THE RECEPTION OF AMERICAN LAW IN EUROPE

WOLFGANG WIEGAND

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The internationalization of law has become a matter of great significance due to the increasing population mobility and to the growth rate of the world economy. A series of recent events evidence a new dimension of internationalization, both in their form and in their effect. One example is the standardization of law within the European Community. Whereas to a certain extent this arises automatically, owing to the close economic and political relationships between member countries of the EC, it also results from the internationalization and globalization of financial markets. A second development, less spectacular but of more far-reaching consequence, is the subject of this paper: The Reception of American Law in Europe.

At the outset, some preliminary matters of terminology need clarification. This concept of reception is not a new approach to the comparison of continental European and Anglo-American law. Rather, it focuses on the specific role played in Europe by the law of the United States of America since World War II. A number of observations contained herein relate to the European Continent as a whole, including Great Britain. The following discussion, though restricted primarily to developments in Switzerland, should be of general, conceptual interest given the fact that the Swiss legal system has always been especially open to foreign law. The term "reception" is intended to denote the integration of foreign ideas and ways of thinking. There exists a certain degree of consensus in favor of the conviction that all reception procedures should be seen as cultural and social procedures. This is particularly relevant to the ter-

WOLFGANG WIEGAND is Professor of Law, University of Bern, Switzerland. This article is based on an article that appeared in Die schweizerische Rechtsordnung in ihren internationalen Bezügen (1988).

The central thesis was formulated during my course on the "History of private law in Europe." In Spring 1987 I had the opportunity to discuss the central points with members of the School of Law at the University of Miami. I am especially grateful to Richard Hyland (University of Miami) and Pinnin Bischof (LL.M., Harvard) for his help with the translation.


2. For Germany, see now Rolf Stürner, Die Rezeption U.S.-amerikanischen Rechts in der Bundesrepublik Deutschland, Festschrift Rebmann (1989).
minology of "reception" traditionally used in the literature.\(^3\)

In this sense, receptions of foreign law have been frequent. However, when European lawyers use the term "reception,"\(^4\) they tend to think in terms of what in European legal history is considered as "the reception," namely the dissemination of Roman law as ius commune throughout Europe in the 12th to 16th century. By using the terminology "reception of American law" I wish to evoke exactly this analogy. This investigation is devoted to demonstrating that remarkable parallels exist between the process by which Roman law took root at the Italian universities in the Middle Ages and developed into the European ius commune on the one hand, and the dissemination of American law, on the other.

I. SYMPTOMS OF A NEW RECEPTION

Dissemination of the ius commune within Europe

To establish the parallel between the two processes at issue here, it is necessary first to describe briefly the reception of Roman law in Europe in the Middle Ages. The predominant view today endeavors to define and to describe the occurrence in its entirety. Hans Schlosser\(^5\) speaks of a phenomenon of legal and cultural history (rechtskulturgeschichtliches Phänomen), characterized by a multiplicity of overlapping factors. This occurrence, which fundamentally changed the understanding of law, displayed similar characteristics in most parts of Europe. Thus, despite differences in intensity and maturity, Coing\(^6\) concludes correctly that the dissemination of ius commune must be regarded as a European-wide development.

The conversion of law into an object of science, and the resultant development of a scientific approach to the study of law at Italian and French law schools, formed the starting point of the Reception.

These new centers of legal science attracted students from the whole of Europe, who returned to their own countries as learned lawyers and gradually began to occupy the key positions in the judicial and administrative system. From these positions, they were able to encourage a breakthrough of the new system of law. A number of factors in addition to the prevailing commercial and political cir-

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4. For example the adaptation of Swiss law in Turkey, see Hirsch, supra n. 3.
cumstances contributed thereto. The educated lawyers were convinced of the merits of the ius commune; at the same time, the rationalism and efficiency of such a system of law acted persuasively. Of course, there were also personal interests of the educated lawyers: A dissemination of the ius commune would recompense their investments in an expensive course of study, and, having a monopoly of the new methods, they would be able to strengthen their own position and gain power. This latter point is of particular significance. More important than the dissemination of particular institutions of law and the teachings of ius commune are its methods and approach; in other words, the rigorous rationalization of the law and the scientific approach thereto. Thus, when drawing comparisons with modern developments, it should be emphasized that an essential effect of the dissemination of the ius commune entailed the imposition of a scientific approach on the local legal system. This also emphasizes the necessity to see the reception of Roman Law in its entirety.\footnote{Schlosser formulated this point as follows: "Current research approaches reception on a European level and understands it as being the conversion of law into a science, accompanied by a basic change in the understanding of law, which is achieved through the transition of jurisprudence and legislation to academic disciplines." (Translation from the German original, supra n. 5 at 42).}

It is of fundamental importance to understand this occurrence as part of a universal transition of the educational and social systems. Coing thus suggests that one can best explain these cultural aspects by reference to the term “Latin Middle Ages” as developed by E.R. Curtius for the history of literature.\footnote{Coing, supra n. 6 at 2.}

This leads to a final comment in this respect, which is of elementary importance: The Latin language was the vehicle which carried ius commune over the Alps. It was the impregnation of German-language documents by Latin expressions and the adoption of Latin as the language of science and culture that permitted the conversion of the law into a science on a European basis.

The American Era

A comparison with the “Latin Middle Ages” renders the concept of an “American Era”\footnote{See the remarks in infra n. 54.} more easily imaginable. I am concerned with the process of Americanization that has constantly accelerated since World War II, initially in Western Europe, but also to an increasing extent in all regions of the world and ultimately even in the communist countries. This is an acknowledged fact and requires no further explanation. The dominance of the American language, which has taken hold in all aspects of life, can be quoted as evidence...
of this development. This is not only to be seen in the penetration of Americanisms into everyday German or French, or in the fact that in many parts of the world, American English has virtually acquired the function of a second language. In scientific areas, the English language has developed into one of the few acceptable means of communication. In this respect, what is relevant without limitations to the natural sciences can also be observed to a large extent and increasingly in many other fields. This special role of the English language in international scientific communications is not a matter of coincidence: it is an expression of the gradual concentration of scientific centers at leading American universities, a development which was already apparent between the two World Wars and which has, since World War II, continued in a clear and dominant manner. In areas beyond the natural sciences the internationalization of knowledge has advanced more slowly and encounters greater obstacles; there such transferrals are more difficult to identify or to prove, in particular because the effects are less measurable or definable. In respect of jurisprudence, however, there are clear indications: almost all fundamental and far-reaching changes in European law and understanding of law during the post-war period have started from America (see III below).

Symptoms and Observations

Studies at an American university today are of comparable value and prestige to studies of the ius commune in Italy during the Middle Ages. There is impressive evidence of this fact.

The Situation at the Universities

The (official) Swiss National Fund\(^\text{10}\) annually provides so-called Nachwuchs stipendien (training funds). Their purpose is to "provide research students, whose ultimate aim is to acquire a teaching or research position, with the possibility of completing their studies, especially overseas." Statistics for law candidates in respect of the countries which they chose for their postgraduate studies during the years 1971-1986 show the following:

Of a total of 171 subsidized students, 88 (51.5\%) studied in the U.S. The trend is even clearer when considered for the eighties alone: of 103 stipendiaries, 64 (62.1\%) attended an American university for postgraduate studies. Because the selection criteria for the

10. I thank the Swiss National Fund ("Schweizerischer Nationalfonds") for the materials; the following observations have been confirmed by my own experience as member of the research commission of the University of Bern, which is responsible for fellowships.
award are purposely elitist, the principal conclusions to be drawn from the statistics are as follows:

Almost two-thirds of the state-subsidized elite students in the field of jurisprudence completed their academic studies by way of a postgraduate course in America. Since the primary purpose of these subsidies is to attract the next generation to teaching and research positions, an aim that is to a large extent achieved, then it also can be concluded that 50% or more of the future Swiss law professors will have an American degree.

This will strengthen a development which already is easy to detect. In particular branches (commercial and constitutional law), studies and postgraduate studies in the U.S. will be considered a requirement for a university professor. The transferral in favor of the U.S. can also be proved in a quantitative form: for example, of the 16 members of the faculty at the University of Bern Law School, six have absolved a part of their studies at United States universities, some even having taught there. Most of them also travel regularly to the U.S. for further education.

The Situation in Industry and Law Firms

After passing the examinations, many students, mostly those of above-average ability, come to their professors to request letters of reference. Very often, these are required for an application for postgraduate studies at an American university, which they intend to finance privately. Their answers to the question as to their motives provides a surprisingly illuminating picture. Two points are frequently mentioned in addition to a rather general interest in postgraduate studies:

— that American law is extremely important for a position in private industry or in a bank;
— an American education is imperative for a position in a law firm (some even talk in terms of a precondition to employment).

Without undertaking a much broader investigation of the labor market it is not possible to determine how relevant these assessments are. There are, however, certain indications, such as that which can be derived from the following advertisement: "On behalf of a well-established Notary, we seek a lawyer, available beginning 1st of April 1988, or thereafter by agreement, who possesses a Bernese Notary License and who would assist the Notary in general duties and in preparation of highly interesting mandates. Initially the assistant will undertake, during one-third of his/her working hours, further studies of American legal language and legislation. Costs
thereof will be fully reimbursed . . . ”

Even though this may be an isolated case, I have been able to determine, during many discussions with ex-students, that those who are engaged in positions in private industry and the major banks could not cope with the demands of their work without a knowledge of American law.

Although these are only personal impressions, the situation in law firms is more easily definable. In order to gain definite indications in this respect, I have researched the situation at the larger law firms in Zurich. Almost all of the firms approached submitted answers. An evaluation of the questionnaires produces the following results:

Total active lawyers: 261
- 129 (49%) have absolved an American postgraduate study, of which
  - LL.M.: 52 = 19.9%
  - MCL/J: 35 = 13.4%
  - other American law studies: 41 = 15.7%

This conclusion requires further amplification on various points. As in other academic fields, the trend is stronger with respect to young lawyers. Whereas an American degree is rather the exception in the case of older interviewed partners, it is almost the rule with respect to the younger ones. In addition, various offices pointed out that they expect an American degree from those of their younger employees who ultimately wish to be integrated into the partnership. Given this fact, an average of 60% of highly qualified younger lawyers have an American degree today, and the tendency is increasing. On the other hand, the result should be qualified to the extent that Zurich is not representative of Switzerland in general. This is not, however, a critical factor; it is, after all, in these densely populated areas where by far the most and the largest legal disputes are processed.

In this respect, the results from Zurich and, to the extent available, from Geneva, Bern, and Basel, are extremely informative; they reveal that, in the large law firms, those with a predominant influence on the development of the law of the country, the trend is similar to the trend at the universities: A substantial number of the legal practitioners have completed an American education, and amongst the younger generation, the trend is increasing.

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12. An inquiry in Geneva resulted in a figure of 30.2% of the active lawyers having an American degree.
II. A FIRST CONCLUSION

The parallels with the process of the dissemination of the *ius commune* are as follows:

The aspect of basic and further education at American universities is by now well-established; this is considered an aid or even a precondition to access to leading positions in the practice of law in Switzerland, at least in the areas referred to. As a direct consequence thereof, a continuously increasing number of young lawyers seek such education. As was also the case with the talented youth of the Middle Ages, they receive support from governmental institutions; they are, however — in this respect also a parallel — often prepared to carry the high costs of the education themselves. The journey across the Atlantic ultimately will prove to be a good investment, as was the case in the Middle Ages with the journey over the Alps: It prepares the way to the key positions in legal practice, positions through which the invested costs are quickly recovered (both for the State and for the individual). As a consequence, one may estimate that, by the end of this century, the elite within Swiss legal profession will, to a large extent, possess an American education or further education. It goes without saying that already for this reason alone an influence upon Swiss law is inevitable. Whether the consequences will be similar to the penetration achieved by the *ius commune* in the Middle Ages, however, requires an examination of a series of other parallel developments.

One of the significant parallels to the medieval reception is the degree to which the developments described herein are embedded in the global process of Americanization. The attraction of American law stems not least from its universalism, which is comparable to that of the medieval "*ius commune*." Just as in the case of conflict between regional laws the parties preferred the "*ius commune,*" today in international contract and arbitration practices American law clearly dominates as the law with the widest degree of acceptability. At the same time, the American way of drafting contracts is dominant nowadays: Not just the general contractual rules, but details and alterative possibilities are regulated as well. The universalism of the English language is hereby having the same effect as did that of Latin during the Middle Ages. The political and economic dominance of the U.S. is naturally also a contributory factor.

III. PARTICULAR INTEGRATION PROCEDURES\textsuperscript{14}

\textit{New Business Concepts}

A series of business relations, practically unknown in Europe prior to World War II, are now extremely widespread. A publication of the University of St. Gallen titled \textit{Neue Vertragsformen der Wirtschaft} [New Contractual Concepts in the Economy] \textit{Leasing, Factoring, Franchising}\textsuperscript{15} is symptomatic. The English-language business practices listed in the title are self-explanatory to a continental audience. Each such contractual practice represents a form of doing business which largely was developed under the system of American law between the two World Wars. Step by step, after World War II, these procedures have established themselves outside the U.S. as an integral part of the process of Americanization and, today, are in use virtually worldwide.

One can initially conclude that the integration of American business procedures has played a greater role in the reception than has the taking over of American legal practices. It was primarily these forms of doing business — leasing, factoring and franchising — which initially led to this integration. The position of power of the American economy after World War II, and particularly the activities of the multinational American firms, was of great significance for the reception.\textsuperscript{16}

\textit{New Legal Concepts}

The example of leasing in particular demonstrates that the integration of new forms of business, due to their commercial advantages, was the driving force behind the integration of formal legal concepts. While the concepts of factoring and franchising could be accommodated in the European legal systems, integration of the concept of leasing met with considerable difficulties.\textsuperscript{17}

\textsuperscript{14} It is possible to differentiate between transfer, transplantation, importation and reception. A closer observation, however, reveals that such terminology does not adequately describe or explain the effective procedure of reception. For this reason, such classification has not been adopted here. I declare rather the particular structures, the intensity and the way of development of the, partially very diffusive, procedures.

See e.g. Rheinstein, "Types of Reception," \textit{Annales de la Faculté de droit d'Istanbul} 31 ff. (1956); Alan Watson, \textit{Legal Transplants} (1974), and on broader basis with numerous references: Alliot, "Über die Arten des 'Rechts-Transfers,'" in \textit{Entstehung und Wandel rechtlicher Traditionen, Historische Anthropologie} 221 ff., Vol. 2 (Wolfgang Fikentscher ed. 1980).

\textsuperscript{15} Ed. by Ernst Kramer, 1985 (insert added).


\textsuperscript{17} See (also for the following) the broad survey by Mario Giovanoli, \textit{Le crédit-bail (leasing) en Europe} (1980).
Belgium and France endeavored to do so by way of special legal provisions, whereas the jurisprudence in Switzerland and Germany attempted to accommodate the new business concept of leasing in a traditional manner on the basis of available contractual forms. This approach, however, of necessity leads to inadequate solutions.

The situation of the trustee offers similar problems. During the course of the 19th century, under the influence of pandectistic legal thinking, Roman legal principles of ownership predominated over the trusteeship concepts then known to Germanic law. Since that time, Swiss law has adhered rigidly to the Roman principles of ownership, and all steps towards a functional division of ownership have been rejected. Proposals from the Swiss Lawyers' Convention, as well as from various authors in the German-speaking region directed towards a reception of the legal concept of trusteeship have remained unsuccessful. With trusteeship, as with leasing, continental law looks to alternative constructions to accommodate an established commercial situation.

The observations in respect of leasing and trusteeship may be summarized as follows: Whereas the concept of leasing has been able to assert itself on the basis of the commercial advantages derivable therefrom in spite of the continuing prevalence of dogmatic legal difficulties, the same development was not possible in respect of trusteeship. This must be related to the fact that, although an economic interest existed on behalf of the introduction of the concept of trusteeship, it did not possess the same weight as that of leasing. The differing outcome in the two cases shows clearly that, in the area of substantive law, integration can often be achieved by way of alternative constructions when there are unavoidable inherent

18. See Giovanoli, supra n. 17 for the legislation in France (123 ff.) and Belgium (170 ff.). The difficulties are caused by the conception of 'lease' in continental law; it is based on the Roman locatio-conductio ("location"), which is totally different to the American lease. The courts had to try to put 'leasing' into this legal frame step by step.


objections in the prevalent legal structures. On the other hand, in contrast to these easily integratable institutions of factoring and franchising, the case of leasing and trusteeship shows that reception tends to influence the basic structure of our system of law. This reception should be seen from the broader perspective of the integration of American law and American legal thought into continental law. The most apparent changes are therefore to be found both in business and tort law, as well as in the field of constitutional law.

Business Law

It was possible to clearly identify the decisive aspects of the commercial dominance of the U.S. in the matter of the dissemination of the American legal principles in the above-mentioned examples. In addition to new contractual concepts (factoring, franchising, leasing), the personal factor is also important: amongst those lecturers who concern themselves in particular with the laws of the United States, one finds—in addition to those lawyers specializing in constitutional law—professors involved in the law of commerce and trade. In the area of commercial law, the combination of these factors produces a progressive and penetrating procedure for change in European law, exemplified below by the way of various particular references. The additional examples are chosen from the fields of corporate, securities, and banking law.

Corporate Law

The American influence in corporate law can be observed both in the specifics and in a general attitude. Exemplary of the specific influence is the view of German legal scholarship on the duty of loyalty and the corporate opportunity doctrine. German law has in this respect increasingly oriented itself by reference to American law, enabling Kübler to determine that “the point in respect of this process of reception is that under the corporate law of the United States the management of a corporation is prevented from taking advantage of ‘corporate opportunities’ for themselves.” It would appear in this respect that the sympathy shown towards the American position is more important than the actual integration itself. On a substantially wider basis, such considerations have been accepted in

22. One of the most significant examples of American influence is to be found in the U.N. Convention on Contracts for the International Sale of Goods. On this matter, I prepared a special study.

various forms under German corporate law, as well as in projects for the standardization of corporate law in the European Community.\textsuperscript{24}

\textbf{Securities and Banking Law}

On July 1, 1988, Switzerland amended Article 161 of the Swiss Criminal Code to penalize insider trading activities.\textsuperscript{25} This legal regulation is the outcome of a lengthy and complicated legal process that, together with a series of other events occurring within the framework of international legal co-operation, have led to the impression of a dictatorship of American law. Even the expression "imperialistic justice" was mentioned.\textsuperscript{26} Such phrases lead to misconceptions and distortions of the actual situation.

It is certainly the case that pending problems have accelerated the process leading to Convention XVI of the Swiss Bankers Association which, from a legal standpoint, represents an unsatisfactory interim solution.\textsuperscript{27} This should not, however, detract from the fact that, irrespective of the particular need therefore, the prohibition of insider trading would in any case depend upon a reception of the American legal thinking. The belief in the danger of insider trading, as it is viewed in American securities law, today prevails worldwide. This is less a consequence of the power of the United States than of the American recognition of the importance and functions of capital markets and their regulation, a view which is increasingly accepted in other countries as well. Insider trading is typical of similar reception procedures which are of a less spectacular nature and therefore do not penetrate to public knowledge. As a generalization, one can say that, with the globalization of the financial markets, the American system of securities regulation\textsuperscript{28} and related legal regulations of

\begin{enumerate}
  \item See for all these developments the documentation by Marcus Lutter, \textit{Europäisches Gesellschaftsrecht} (2nd ed. 1985).
  \item The influence of American law is particularly evident in respect of antitrust law. See the remarks in: Sturrer, supra n. 16 at 39; Bernhard Grossfeld, \textit{Macht und Ohnmacht der Rechtsvergleichung} 41 (1984). I decline in this respect to elucidate further on these tendencies because this is a particular area where the development of law in Switzerland, is behind those of neighboring countries. The situation is different in legal fields relating to Switzerland \& a top financial center.
  \item For the following "Colloque international, l'avant-projet de loi fédérale sur les operations d'initie" (1984) with broad documentation and articles from the viewpoint of comparative law.
  \item This impression was caused by announced and partly realized measures of the SEC, so for example SEC v. Banca della Svizzera Italiana, 92, F.R.D. (1981) or the Santa Fe-case; see for further documentation, Peter C. Honegger, \textit{Amerikanische Offenlegungspflichten in Konflikt mit schweizerischen Geheimhaltungspflichten} 61 ff. (1986).
  \item See for the background and the broad influence Kühler, "Verrechtlichung
the financial markets have increasingly gained influence.

This also explains the tendency in Switzerland towards a strengthening of the liability of investment advisors, and goes hand in hand with a general strengthening of liability within the services sector, which once again is connected to American influences.

Summary

The observations made in the area of private law show both particular reception procedures as well as the integration of basic legal concepts. At this stage, it is the close relationships and interactions of rules which relate partially to public and partially to private law that should be emphasized. It is precisely this overlapping or, more exactly, this lack of clear distinction between public and private law that is symbolic of those characteristics of American legal conceptions that in general lean towards a more political view of the law. A second aspect is closely connected thereto; namely, the predominance of protective norms of all types that can be observed in many areas. This is relevant, for example, to the protection of minority shareholders, the regulation of insider trading, and the protection of the individual investor. This idea of protection has a dominant role in those areas to be considered now.

Tort Law

One of the most significant fields of American law, one that has received wide publicity in Europe, is that of substantial damage awards in tort law. Repeated warnings against "American conditions" are often heard from European lawyers in this respect. Such fears are not only ungrounded, but they also prevent proper consideration of an urgently needed realistic assessment of the reasons for the differences between these legal systems. It has been demonstrated, in repeated investigation, for example, that the amount of damages depends on specific characteristics of civil procedure and apportionment of the costs, as well as on the differing role of the legal professions. Of no less importance are the factors to which


Grossfeld\textsuperscript{31} has drawn attention, including the differing social surroundings and the differing functions of the award of damages, which plays a significant role particularly in compensation of loss due to accidents. These factors which need to be repeated here, avoid the taking over of American tort practice, at least insofar as the amount of damages is concerned. But in fact, the political-legal motives and conceptions which form the basis of this system of liability are of much greater importance to the long-term development of the law.

\textit{Products Liability}

Beginning with the \textit{Escola} decision\textsuperscript{32} of 1944, the American legal system has developed a concept of liability for defective products. The cause of action for negligence, which was at that time the prevalent one in the United States, was replaced by a system of strict liability. The main reason for this development was the need to compensate users of mass products for damages caused by defects. This aspect, later formulated as “consumer protection,” found sympathy in all parts of the world. The result was an international discussion concerning the possibility of protecting consumers by means of liability considerations. Under the influence of this comprehensive and politically significant tendency, numerous countries adopted provisions similar to those that had been developed earlier in America. Both the French Cassation Court and the German Federal Supreme Court adopted a strict liability system for defective products.\textsuperscript{33} The Swiss Federal Supreme Court, without expressly so holding, has also made concessions in more recent decisions and has adopted a kind of products liability without proof of negligence.\textsuperscript{34} The provisional conclusion of this reception procedure is consolidated in the Directive of the Commission of the European Community of 1985, which obliges the Member States to introduce a strict liability system in the field of products liability.\textsuperscript{35}

\textsuperscript{31} Grossfeld, supra n. 24 at 110, 120 with references.
\textsuperscript{32} Escola v. Coca Cola Bottling Co. of Fresno, 24 Cal. 2d 453, 150 P.2d 436 (1944).
\textsuperscript{33} For France: Cour de Cassation (Civ. 17.2.1965, Bull. Cass. 1965 III rev. 133) deriving from article 1845 Code Civil; for Germany see the summary in: Staudinger-Schäfer, Kommentar zum BGB (12th ed. 1986) § 831 Rz. 170 ff.
\textsuperscript{34} Decision of the Swiss Supreme Court of Oct. 9, 1984 (BGE 110 II 456) and of May 14, 1985 (not published). See Pierre Widmer, recht 1986 50 ff.
Medical Malpractice Liability

A similar development can be described in the area of medical malpractice law. It is true that it has always been the case that medical doctors have been liable for the consequences of incorrect treatment. However, when one talks today of the liability of the medical profession, one thinks in terms of the movement commenced by American malpractice law. "Medical malpractice" has become a part of everyday language, and the term of "informed consent" has been adopted as a legal term in almost all European legal systems. It is certainly true that this development fits much more easily into traditional doctrinal categories than did products liability. The preconditions of liability, however, have been substantially increased, and the consequences of liability considerably extended. This applies also to Switzerland (although not to the same extent as in neighboring countries), where the Federal Court has increasingly applied clearer and stronger rules of liability.

The Idea of Protection

Consideration of the related basic concept of "protection," and the developments which arose in connection therewith, is of much more importance than describing the integration procedure itself. These have already had a considerable effect on the European system of law and will bring about changes of a fundamental nature. For our purposes it is sufficient to cover these theses with brief commentaries.

Considerations in favor of consumer protection were the driving force behind products liability developments. Enhanced malpractice liability has the same origins; one could substitute the term "consumer" for that of "patient." Both developments emanate from the popular legal concept of protection of the weak. This is in no way a new concept, but rather one which has numerous parallels throughout legal history. What is new, however, is the degree of dominance recently acquired by this concept. Whereas the previous conception of protective legislation was primarily preventive in single cases of injustice, in recent times it has become rather the primary aspect for consideration in the application and regulation of the law. This is a

38. See the decision of the Swiss Supreme Court of November 3, 1987 (BGE 113 II 429).
development which is interwoven with changes in social behaviour. These developments might be summarily captured by the sense that in present day society any mishap or accident is bound to be decreed unlawful. The necessity for locating a responsible party in every case of damage or, legally phrased, the demand for an ever-increasing degree of liability can be attributed to this development in the law, which is to a certain extent a parallel development to that of a changed mentality within the society at large.

This aspect of broader and more extensive liability increasingly affects more and more fields of the law. The law of the services sector is an example worth examining in this respect. The services sector, in contrast to the agricultural and the industrial sectors, comprises a wide spectrum of products, such as packaged legal and tax advisory services or investment and capital management services. Under these circumstances it is not surprising that the scale of liability for service is increasingly the same as for defective products; in other words, that the consequences of human inadequacy are to be negated and every single failing in the provision of services is to be seen as a fault. In this respect, as is the case already to a large extent in the field of medical liability, the tendency is towards a degree of liability irrespective of the degree of negligence.

The effects of the consumer protection perspective are not, however, limited only to the most complicated risks, those which a consumer/patient would be unable to determine alone; they also influence the basic concepts of contract. As in America, consumer protection has in almost all European countries led to the development, first by the courts and subsequently by the legislature, of rules regarding standardized contracts. In the Federal Republic of Germany, for example, the debate preceding the legislation was conducted almost exclusively on the subject of consumer protection. In Switzerland, too, the substantive control of standardized contracts was highly favored by the literature and was also based on the idea of consumer protection, as was the regulation of the closely related fields of consumer credit and door-to-door sales. All such existing or impending rules are intended to protect the weaker party in the business transaction.

Here the question is not of the equity of consumer protection, but rather of its origin and dissemination. The final consequences of this development can not at this stage be predicted. Without ques-

40. See Kötz, in Münchener Kommentar (2nd ed. 1986), Einl. AGBG Rz. 6 ff.
tion the basic concept of private law, that all partners conducting business with one another are from the outset to be considered in all formal respects as equals, has been superseded by considerations that accept and purport to compensate for a degree of inequality between contractual partners. This may reach the point that it requires a reconsideration and a reformulation of the basic concepts of contract law.

A further salient point is closely interconnected with the above described development, one which to a certain extent reflects the other side of consumer protection: The aspect of emphasizing the protection of the individual becomes increasingly apparent, particularly in the areas of the medical malpractice law and the doctrine of "informed consent." This tendency is closely connected to a changed mentality which was to a certain extent initiated by, and to a certain extent required of, the law in both its substantive and doctrinal aspects. Today, this aspect is not only to be observed in the field of law relating to the medical profession but also in many other sectors, such as data protection. This automatically leads us to two final points.

Constitutional Law

The concept of protectionism has found particularly strong support and usage under American constitutional law. Constitutional rights have been developed into a social instrument by which interventionism can be practiced in all walks of life and all fields of law. In Europe, and in particular in the Federal Republic of Germany, the introduction of a Supreme Court for constitutional law is closely related to the conception of the American Supreme Court as the institution by which such development can be carried out. German doctrine has also followed the American model in using constitutional rights as instrumental rules.

In Switzerland, too, the tendency towards a constitutional court is already apparent, Swiss law tends towards treating fundamental rights as guiding legal concepts. This tendency leads to an increasing legal regulation of all aspects of life. The effects of such development have, in America, long been a popular subject for research


45. See e.g. Peter Saladin, Grundrechte im Wandel 294 ff. (3rd ed. 1982), and more frequent Jörg Paul Müller, Elemente einer schweizerischen Grundrechtstheorie (1982).
in the fields of sociology and economics as well as in the area of law. The theoretical concepts which have arisen therefrom are also an aspect of reception.  

**Theoretical and Methodical Reception**

The integration of the American law and legal thought has not been limited to the phenomena described so far. There is an increasing tendency in Europe to adopt American theoretical concepts as well. In one respect this can be seen in the debate concerning legal regulation. This theory, which has primarily been developed along economic lines, has been adopted in Europe by both politicians and lawyers. The aim of this movement, which has also found considerable sympathy in Switzerland, is to check or even to reduce the increasing tendency towards State regulation. It is not difficult to determine that this tendency has developed as a countermovement to that of consumer protection, protection of the individual, and the other similar developments described above that all have a tendency towards more and more legal regulation.

A further concept also stemming from the economic field views legal regulations and decisions from an economic standpoint. This economic analysis of law method has, after the usual timelapse, taken root in Europe as well. It increasingly influences legal theory and methodology discussions.

These theoretical developments support two theses. First, there exists a close relationship between law, politics and economy in the United States — the "interdisciplinarity" inherent in American law. Second, in the field of jurisprudence, as in other scientific sectors, America has assumed a leading international role. In conjunction with the leading position of the U.S. in the field of research and science, this leads increasingly to a situation whereby American legal thought considers itself as the initiator of legal change: Due to this leading position in science and technology, almost all new problem areas are recognized and discussed first in the United States. The

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47. "Deregulation" is a popular topic in England and Germany; for Switzerland see Kohler, in *Verrechtlichung und Verantwortung*, (supra n. 46), 1 ff.


discussion of environmental protection concepts is illustrative. Similarly, the debate concerning the possibilities, limitations, and risks of gene technology was conducted in the U.S. at a time when this terminology was almost unknown in Europe.

IV. ANALYSIS AND PREDICTIONS

The process of reception of American law, as in the case of all other reception procedures, is comprised of a number of interdependent factors. On this regard, the parallel between the reception of American Law and that of *ius commune* in the Middle Ages is significant. This parallel is relevant not only because of the incorporation in culture and society of what is generally described as Americanization, but also in particular in respect of the personal element. The education of lawyers is a key function in the process of reception. This is clear in the way that preference was given to the *ius commune* over local law and in the way that its methods infiltrated the remaining local law.\(^{50}\) If one considers further that the breakthrough of the *ius commune* was achieved because the lawyers educated therein were able to take over the key positions in the fields of justice and administration, then two further conclusions can be drawn. The fact that lawyers occupying leading positions in academic institutions, law firms, major banks, and private industry that all display a strong leaning towards America will have fundamental effects on European law. In Weberian terms, because the leading Swiss lawyers\(^{51}\) are increasingly educated in the United States, the continuing trend towards Americanization of European Law is probable. A further fundamental parallel to the medieval development is the universalism of the reception of American law. Repeating the example of the Middle Ages, not only America's law but also its language holds a leading position and accompanies the leading position of the U.S. in research and science.

As with the medieval reception process, all of these factors lead to the adoption of American law as an integral part of the process of social and cultural reception.\(^{52}\) On the other hand, the parallels to the medieval developments are not complete. For example, a funda-

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mental point which led to the accelerated propagation of the *ius commune* in Europe is lacking under present day developments: American law is not superior to European law in the sense that *ius commune* was to the European law of that time. All European countries have highly differentiated legal systems, possessing long scholarly and judicial traditions. The lack of the degree of superiority possessed by the "*ius commune," however, is compensated for in other areas; in particular by the political and economic dominance of the United States. This dominance was responsible for the dissemination of the new forms of business transactions as well as for the reception of American legal terms and legal thought throughout worldwide financial markets.

Other aspects have favored the rapid reception of ideas from American tort and constitutional law. The conviction that consumers, patients and citizens require an increasing degree of protection was more quickly developed and disseminated in America, partly because of its early transition to a fully industrialized and then to a post-industrialized society. Whereas, at the beginning of this century, American courts considered it unconstitutional to hold employers liable for employees' accidents,\(^53\) the same courts today protect the individual from the dangers emanating from mass-produced products or from invasions of the individual's privacy. Consequently the dissemination is related to the fact that basic ways of thinking changed earlier in America, and were able to prevail in other countries due to the leading position of American science.

When one takes all of the above into consideration, one has to conclude that the reception of American law is an irreversible process. It arises from a series of factors that are interdependent on one another and enforce the momentum of the process. One aspect is of particular importance: namely, the fact that to a large extent American legal developments have followed the requirements of the post-industrial era and of the service-dominated society. Consequently one can also predict that the frequently forecast imminent "end of the American era"\(^54\) will not alter the process that is already underway. For these reasons, the process of Americanization will continue even should the powerbase of the U.S., both economically and politically, have lapsed. The transfer of technological and scientific leadership to the Pacific Rim would change nothing in the foreseeable future. The procedure of Americanization, of which the reception of American law is an integral part, will continue (as did

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Hellenism in ancient times), to influence social and cultural developments regardless of whether the U.S. itself surrenders its hegemonic position.

Consequently it would be unconvincing to describe the reception as a resort of the "judicial hegemony"\textsuperscript{55} of the U.S. Defensive measures against foreign judicial hegemony or judicial imperialism are by no means misplaced, but this reception should not be considered from this rather contorted viewpoint. I prefer the following approach: If one can come to terms with the fact that a large number of the developments described here are commensurate with the current requirements of society but that innumerable basic concepts of our legal principles will thereby become questionable, or at least will be affected to a certain degree, then it is at least initially required that jurisprudence analyse and clarify the fundamental elements of this process. Traditional European viewpoints must then be reappraised against this background, in order to determine which of those elements should not be sacrificed to this process. It is clear from the formulation used that this undertaking is not one which should be considered in Switzerland alone, but rather should be effected in all of the European countries\textsuperscript{56} with comparable legal cultures.

\textsuperscript{55} See Stürner, supra n. 16.
\textsuperscript{56} See Stürner, supra n. 2.