Desautels-Stein on Race as a Legal Concept

Justin Desautels-Stein (University of Colorado Law School) has published Race as a Legal Concept in the last issue of the *Columbia Journal of Race and Law* (it is also available on SSRN here). The paper proposes to use a conflict of laws approach to address a problem which has traditionally been considered as beyond the scope of conflict of laws. It builds on the article of Knop, Michaels and Riles which did the same with respect to feminism and culture.

> *Race is a legal concept, and like all legal concepts, it is a matrix of rules. Although the legal conception of race has shifted over time, up from slavery and to the present, one element in the matrix has remained the same: the background rules of race have always taken a view of racial identity as a natural aspect of human biology. To be sure, characterizations of the rule have oftentimes kept pace with developments in race science, and the original invention of race as a rationale for the subordination of certain human populations is now a rationale with little currency. The departure from this "classic liberal" conception of race, and its attendant and disturbing view of the function of race, did not, however, depart from the idea that race is a natural and organic part of being a human being. As this Article argues, this seminal background rule—that race is natural, neutral, and necessary—is deeply problematic and a substantial obstacle in the fight against the Supreme Court's ascending anticlassification jurisprudence. Not to mention, it is also false. In an effort to make some headway against the idea that race is a natural idea, as opposed to a legal concept, the Article attacks the background rules of race via the unlikely field of Conflict of Laws. Taking the Supreme Court's decision in Parents Involved in Community Schools v. Seattle School District No. 1 as a benchmark, the discussion first suggests an early functionalist view of voluntary school integration by way of an analogy to the early twentieth-century transformations occurring in Conflicts of Laws. Second, and in the alternative, the discussion then situates the facts of Parents Involved as literally a problem of Conflict of Laws. In both instances, the hope is to focus legal discourse on the background rules of race so as to empower a new and emancipatory anti-subordination jurisprudence.*

Max Planck Post-Doc Conference on European Private Law

On **7** and 8 May 2012 the Max Planck Institute for Comparative and International Private Law Hamburg hosts the forth Max Planck Post-Doc Conference on European Private Law**.** It invites European Junior Scholars to present and discuss their research work.

Further information is available here. The programme reads as follows:

MONDAY, 7 MAY 2012

- 8.30 **Accreditation**
- 8.50 **Opening Statement,** *Reinhard Zimmermann*
- 9.00 **Error communis facit ius. Application and Distortion of a Roman Law Principle in Western and Eastern European Private Law Codifications**, *Péter Bónis*
- 9.30 **Unwinding of Failed Contracts**, *Joke Baeck*
- 10.00 **Discussion**
- 10.45 **Coffee Break**
- 11.00 **Roman Law in Comparative Perspective: Acquisitive Prescription**, *Jelle Erik Jansen*
- 11.30 **Functionalism in Personal Property Security**, *Hano Ernst*
- 12.00 **Discussion**
- 12.45 **Lunch**
- 14.00 **Estonia – a Test-Country for Common European Sales Law**, *Karin Sein*
- 14.30 **Discussion**
- 14.55 **New Developments as to Internet Related Infringements – Interest Analysis within the Frames of the Brussels I Regulation**, *Ulf Maunsbach*
- 15.25 **Discussion**
- 15.50 **Coffee Break**

- 16.05 **Law Applicable to Cross Border Defamation**, *Justyna Balcarczyk*
- 16.35 **The Country of Origin Principle after eDate Advertising**, *Jan-Jaap Kuipers*
- 17.05 **Discussion**
- 19.00 **Dinner at the Max Planck Institute**
- 20.30 **Closing Discussion**

TUESDAY, 8 MAY 2012

- 9.00 **Private International Law and Federalism. A Comparative Perspective (EU / US),** *Jeremy Heymann*
- 9.30 **Party Autonomy in the Field of Non-Contractual Liability Covered by Motor Vehicle Compulsory Insurance**,*Georgina Garriga*
- 10.00 **Discussion**
- 10.45 **Coffee Break**
- 11.00 **Exitprocedures for Minority Shareholders in Private Companies**, *Claartje Bulten*
- 11.30 **Is Corporate Law a Catalyst for Hedge Fund Activism? A Cross-Border Empirical Analysis**, *Dionysia Katelouzou*
- 12.00 **Discussion**
- 12.45 **Lunch**
- 14.00 **The Duty of Loyalty and the Corporate Opportunity Doctrine**, *Corrado Malberti*
- 14.30 **Risk and Regulation of Share Ownership: Different Kinds of Shares and Control-Enhancing Mechanisms (CEMs)**, *Veikko Vahtera*
- 15.00 **Discussion**
- 15.45 **Coffee Break**
- 16.00 **Enforcement of Stock Exchange Rules: Highlightening the Interplay between Civil Law, Administrative Law and Penal Law**, *Nina Reiser*
- 16.30 **Discussion**

Brussels Conference on Cross Border Class Actions

On Friday 27 April 2012, an international symposium will be held in Brussels on "Cross-Border Class Actions: The European Way". The symposium is part of an inter-university research project on judicial cooperation in regulatory matters and consumer protection. The event will be held at the Stanhope hotel, within a walking distance from the European Commission headquarters. Full details and registration form can be found online.

The programme is as follows:

9:00- 9:15: **Welcome Speech**

Andrée Puttemans, Dean of the Law Faculty of Université Libre de Bruxelles

Introduction to the conference

Arnaud Nuyts, Université Libre de Bruxelles

Part I – Aggregate Litigation as a New Regulatory Technique

Chair: George Arestis, Judge, European Court of Justice

9:15- 9:40: **A Model Typology of Class Actions**

Michael Karayanni, Hebrew University

9:40- 10:20: **Introducing a EU Regime for Collective Redress Litigation – The State of Play**

- *Maciej Szpunar, Ministry of Foreign Affairs (PL), University of Silesia,*
- *Lukasz Gorywoda, Université Libre de Bruxelles*

10:20-10:45: **Collective Redress in the Post-Regulatory State**

Horatia Muir Watt, Science-Po Paris

Part II – EU Cross-Border Collective Redress Litigation

Chair: Alexander Layton QC, 20 Essex Street, London

11:25-11:50: **Collective Redress and the Brussels I Jurisdictional Model**

Burkhard Hess, University of Heidelberg

11:50-12:15: **The Consolidation of Collective Claims under Brussels I**

Arnaud Nuyts, Université Libre de Bruxelles

12:15-12:40: **Recognition, Enforcement and Collective Judgments**

Richard Fentiman, University of Cambridge

Luch time: **Keynote Speech**

Salla Saastamoinen, European Commission

14:10-14:50: **The Worldwide Reach of US Class Actions**

- *Ralf Michaels, Duke University*
- *Louise Ellen Teitz, Roger Williams University, Hague Conference*

14:50-15:10: **Collective Redress and Arbitration**

Luca Radicati di Brozolo, Catholic University of Milano

Part III – Cross-Border Collective Redress in Specific Fields

Chair: Hakim Boularbah, Université Libre de Bruxelles

15:30-16:10: **Collective Redress and Competition Policy**

- *Michael Hellner, University of Stockholm*
- *Lia Athanassiou, University of Athens*

16:10-16:50: **Collective Redress and Consumer Protection**

- *Cristina González Beilfuss, University of Barcelona*
- *Malgorzata Posnow, Université Libre de Bruxelles*

16:50-17:30: **Collective Redress and Financial Markets**

- *Anna Gardella, Catholic University of Milano*
- *Charalambos Savvides, University of Cyprus*

18:00: **Conclusions – Collective Redress and Global Governance**

Nikitas Hatzimihail, University of Cyprus,

Max Planck Encyclopedia on European Private Law released

The Max Planck Institute for Comparative and International Private Law in Hamburg has released the English-language working of its Encyclopedia on European Private International Law. Published by Oxford University Press and featuring more than 120 authors the publication follows the 2009 release of the German-language version. The information on the institute's website reads as follows:

> *The creation of a private law applicable for all Member States of the European Union represents one of the most significant developments of our time. The legislature of the EU has, however, primarily limited itself to short-term considerations driven by the politics of the day. The framework of regulations that has been promulgated in the past two decades is, as a result, fragmentary and has failed to follow an over-arching systematic approach. Responding to this development, the Max Planck Institute for Comparative and International Private Law published in 2009 the Handwörterbuch des Europäischen Privatrechts. Now, the Oxford University Press has released the Max Planck Encyclopedia of European Private Law. More than merely a translation, it*

stands as an independent work tailored to the varying legal backgrounds of international readers. Consistent with the format of an encyclopedia, the core of the work is comprised by the approximately 500 keyword entries which are presented alphabetically. Yet on account of the complexity of the material, the Encyclopedia offers far more information than a simple dictionary. With an editorial focus on the foundational content and principles of European private law, the work may serve to orient scholarship and legal practice within the context of the legal unification increasingly pursued by the European legislator. The work has been edited by Institute Director Jürgen Basedow, Institute Director Reinhard Zimmermann and former Institute Director Klaus J. Hopt, with Andreas. The authors of the keyword entries are primarily current or former fellows of the Institute but include also a number of external scholars having a close and special affinity to the Institute.

More information is available on the publisher's website.

Spanish Forum on Private International Law

Leading Spanish private international law scholars have recently founded the Spanish Forum on Private International Law (Foro español de Derecho internacional privado – FEDIP). The Foro is meant to promote the awareness on private international law issues in the Spanish society and to foster discussion on those issues among academics and other specialists in the field. One of the basic goals of the Foro is to enable its members to adopt a common position on current developments in private international law with a view to offer advice on the legislative processes both at national and EU level.

Two main areas have been selected as priority fields for the activities of the Foro in the coming months. First, the long-awaited proposal to adopt a New Spanish Act on International Judicial Cooperation in Civil Matters (covering issues such as cross-border service of judicial and extrajudicial documents, cooperation in the

taking of evidence and recognition and enforcement of judgments). The need for legislative reform at national level in this area remains high in Spain given the inadequacy of its current legislation and the lack of progress within the EU as far as relations with non EU Member States are concerned. Secondly, attention will be devoted to the follow-up of current developments in EU Private International Law with a special focus on the implications of the envisaged EU regulation on succession and the evolution in the field of contract law.

Also in the first general assembly meeting the members of the executive committee of the Foro were elected: Juan José Álvarez Rubio, (Univ. País Vasco), Rafael Arenas García (Univ. Autónoma de Barcelona), Pedro De Miguel Asensio (Univ. Complutense de Madrid), Cristina González Beilfuss (Univ. Barcelona), Andrés Rodríguez Benot (Univ. Pablo de Olavide, Sevilla), M. del Pilar Diago Diago (Univ. Zaragoza) and Aurelio López-Tarruella Martínez (Univ. Alicante).

Muir Watt on PIL as Global Governance

Horatia Muir Watt (Sciences Po Law School) has posted a new version of her paper on Private International Law as Global Governance: Beyond the Schism, from Closet to Planet on the PILAGG website. The abstract reads:

> *Despite the contemporary turn to law within the global governance debate, private international law remains remarkably silent before the increasingly unequal distrib tion of wealth and power in the world. By leaving such matters to its public international counterpart, it leaves largely untended the private causes of crisis and injustice affecting such areas as financial markets, levels of environmental pollution, the status of sovereign debt, the confiscation of natural resources, the use and misuse of development aid, the plight of migrating populations, and many more. This incapacity to rise to the private challenges of economic globalisation is all the more curious that public international law itself, on the tide of managerialism and fragmentation, is now*

increasingly confronted with conflicts articulated as collisions of jurisdiction and applicable law, among which private or hybrid authorities and regimes now occupy a significant place. The explanation seems to lie in the development, under the aegis of the liberal separation of law and politics and of the public and the private spheres, of an « epistemology of the closet », a refusal to see that to unleash powerful private interests in the name of individual autonomy and to allow them to accede to market authority was to construct the legal foundations of informal empire and establish gaping holes in global governance. It is now more than time to de-closet private international law and excavate the means with which, in its own right, it may impact on the balance of informal power in the global economy. Adopting a planetary perspective means reaching beyond the schism and connecting up with the politics of public international law, while contributing a specific savoir-faire acquired over many centuries in the recognition of alterity and the responsible management of pluralism.

Time-sharing in Spain

One year after the expiry of the deadline set by the Directive 2008/122/EC of the European Parliament and the Council of 14 January 2009, on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange contracts, the Spanish legislator has transposed it through the Royal Decree-Law 8/2012 of 16 March (BOE of March, 17), already in force. The Time-sharing Act (Act 42/1998 of 15 December) is repealed.

In addition to some rules on the language of pre-contractual information and the contract itself, Art. 17, entitled “Rules of private international law”, states that when according with the Rome I Regulation the applicable law is the of a non-member State of the EEA, the consumer may invoke the legal protection granted by the Royal Decree-Law in the following cases:

a) When the any of the inmovable properties concerned is located whithin the territory of a Member State of the European Economic Area.

b) In the case of a contract not directly related to immovable property, if the trader pursues commercial or professional activities in a Member State or by any means directs such activities to a Member State and the contract falls within the scope of such activities

Also on the applicable law, Annexes I to IV provide for standard forms for different types of contracts which include the following standard term: "In accordance with private international law, the contract may be governed by a law other than the law of the Member State in which the consumer is resident or is habitually domiciled, and disputes may be referred to courts other than those of the Member State in which the consumer has his habitual residence or domicile "

Art. 20 provides for the submission to arbitration and other ADR methods included in the list published by the European Commission on ADR for consumers contracts.

On Business and Human Rights (Article)

Prof. Zamora Cabot's course on Human Rights (Donostia-San Sebastian, May 2011), entitled **"La responsabilidad de las empresas multinacionales por violaciones de los derechos humanos: práctica reciente"** has just been published in *Papeles "El tiempo de los derechos"* (ISSN: 1989-8797), and can be downloaded here. In due course it will also appear in the standard form in which these courses are usually published.

The author addresses the most relevant and contemporary items on the topic of human rights, multinational corporations and responsibility: the Protect Respect and Remedy framework of the UN, the Dahl Model Law, the Kiobel case under revision by the USSC… He also analyses five cases concerning the mineral extraction sector and Canadian companies, and another five of other business areas, among which the case of illness inoculations in Guatemala, involving the U.S. Government.

Worth remarking are the very extensive documentation that supports the study and the selection of cases, from which a panorama of the most interesting data about the current situation of litigation against multinational corporations for human rights violations may be inferred. As means of conclusion, the author speaks in favor of private litigation as necessary in order to compensate -even if only in part -the victims of the atrocities, and also as and effective tool for deterrence.

With this publication Professor Zamora Cabot goes one step further in his already rich literary production (so far probably the richest in Spanish) centered on disputes under the ATS in the business-human rights realm.

Swiss Court Rules on Enforcement of English Freezing Orders

On October 31st, 2011, the Swiss Federal Tribunal ruled again that English freezing (formerly *Mareva*) orders may be declared enforceable in Switzerland.

The judgment was delivered in German, but it is usefully presented in English by Matthias Scherer and Simone Nadelhofer (Lalive) at the *Kluwer Arbitration Blog*.

The most interesting contribution of the case is to address the issue of whether obtaining a declaration of enforceability is conditional upon the plaintiff showing that he has a legitimate interest in seeking such declaration. The argument against the existence of such interest was that Swiss banks typically comply with English world wide freezing orders voluntarily. The Federal Court held that this did not prevent plaintiffs from seeking a declaration. According to Scherer and Nadelhofer:

> *According to the Supreme Court, the Lugano Convention 1988 does not require that a party shows a legitimate interest in obtaining a declaration of enforceability of a freezing order. Furthermore, the (Swiss) bank's voluntary compliance with a foreign freezing order is no obstacle to the claimant's right*

to have the order declared enforceable. Indeed, once the claimant obtains such a declaration, the foreign freezing order is treated as if it were a Swiss decision. The recognition of a foreign judgment thus results in its equal treatment with domestic judgments. The declaration of enforceability by domestic courts further allows for a facilitated enforcement procedure.

Rühl on European Sales Law and PIL

Giesela Rühl (Jena University) has posted The Common European Sales Law: 28th Regime, 2nd Regime or 1st Regime? on SSRN. The abstract reads:

The article analyses three basic models that can be applied to determine the relationship between the proposed Common European Sales Law (CESL) and the rules of private international law: the '28th regime-model', the '2nd regimemodel', and the '1st regime-model'. It argues that both the '28th regime-model' and the model favoured by the European Commission, the '2nd regime-model', endanger the overall objective of the CESL because Article 6 Rome IRegulation will continue to apply. The '1st regime-model', in contrast, avoids application of Article 6 Rome I-Regulation because it classifies the CESL as a uniform law that takes precedence over the rules of private international law. The article, therefore, concludes that the European Commission should rethink its position and apply the '1st regime-model' instead of the '2nd regime-model'.