



Volume 1 • June 2009

# **CiCLOPs**

Center for International & Comparative Law  
**OCCASIONAL PAPERS**

[www.law.duke.edu/cicl/ciclops](http://www.law.duke.edu/cicl/ciclops)

## **CENTER FOR INTERNATIONAL & COMPARATIVE LAW OCCASIONAL PAPERS**

Published by the Center for International & Comparative Law, Duke University School of Law, Science Drive and Towerview Road, Durham, NC 27708.

Edited by Ralf Michaels, Duke University Professor of Law and Director of the Duke Law Center for International & Comparative Law; Stephen Bornick, Associate Director of the Duke Law Center for International and Comparative Law; and Jonathan Dalton White, Research Assistant.

© 2009 by Duke University School of Law, Center for International & Comparative Law.

For individual back issues please contact Center for International & Comparative Law, Duke University School of Law, Box 90360, Durham, NC 27708-0360, USA. All issues are also available online at our website (<http://www.law.duke.edu/cicl/ciclops>).

If you would like to be added to a mailing list to receive information about the Center's activities, please send an email to [CICL@law.duke.edu](mailto:CICL@law.duke.edu).

## FOREWORD

### CICLOPs Volume 1 The Bernstein Memorial Lecture The First Six Years

CICLOPs, the Center for International & Comparative Law Occasional Papers, could not be launched with a better issue than one dedicated to Duke Law's named lecture series in the field, the Annual Herbert L. Bernstein Memorial Lecture in Comparative Law.

Herbert Bernstein was Duke's much-beloved professor of comparative law. His early life is warmly described in a meticulously researched article by my colleague and friend Paul Haagen, published in a special issue of the *Duke Journal of Comparative & International Law* (2003) that was dedicated to Prof. Bernstein's memory and is available at [www.law.duke.edu/bernsteinlecture/](http://www.law.duke.edu/bernsteinlecture/). The lecture series, established in Prof. Bernstein's honor after his sudden death in 2001, has drawn leading scholars from all around the world to speak at Duke Law School on comparative law. This first issue of CICLOPs contains the text of the first six lectures, some of them previously published in hard-to-access venues and some not at all. As such, it serves as a tribute not only to Herbert Bernstein, but also to Duke Law's vibrant and active comparative law community, which encompasses both numerous faculty members and also students pursuing Duke's JD/LLM degree in international and comparative law as well as other student groups.

The issue contains all lectures in the order in which they were delivered. The inaugural Bernstein lecture was given in 2002 by Hein Kötz, former director of the Max Planck Institute for Comparative and International Private Law in Hamburg, perhaps the leading institution worldwide in its field [*Civil Justice Systems in Europe and the United States*, pp. 1–16]. Hein Kötz takes on a pet theme of comparative law—the comparison of German and U.S. principles of civil procedure—and brings, in his hallmark elegant style not just a lucid assessment of the debate but also a number of useful insights. Perhaps the most important among these is one based in Kötz's long-standing emphasis on functional equivalence: Comparatists, in comparing German and U.S. court rules, are dealing with nonequivalent things: U.S. rules are made with big cases in mind, for which German civil procedure may

be inadequate. German rules by contrast are made for small cases, which in the U.S. would be dealt with not in ordinary courts but in small claims courts, with rules not so dissimilar to those in German civil procedure.

Christian Joerges, then of the European University Institute in Florence and now again a professor at Bremen University, gave the next lecture in 2003 [*Europeanization as Process: Thoughts on the Europeanization of Private Law*, pp. 17–40]. Prof. Joerges suggests an ambitious reconceptualization for private law in Europe, combining insights from European law, comparative law, and private international law or conflict of laws, in the tradition of Brainerd Currie, a leading figure of U.S. conflict of laws and a former Duke Law professor. A much-extended version of this lecture has been published by the Duke Journal of Comparative & International Law and is widely cited. In this issue, we republish a text that resembles more closely the original lecture as it was presented.

For the third Bernstein Lecture in 2004, we took our focus away from European law schools but not necessarily from Europe itself. The speaker was Chibli Mallat, a Jean Monnet Professor of Law at the University of St Joseph in Beirut, former candidate for the Lebanese presidency, now a professor at Utah Law School, and perhaps the world's leading expert on what he calls Middle Eastern Law [*Constitutions for the Twenty-First Century, Emerging Patterns: The EU, Iraq, Afghanistan...*, pp. 41–62]. Prof. Mallat provides a fascinating comparison of new constitutions in the 21st century that may at first sight look incomparable, namely those of Iraq, Afghanistan, and the European Union. He not only shows how comparison between them can provide exciting insights but also provides comparative constitutional law with mileposts, simplifiers, acid tests as tools, and with an outlook on emerging patterns that are valuable beyond just his own analysis.

The fourth Bernstein Lecture, in 2005, was given, perhaps untypically, by a U.S. scholar, but one of unusually broad and cosmopolitan erudition—Richard Buxbaum from Berkeley [*Comparative Law as a Bridge Between the Nation-State and the Global Economy: an Essay for Herbert Bernstein*, pp. 63–78]. Prof. Buxbaum offers nothing less than a reconceptualization of the field of comparative law itself, away from its focus on disinterested comparison between national legal systems, and towards acknowledgement of both the supranational nature of much contemporary law and a new emphasis on economic, as opposed to private or public, law. The lecture has not previously been published, so we are especially grateful to Prof. Buxbaum for updating it for publication in this issue and are sure that the comparative law community will join in these thanks.

In 2006, Duke Law was fortunate that Zhu Suli accepted the Dean's invitation to speak [*Political Parties in China's Judiciary*, pp. 79–110]. Prof. Zhu is Dean of Peking University Law School, China's most highly regarded law school, and a scholar of unusually extensive interest and expertise not only in Chinese but also in U.S. law and legal philosophy. His lecture begins as a response to a review of one of his books but soon turns into a fascinating suggestion that Western notions of judicial independence are inadequate for an analysis or even critique of Chinese law. Provocative for a Western audience, the lecture highlights a core theme in modern comparative law: the contingency and frequent Western bias of many of our frames of reference, and the difficulty (and promises) of intercultural comparison and critique. Jonathan Ocko, a professor of history at North Carolina State University and an adjunct professor at Duke Law School, adds an immensely helpful introduction.

Finally, 2007 saw a lecture by a close friend and collaborator of the late Prof. Bernstein: Joseph Lookofsky, an American graduate from New York University Law School who is now a professor at the University of Copenhagen [*Desperately Seeking Subsidiarity: Danish Private Law in the Scandinavian, European, and Global Context*, pp. 111–130]. Prof. Lookofsky provides an insight into Danish legal culture, but not as mere illustration. Rather, he views that culture as endangered by the Europeanization of law, and his view on that Europeanization from the perspective of a small country with a very peculiar identity, both national and Scandinavian, greatly enriches our standard pictures of Europe.

Viewed together, these lectures provide a glimpse of the richness of comparative law today and prove the high value that the field has at Duke. The six authors came from universities in six different countries, and where a topic occurs in more than one lecture—the constitutionalization of European law for example, or the direction of comparative law as a field—their views often differ. The variety of perspectives and viewpoints among these articles reflects quite effectively what may be the best of comparative law today. As compared to the lone perspective available to the mythological Cyclops, this variety bodes well for the future of CICLOPs.

In finishing, I thank Stephen Bornick, Associate Director of the Center for International & Comparative Law, and Jonathan White, a first-year student in Duke's JD/LLM program, for their editorial work on the individual papers. Susan Manning and Melinda Vaughn from Duke Law's communication department formatted the papers; I am grateful to them as well. I thank Neylân Gürel, program coordinator at the Center, for her work and her contributions, including especially the design of the CICLOPs cover.

I would also like to thank each of the copyright holders: Kluwer Law International, *Duke Journal of Comparative & International Law* and Peri Bearman, Wolhart Heinrichs, and Bernard G. Weiss for their consent to allow republication of these articles in CICLOPs. The articles and citations contained herein are unchanged from their respective original or published versions, with the exception of minor editing and formatting.

Each of the lectures can be viewed in its entirety at: <http://www.law.duke.edu/bernsteinlecture/archive/>.

—*Ralf Michaels*  
*Professor of Law and Director,*  
*Center for International & Comparative Law 2007-2009*  
*Duke University*  
*May 2009*