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Some Comparative Remarks about the Efficacy of International and Constitutional Law

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SOME COMPARATIVE REMARKS ABOUT THE EFFICACY OF INTERNATIONAL AND CONSTITUTIONAL LAW

*by Mark W. Janis**

This is the last formal presentation in what I think has been a very successful series of papers. I would like to begin by simply saying what so many of our visitors have said before, how grateful we are to all of our friends at Eötvös Loránd University for helping to organize such a successful Conference. All of us from Connecticut have enjoyed working on the Conference as it has been developing over this year. We certainly enjoy being here in Budapest and greatly appreciate your hospitality. We are very much in your debt for everything that you have done. I know I speak for all the Journal members and all the faculty from Connecticut. Thank you!

I want to try in the time allotted to me to pull together some of the strands not only from this afternoon's panel, but also from this morning's panel and to see what we can do in terms of initiating a useful general discussion. I think that perhaps my most useful role now will be to introduce some of what I think are the central questions that have been raised by the discussions today and let you as the audience come back and deal with those questions and bring in your own insights.

Rick Kay with whom I have co-authored a book on European Human Rights Law knows that one of my favorite little quotes is a saying from Montesquieu where he explains that he is not so interested in what rules of law there are, because there are good rules of law everywhere — he is interested in what makes good rules of law effective. One of the things motivating my own interest in international law and constitutional law is not so much the formal rules of law, not what is necessarily written down on paper, but what actually makes laws

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work or not work. I think that all of the papers that we have heard today have gone to this topic to some degree. Obviously, the efficacy of law is a matter of special interest to those of us outside central and eastern Europe as we watch the countries here begin to develop rule of law states. I am sure, too, that it is a matter of interest in these countries as well.

As David Seymour I think meant to say when he began his presentation, it has taken hundreds of years of trial and error in places like England and America to achieve what we have presently achieved in rules of law states. Of course England and America are far from perfect, but one of the reasons why Montesquieu in the eighteenth century went to study England and its laws was to try to figure out why England and not France had managed to protect individual liberties. He came to the conclusion that it was not just rules of law that made a difference but what he called the spirit of the laws. What Montesquieu meant, I think, was the kind of spirit that people had towards the law, the way in which the law invigorated the society, the way in which society perceived law, judges, and the courts.

One of the things that struck me as I was listening to all of the papers today is that it is easy to confuse democracy and law. I am firmly persuaded that on some of the most important political issues of the day, the law may be on one side and democracy on another. Majoritarian rule may lead to one set of decisions; courts and law may lead to another. This is a realization that I think the United States recognizes with the doctrine of judicial review and the division of authority among the President and the Congress, and the Supreme Court.

For example, three papers today addressing issues of minority rights, which I think are almost always better protected by law than by majoritarianism. By definition, democracy is based on majoritarian rule. If minority rights mean anything, they mean the minority will be protected from the majority. It may be a useful lesson that we can draw from today's panels, that there is a need for a rule of law state, that there is a need for judicial review, that there is a need for law that can sometimes control the democratic process.

Hugh Macgill knows that whenever I give a lecture in Connecticut to incoming students about what we offer in international and comparative law, I always list all of the international and foreign law courses. One of the things that I think amuses him is that I always put constitutional law down on my list of our international law offerings.

One of the interesting things about the American Constitution

that might be a model or a lesson as we look to Europe in the last decade of this millennium is that the American Constitution is basically an exercise in international law making, that it was and is a treaty of sorts. James Madison, being a good Princetonian, had had a good background in history and politics and looked principally, I think, at the Constitutions or the Treaties as they were then in the Netherlands and in Switzerland to try to find a model that he could use in creating the new American Union. When you look for the very first principal law book in the United States, Chancellor Kent's commentaries, his four volume treatise on United States law, you will see that his very first chapter is about international law. His second chapter is about American Constititutional law which, even as late as 1820 or 1830, Kent saw as just one step down the international path. Kent saw the Constitution as another form of treaty, this a treaty between many sovereign states. It took the United States a bloody civil war to answer the question of whether or not the Federal Union was a nation or a collection of states and whether or not states should secede from the Union.

I think there are some lessons to be taken from the Constitution for Europe. One of them might be that Federalism and Constitutionalism are good ways of making problems more ambiguous, and making things vaguer than they seem. I sometimes try to encourage my law students not to always think of law's clarifying function. Sometimes the necessity of law is sometimes to confuse things, to try to muddy the waters. I think the American Constitution has been rather successful at ambiguity. Sometimes it is very important to reach a stage of ambiguity when you are dealing with problems that really cannot be solved. I think that one of the successes of American law and American Constitution has been our ability to ambiguously share power not only between the President, the Congress and the Supreme Court and between the central government and the states, but also between the legal system generally and the democratic politicians.

One sees in Europe not only the construction of parliamentary democracies in central and eastern Europe and successional constitutional systems, but the emergence of legal systems like European Economic Law and European Human Rights Law. I hope these international systems will be able to share some of the powers — muddy the waters if you will — divide up what Professor Weisbrod referred to as state sovereignty, perhaps not always in any clear fashion but in ways that solve real problems.

One of the things I found especially interesting in the first panel was the way the very distinguished panelists, all of whom know a great deal about European Human Rights Law, were very careful not to commit themselves to definite answers about the powers of the Court, or the Commission. My feeling about European Human Rights Law and a little less about European Community Law is that these are systems in transition. Nobody here or anywhere probably really knows what the roles for European regional legal institutions will be in five or even ten years, but it may be that with respect to some of the minority problems that we have discussed here today, perhaps a certain amount of ambiguity will ultimately be necessary.

Montesquieu went to England to try to figure out what the English were doing about law. We have many people here from Connecticut who have come — I hope not only to preach, though we seem to be dreadfully good at it — but also I hope to listen. In many ways America is an inward looking kind of country. One of the things I think we as United States lawyers can do is to try to bring lessons from other countries to the United States.

Once again, for all of us, I want to thank you very much for your hospitality. Thank you.