between the Shays debtor rebellion and the power of the President to suppress disorder, he has nothing to say. In general, his ideological commitment is an important corrective of the earlier view. But to bring once more to this period the transient taint of one's own times is discouraging to those who seek in history the makings of a cumulative subject.

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What are the constituent elements of a legal system? Does it consist exclusively of the rules of law which have found expression in precedents or statutes and which provide, more or less clearly, how particular questions are to be decided? Or are there additional elements which have gone into the making of a legal system? Such additional elements unquestionably exist. Without them the sum total of the rules of law of a given community would constitute a shapeless congeries rather than a system. But they are difficult to define. Maitland has pointed out the significance of a taught tradition. But what does such

† Volume I, Inquiries into the Comparative Theory of Law and the Methodology of Comparative Law. Published by the German Society of Comparative Law, Section on Basic Research.
a tradition consist of? Roscoe Pound has sketched the role played by legal standards and principles. In the book under review, Professor Esser of the University of Mayence, Germany, has made our problem the subject-matter of an inquiry of unparalleled width and intensity. In so doing he has presented us with a methodological study of far-reaching importance and with a model of the uses to which the method of comparative law can be put.

The elements which must be present in addition to the concrete rules of law in order to unify them into a legal system are, according to the author, the following: legal maxims, general clauses, concepts, institutions, doctrines, and, finally, the rules of the legal art or craftsmanship. Legal maxims are those broad and usually terse statements of such general propositions as that "nobody will be heard to plead his own wrong," or "error of law is no excuse," or "equity regards as done what ought to be done." General clauses, in German terminology, are those sections of a code or statute which do not contain a definitely formulated rule of law but refer the judge to some extralegal standard. Thus Section 242 of the German Civil Code provides that a promisor has to perform his promise in accordance with good faith and fair dealing; under Section 826 reparation is to be made for the harm which one person has knowingly inflicted upon another in a manner which is contrary to good mores. American law also uses such references, as, for instance, when reparation is demanded of one who has invaded another person's interest in bodily security by failing to exercise the carefulness of a reasonable man, or when naturalization is denied to one who has been convicted of a crime involving moral turpitude. Since neither thinking nor coherent speaking is ever possible without the use of concepts, no legal rule can, of course, ever be articulated without conceptualization. When the author speaks of concepts as necessary elements of a legal system, he apparently uses the term "concept" in a narrower sense, viz., in that of fixed patterns of thought and articulation which are used consistently whenever reference to the thought pattern in question occurs in the course of legal thinking. Illustrations of concepts of this kind are presented by such terms as title, fee, contract, easement, heir, or tenant, etc.

What the author means by institution is not expressly defined, but it is clear that he is thinking of such phenomena as property, marriage or family, in which a large number of typically interrelated patterns of behavior are recognized as belonging together and such recognition has found articulation in a concise term of generally understood, but not always clearly defined, meaning.

Doctrines are the formulations of alleged necessities of legal significance, such as the proposition that no promise can be legally valid without a consideration, or that an expectation created in one person by the words or conduct of another must be protected, or that the intention of contracting parties that their contract be governed by the law of a certain state cannot be valid unless such a choice of law is permitted by the proper law of the contract, etc. It goes without saying that it is irrelevant for the definition of the term whether or not a par-
ticular doctrine is "right." The author's sole concern is the role which is played by doctrines in general in the integration of a legal system and the determination of its characteristic aspects.

Rules of legal art or craftsmanship, finally, are those rules which indicate how a precedent is to be used, a statute to be interpreted, an instrument to be construed; how large or how small a step of innovation is permissible under a given set of circumstances, how the decision is to be justified in the written opinion, whether, and if so, in what manner an innovation is to be disguised as mere application of existing law, etc. They are subtle and rarely articulated. Often they constitute undefinable traditions which are more felt than known by the judges and other officers of the law, including the scholars. But so important are these leges artis judiciariae that felicitously Esser calls them the constitutional law of judicial legislation.

All these phenomena are brought together under the name of "principles," contrasted as such with the separate "rules of law," and investigated as to their role in the integration, characterization, and development of legal systems. In the choice of the term "principle," the author appears to have been influenced by the terminology current in those recent Italian writings which have been devoted to the exploration of the role of what is called in Italian principi. In that language the term seems to be less susceptible to misunderstanding than it is in English or German, but whatever its general meaning or meanings may be in those languages, the author is entitled to his own terminology provided he has made clear his meaning. Investigations of the role of the principi, or what turns out to be largely the same, of legal methodology, have in recent decades been undertaken in other countries too, especially in France and in the United States, but also in Germany, England, Switzerland, and Spain. One of the special merits of Professor Esser's investigation lies in the fact that it extends over the legal systems of all these countries and that it specifically constitutes an incisive comparison of the methods of thought respectively characteristic for the great systems of the common law and the civil law. In constantly comparing these two systems, the author has succeeded in bringing to light subtle features which must remain hidden to the scholar who limits himself to the observation of exclusively one or the other of the two systems and which cannot become apparent unless either system is constantly seen reflected in the mirror of the other.

A review cannot reproduce the full contents of the book, least of all when it is concerned with a book so rich in thought and so subtle in its insights as that of Professor Esser. All we can do is indicate why this book of a German scholar is significant for American legal thought.

To a thoughtful observer it may well appear to be obvious that any legal system is essentially determined by its principles. In Professor Esser's book, he will find the detailed proof why it must be so. No code can be made unless there are already on hand the concepts it has to use, the institutions with which it has
to deal, and the basic attitudes by which it is inspired. Indeed, so the author properly observes, the most essential aspects of a code remain unwritten, because they are regarded as self-evident. Once the code has been written it will, again, be by principles that the purport of its rules will be determined, supplemented, and altered.

In a case law, too, the single case means nothing without the principles which determine how it is to be fitted in with others, how the concepts used in it are to be understood, how narrowly or how broadly the rule of the case is to be defined, how it is to be separated from the dicta, and how one has to use the dicta and the doctrines which they may express or to which they refer.

From the analysis of the respective roles of code and precedent emerges not only the difference between a "closed" and an "open" system of law, but also the fact that these terms are relative and changing. In each legal system not only the rules are subject to change but also the principles, although their change may be slower and less obvious.

It has, of course, been frequently observed that in the continental countries generally and in Germany in particular the role of code and statute has been on the decline and that of the judge in the ascendancy. The reason simply lies in the fact that the parliamentary bodies have turned out to be unable to cope with the need of keeping the law abreast with changing conditions. Parliamentary parties have often found it impossible or inadvisable to vote on the hot problems involved, or, even more commonly, the task has just been too vast or too complicated. But the conditions of life have changed, in many respects radically, under the impact of political upheaval, war, national catastrophe or simply of technological, economic or social development. The law had to be adapted to these changes, and the task could not be assumed by any one but the judges, for whom it has not always been easy to grow into their unaccustomed new role. Attempts in accordance with traditional theory to disguise their activity as mere interpretation of the existing body of code and statute law have properly been exploded. But it takes time for the judges to grow into the role of lawmakers and, at times, they have shown themselves to be either too hesitant or too radical. Two recent episodes seem to have stimulated much of the thought of the author that has found expression in his book.

In the 1949 Constitution of the Federal Republic of Germany it is provided that men and women are to have equal rights and duties. For implementation of this general maxim, the Constitution referred to a statute still to be enacted. Cautiously it was added, however, that the maxim as such should take effect on April 1, 1953, if by that date the implementing statute should not have been enacted. The Constitution makers' suspicion turned out to be well founded. In the legislature such differences of opinion developed, especially between the representatives of conservative Christian and those of liberal thought, that no statute could be resolved upon. What were the courts to do after March 31, 1953? How were they to answer the innumerable questions of detail which arose
with respect to such problems as the mutual rights of husband and wife in matters of property, of determination of domestic affairs or of the education of the children, or with respect to the law of support after separation or divorce? Might a wife now be obliged to render support to her husband, or was the husband's duty of support to be regarded as abolished? Were equal wages for men and women now obligatory in all relations of employment? Would unnatural intercourse between women now be punishable as sodomy or was the punishability of homosexual intercourse between men to be regarded as repealed? A few lower courts regarded the solution of these problems as so far surpassing the permissible sphere of judicial activity that they held unconstitutional the provision of the Constitution which declared the maxim of equality of the sexes to be an effective part of the law as of April 1, 1953. Although these decisions were reversed by the Supreme Court, the courts were hesitant in the solution of the concrete problems for which the Constitution had failed to indicate concrete directives. At this juncture, Professor Esser, drawing upon his knowledge of judicial lawmaking in common law countries, published an influential article1 in which he showed to the courts how the formal command of the Constitution might be filled with content by the careful observation of those attitudes and discussions out of which the demand of equality of the sexes had arisen. By such study, the formal command might be transformed into a set of concrete postulates, which might then be approximated step by step in a continuous line of development and without an abrupt break of tradition.

An example of the opposite kind was presented by the twist which certain courts gave to a long line of precedents which, in true judicial lawmaking, gradually developed a set of rules imposing a duty to take precautionary measures upon landowners opening their premises to the public or to certain segments of it. Jumping ahead abruptly several appellate courts rendered opinions which, if unchecked, would have rendered municipalities liable for practically all kinds of accidents occurring on the public streets. Again referring to the common law, i.e. to the cases dealing with the liability of landowners to invitees, licensees and trespassers, Professor Esser demonstrated to the German courts concerned the faultiness of their method of lawmaking,2 which was based upon vague ideas of fireside equity. In the present book such a method is shown to be particularly dangerous where it results in judicial intervention with freedom of contract. That section of the German Civil Code which pronounces that "an obligor has to render performance in the manner required by good faith and fair dealing with regard being had to the public mores,"3 has been expanded by the courts into a general principle according to which both parties to a contract have to observe the requirements of good faith in their relations to each other.

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3 German Civil Code §242.
A promisor will thus be held to be bound not only to what he has promised expressly but also to numerous "auxiliary duties" of protecting the interests of the obligee. The latter in turn has been held to be bound to exercise his rights so as not unnecessarily to burden the obligor. Finally, the section has been used to bring about an adjustment in cases of unforeseen events such as political upheaval or catastrophic inflation.\footnote{Cf. F. Wieacker, Zur rechtstheoretischen Praezisierung des §242 BGB, Recht und Staat, Heft 193/194 (1956).} Esser approves of such judicial lawmaking insofar as it continuously tries to explore what the individual parties to the contract actually had intended or would have intended. He warns, however, against that trend under which the courts have tried to enforce their own social value judgments or those of some group which has succeeded in finding judicial sympathy for its ideas of social ethics. Substitution of what the judge regards as right, for the plan worked out for themselves by responsible parties, is regarded as subversive of the bases of a free society. As long as the answer to a contingency can be found by way of interpretation the judge is not to correct, supplement or adjust the parties' own scheme, unless his power to do so finds a clear basis in the existing law.\footnote{Now see also Esser, §242 BGB und die Privatautonomie, [1956] Juristen-Zeitung 555.}

In his criticism of the German courts Esser may be too harsh. If one surveys the vast body of case law which has been built around Section 242, he can hardly fail to admire the ways in which the courts have dealt with the impact upon private contracts of the catastrophic events of German history since 1914. Once judicial creativity was called forth on a vast scale, excesses did of course occur, and in some respects courts have indicated a tendency to use their newly won powers to pave the way to some new ideal of social justice. If they were allowed to go unchecked such tendencies could result in substituting some reform group's social ideals not only for the autonomous will of private parties but also for value judgments which are still those of the community at large. In the face of such tendencies, which can be found in this country, too, Esser's warning is appropriate. The method which he advocates seeks both to free the judge from the shackles of positivistic conservatism and to warn him against unfettered reformism. When he believes the right method is to be found in the common law, he is as overfriendly, however, toward our system as he is overcritical of the courts of his own country. While Esser properly emphasizes that a court must not try to supplement or modify the contractual scheme of private parties as long as their intentions can be discovered by way of interpretation, we must not overlook that such emphasis upon interpretation makes it easy for a judge to yield to the ever-present temptation of passing off intervention as mere interpretation.

While in Germany, France and other civil law countries the legislature has lost influence in lawmaking to the judiciary, in England the role of legislation has grown and so has, in both England and the United States, that of another
source of lawmaking, viz., the legal scholars. The inquiry into the changing relationships between legislatures, courts and scholars constitutes one of the most fascinating parts of Esser's book, although his statements in this respect are not entirely free of a certain contradiction. While in chapter 12, he seems to ascribe the leading role, in all kinds of legal systems, to the judiciary, in other parts he amply demonstrates the great importance of the part played by legal scholarship. On the Continent it was indeed by the scholars that there have been elaborated those concepts, maxims and doctrines which alone made it possible to build up a legal system upon the anachronistic Roman sources. The common law had its Bracton, Littleton, Cook, and Blackstone even during the period when its judicial development was centralized in the Royal Courts of Westminster. Its preservation as one system of law after the disappearance of the one central supreme court of law and equity would not have been possible without the unifying activities of the legal schools, law reviews and treatises. This unifying role of legal science is perhaps not sufficiently emphasized by our author. What he makes abundantly clear, however, is the role played by the scholar as the preserver of the internal consistency of a legal system, of its economy of thought and of the practicability of its conceptual tools. In this present age of disparagement of “conceptual jurisprudence,” it is refreshing to find a thoroughgoing realist pointing out the indispensability for fruitful legal thought of carefully elaborated and properly used concepts. While being fully aware of the dangers of a mechanical use of concepts as a source of formalistic deduction, he also shows how the traditional concepts of legal thinking are depoliticized expressions of value judgments in which the experiences of past generations have been distilled and which make it possible for the courts to reach decisions which correspond to the values of the community without being compelled every time to ascertain them anew.

This well-balanced re-evaluation of the role of scholar-made concepts and scholar-made systematization is particularly welcome at a time in which these activities are in danger of being undervalued and thus discouraged. In contrast to the 1920's and 1930's, American thought of the post-war years has been characterized not only by a dearth, but also a disparagement, of systematization in the law. Of course, we need the careful factual analysis of problems of detail; of course, in order to be fruitful, such analysis must be extended to the comparable facts and experiences of the world outside of the borders of the United States; of course, we need the methodological inquiries of a Llewellyn or the philosophical meditations of a Pound, but we also need that constant re-thinking and reformulating of the problems and concepts and their consistent co-ordination as it has been carried on by Wigmore, Williston, Prosser, or the Restaters, especially Bohlen. It is a matter of taste whether or not one wishes to apply the word science to their activities, but we need them lest our law fall apart internally in each jurisdiction, and, even more so, between them.

From what has been said it will appear that the book has been written not
only as an investigation of an important aspect of theory but also as a contribu-
tion toward the solution of problems of immediate practical significance. These
problems are concerned with the adaptation to present conditions of both the
civil and the common law, and also with the further development of three fields
of law which are of a supra-national character, in which concrete norms are not
yet fully developed, and in which the principles thus occupy positions of
decisive importance. These fields are international law, conflict of laws, and the
law applicable in international commercial arbitration.

In international law its supreme tribunal, the International Court of Justice,
is by its own charter ordered to decide in accordance with the "general principles
of law recognized among the civilized nations" where the decision is not yielded
by a treaty or by international customary law. A stimulating chapter of the
book is devoted to the question of what is meant by this term, how the general
principles of the law recognized among the civilized nations are to be ascer-
tained, and how they are to be applied and developed.

The law of conflict of laws, if it is to perform its task of mutually adjusting
the laws of the world's several jurisdictions in their application to concrete
problems of private law, must be so formulated that its provisions can be
applied to problems of life wherever they arise. At present such formulation has
not been achieved. In each country the choice of law rules have generally been
formulated by the use of concepts taken from that country's substantitive law.
As a result the rules frequently fail to fit legal relationships that have originated
in a country whose substantive law has a different set of legal concepts. The
tortured problem of characterization has arisen out of these discrepancies. In the
United States this problem has so far bothered the theoreticians rather than the
courts. In Europe, where the conflicts are regularly between countries of differ-
etent legal systems rather than between states sharing the same system, char-
acterization has become the central problem of the entire field of conflict of
laws. Ernst Rabel has shown that the problem can be solved only in one way,
viz. that of developing a set of choice of law rules which use in their structure
not concepts of any particular national system but concepts of supra-national
significance. In order to form these concepts it is necessary by careful compari-
sion to determine the practical function of the diverse institutions of the national
laws and to express the new concepts in terms of such function rather than of
formal structure.6 The elaboration of such a set of internationally workable con-
cepts is a difficult but by no means insoluble task. How comparative law can be
used for that task is instructively shown by Esser.

In commercial arbitration it is possible under most national systems for the
parties to agree on one of three different methods. They may direct the arbitrators
to decide in exact accordance with some system of national law, to disregard
any law and simply decide in accordance with fairness and equity, or to decide

6 1 Rabel, The Conflict of Laws 42 et seq. (1945).
in accordance with general principles of law. The last-named method, which increasingly appears to be that of arbitration in international cases and which is particularly well suited for them, frees the arbitrators from the necessities of first determining which national system is to be the basis of their procedure and decision, and then having strictly to adhere to all its provisions. But reference to general principles of law also ties the arbitrators to certain definite basic principles, the observation of which can be checked, and the violation of which may render the award unenforceable. Again the questions arise as to what these principles are, how they are to be ascertained, applied and developed, and again instructive directives are given by the author.

Lastly, and this is no small matter, the author addresses himself to the problem of how those aspects of the law which touch upon the basic aspects of our civilization can be transferred from the realm of disruptive political dispute into the calm atmosphere of technical legal discussion. Perhaps the author is a bit too optimistic in this respect. His discussion might also have gained in perspective if, looking beyond the comparatively quiet sphere of private law, he had inquired into that of constitutional disputes and quite particularly if he had taken into consideration the world's most ambitious attempt to turn political disputes into justiciable controversies, i.e. that made by means of the judicial control in the United States.

But we ought to be grateful for Esser's work as it stands. It constitutes the quintessence of an enormous amount of learning elaborated by a penetrating and subtle mind. The author's treatment of problems of his own, German, law is that of the expert and creative scholar. He is equally at home in French and Italian law and in the methodological writings of the Continent as well as of England and the United States. The American reader will be impressed by the author's knowledge of the common law and by his empathy for its spirit. The only major criticism of Esser's treatment of the common law is that at times he does not appear to be fully aware of the differences which have grown up between England and the United States. The traditional attitude of English judges toward statutes has ceased to prevail in the United States.

Esser's insights ought to be made available to readers who cannot understand the German text. Unfortunately, however, a mere translation would be impracticable. Esser's German is not easily translatable. The fault is not ponderousness, which is so often alleged to be a peculiar feature of teutonic writing, but rather the apodictiveness of Esser's presentation. Whole passages of the text consist of mere hints understandable only to the expert. In the innumerable footnotes, cases or texts from a large number of countries are referred to by simple reference rather than by indication of the facts. What German reader can be expected to know what Moses v. Macferlan was about, or what were the facts of Blyth v. Birmingham Waterworks Co. or any other of the

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two hundred or more common law cases mentioned? An American reader will be equally helpless as to citations of cases from Germany, etc. Before a translation is made, the author should thus revise his text and footnotes with a view to what an American reader can be expected to understand and to know. Cumber-some though a translation may be, the book is too important to be lost to American legal science.

Fairness to the reader requires the statement that the author has dedicated the book to the present reviewer, who also wishes to state, however, that he believes that his judgment has not been influenced by this fact.

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This book consists mainly of the memorandum which Professor Kaysen prepared as “law clerk” to Judge Wyzanski in connection with the trial before him of the United Shoe Machinery case. In addition there is an introductory chapter summarizing the earlier history of the company as it was disclosed in prior anti-trust suits, a chapter discussing the final decree, and a chapter dealing with the “economic standards of the anti-trust laws and the problem of its enforcement” (p. vii). The book is, therefore, confined to the analysis of the empirical evidence as it was disclosed at the trial. Hence its chief interest is to show by example what economic analysis, or at least a given economist can contribute to the interpretation of the evidence presented in an anti-trust case. As Professor Kaysen points out, the evidence and hence also its interpretation might be quite different if technical economic analysis was also used in preparing a case.

A basic issue for the economist and the lawyer in any monopolization case has two aspects: (1) whether the firm has achieved monopoly, and (2) whether it has engaged in monopolizing. A distinction is usually drawn by both economists and lawyers concerning monopolizing or attempts to monopolize between firms which have, and those which do not have some monopoly powers. This distinction which Professor Kaysen accepts rests on quite dubious analysis. Obviously a firm without monopoly power cannot charge competitive prices and impose restrictions on its customers. The distinction must presume then that a monopolist can maximize his monopoly revenue and at the same time impose additional restrictions on his customers which will either make it possible for the monopolist to prevent entry into his market or to acquire a monopoly in another market. In this form the analysis is quite wrong. The monopolist can either maximize his monopoly revenue or charge lower prices and impose additional restrictions. The distinction is also based on the presumption that a monopolist can use