

The **PRIDE** of Transnational Law

Ralf Michaels

Robert Menasse, Capital City (2017)

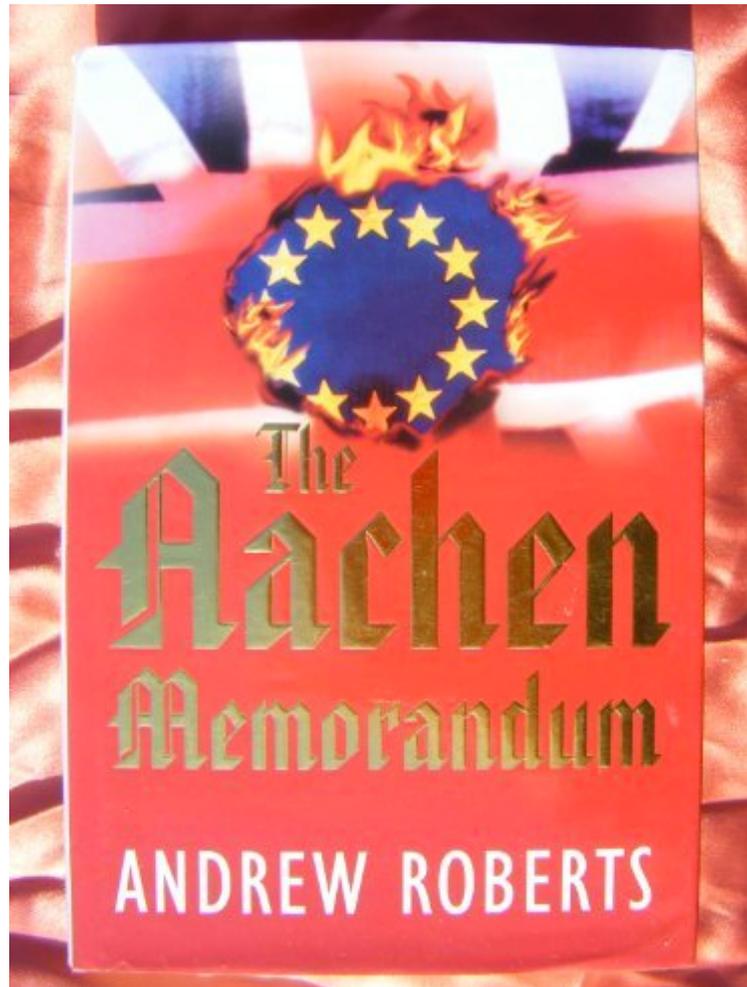


Pride vs Sense?



Robert Andrews,

The Aachen Memorandum (1994)



1. Rejection of Transnational Law



EU Law as Transnational Law

I shall use, instead of "international law," the term "transnational law" to include **all law which regulates actions or events that transcend national frontiers**. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories.

Jessup 1956

The basic treaties are pure international law, as is the rule which makes these treaties binding—*pacta sunt servanda*. But **the jurisprudence of the Court of Justice of the European Communities** shows that to a great extent the law of the Communities **is something different—something which I would call "transnational,"** which may be in part international law in the sense in which that term is used in Article 38 of the Statute of the International Court of Justice, and partly law which has certain other characteristics .

Jessup 1964

The sharing of sovereignty

“If we can remove the snobbery and the selfishness from our international thinking, really admitting that the **principle of sovereignty is not a sacred and unlimited thing**, we shall be well on our way toward true international democracy.”

Jessup 1942a

“in fact the **sovereign’s power is neither exclusive nor absolute within its own territory**, and that this is true whether one is talking in terms of legal or extralegal power.”

Jessup 1956

To escape from the idea that all law must originate in a single power source, like a sovereign, is thus to discover the possibility of taking a broader, more diffuse, view of law. The alternative approach is system-oriented in the sense that it stresses the kind of normative system law is, rather than some particular or exclusive set of power relations as fundamental to the nature of law.¹⁵ It is a view of law that allows of the possibility that different systems can overlap and interact, without necessarily requiring that one be subordinate or hierarchically inferior to the other or to some third system.

MacCormick 1993

The call for sovereignty in Brexit (and Catalunya)

Internal Sovereignty

territory
population
Government

- closed borders
- homogeneous people
- exclusive power to UK government

External Sovereignty

Ability to enter into relations with foreign States

Result: Self-governance in the Westphalian State

2. The Nostalgia of the Nation State



The Overcoming of Stratification



Citizen/
rule of law

The mirage of self-governance

“in fact **the sovereign’s power is neither exclusive nor absolute within its own territory**, and that this is true whether one is talking in terms of legal or extralegal power.”

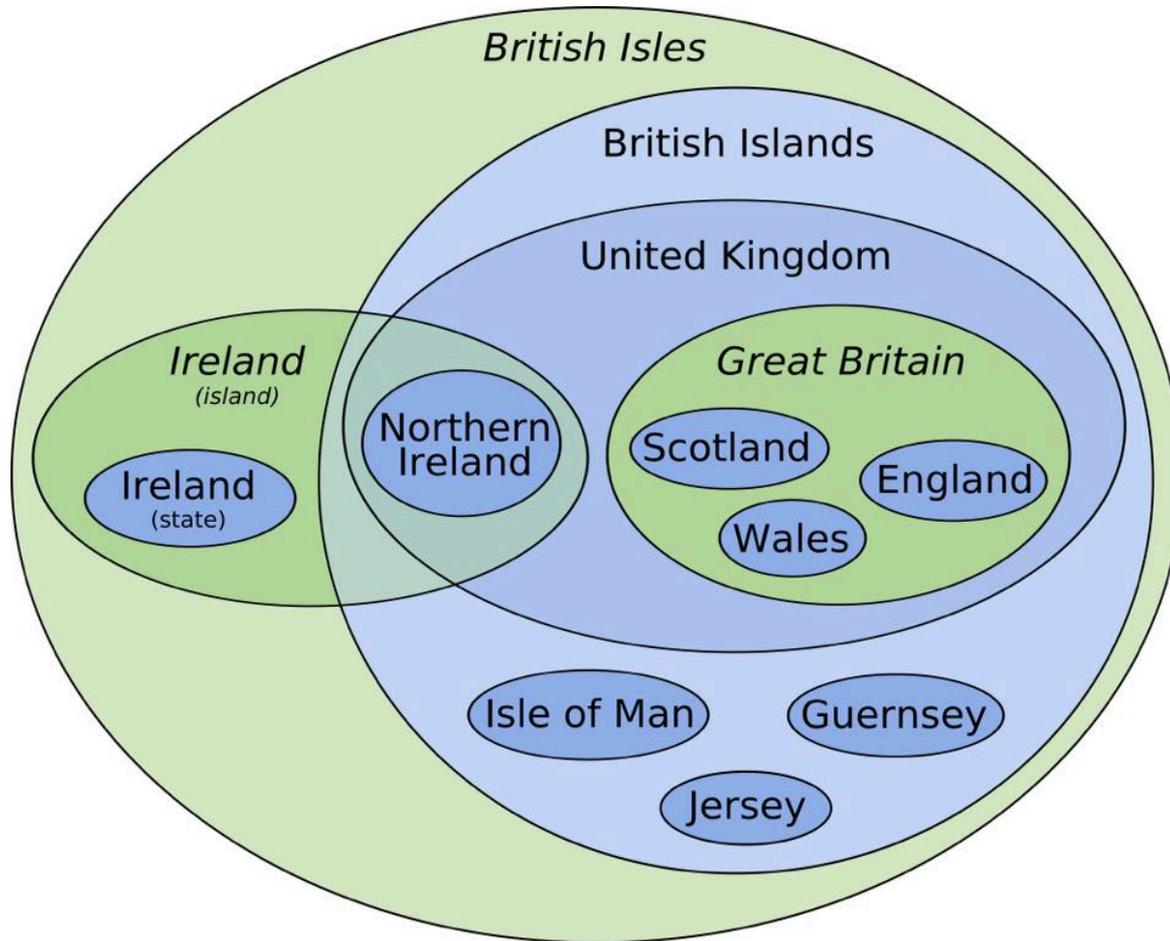
Jessup 1956

The mirage of sovereignty

The very existence of a government of a state is a **fiction**, for a state is an intangible, and our international law picture of a sovereign state never had life. Sovereignty is essentially a concept of completeness. It is also a legal creation, and as such, is a **paradox**, if not an **absolute impossibility**, for if a state is a sovereign in the complete sense, it knows no law and therefore abolishes, at the moment of its creation, the jural creator which gave it being. All juristic persons [...] are fictions created by a superannuated doctrine which should be discarded.

Jessup 1942b

The mirage of the nation state 1

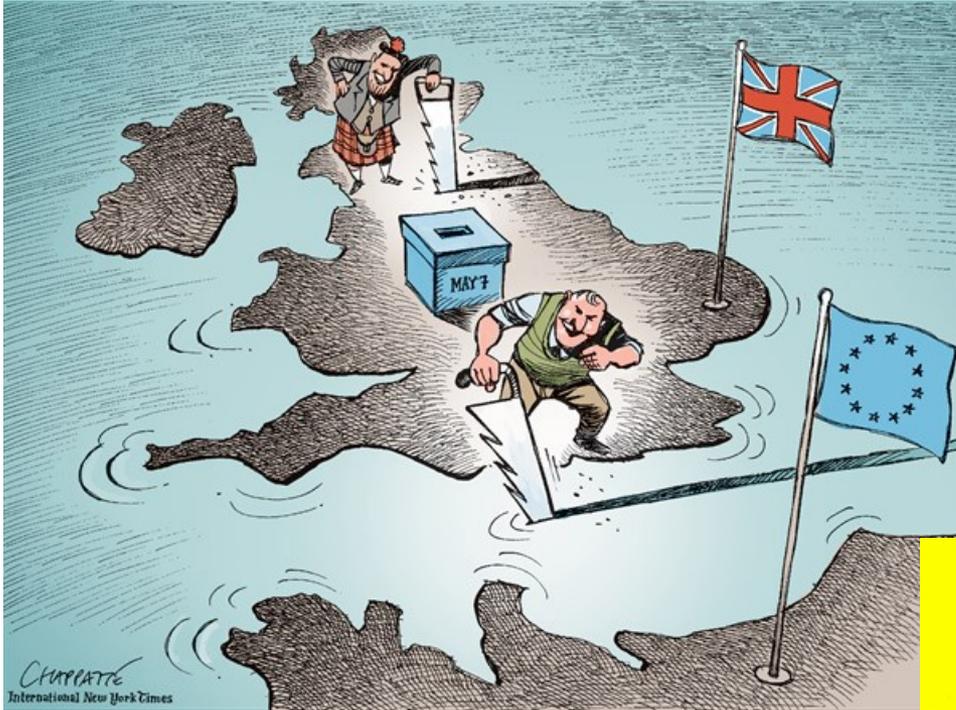


The mirage of the nation state 2

**UK votes
to leave**



Who is the self in self-governance?



The mirage of society



And who is society? There is no such thing! There are individual men and women and there are families and no government can do anything except through people and people look to themselves first... There is no such thing as society.



3. The Nostalgia of Transnational Law

The World circa 1957



The Past: World Wars out of nationalism
→ transnationalism



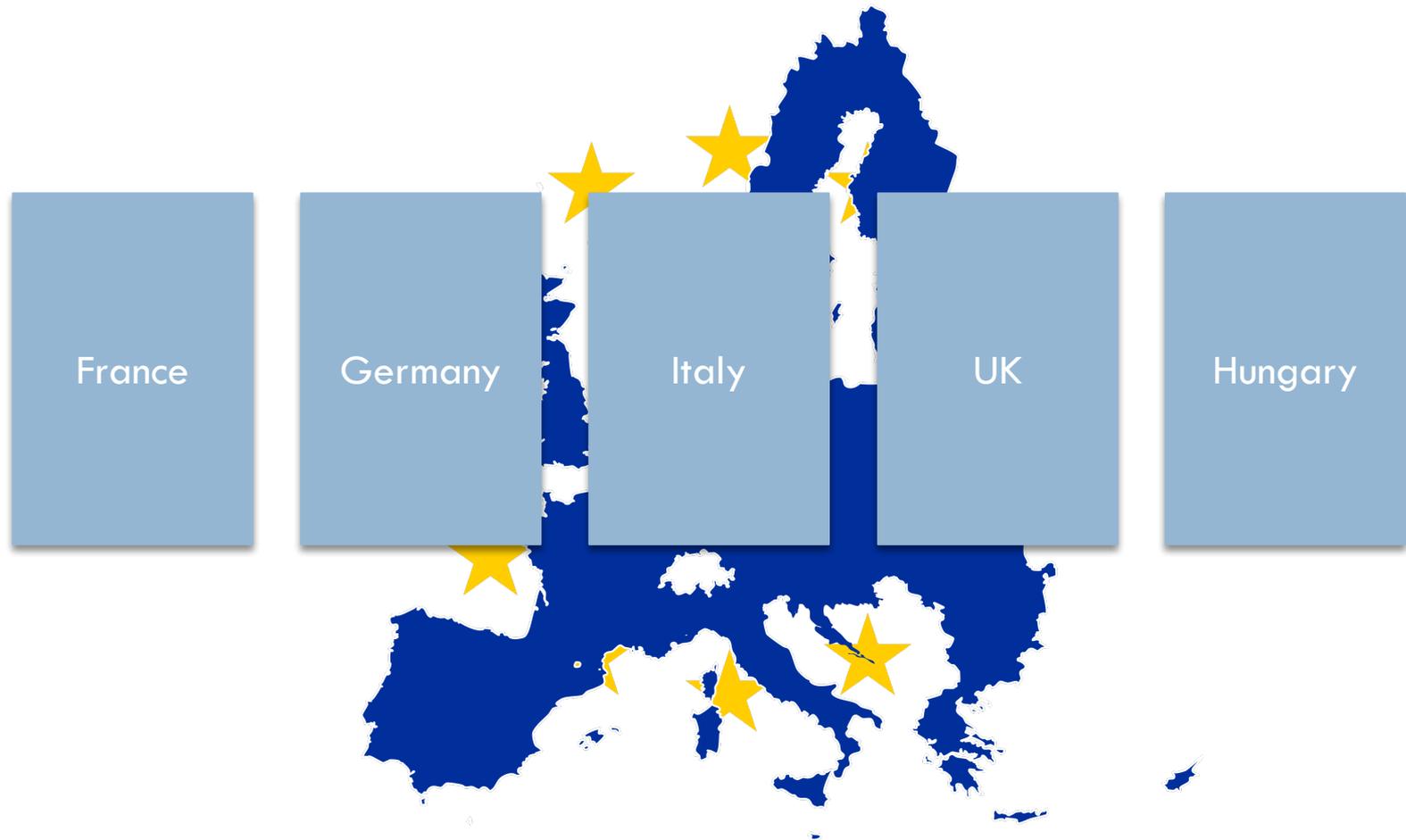
The present: competition with communism
→ individualism (free markets, human rights)



The approach: law as problem-solving
→ expert institutions (Mixed Arbitral Tribunals,
Commission/Court of Justice)



The overcoming of Segmentation



The Challenges Today

Desire for community:

"Believe in Britain. Together we can do great things."

Fear

→ of competition (the Polish plumber)

→ of human rights (immigration)

Populism, anti-elitism:

"People in this country have had enough of experts"

The Mirage of Cosmopolitanism



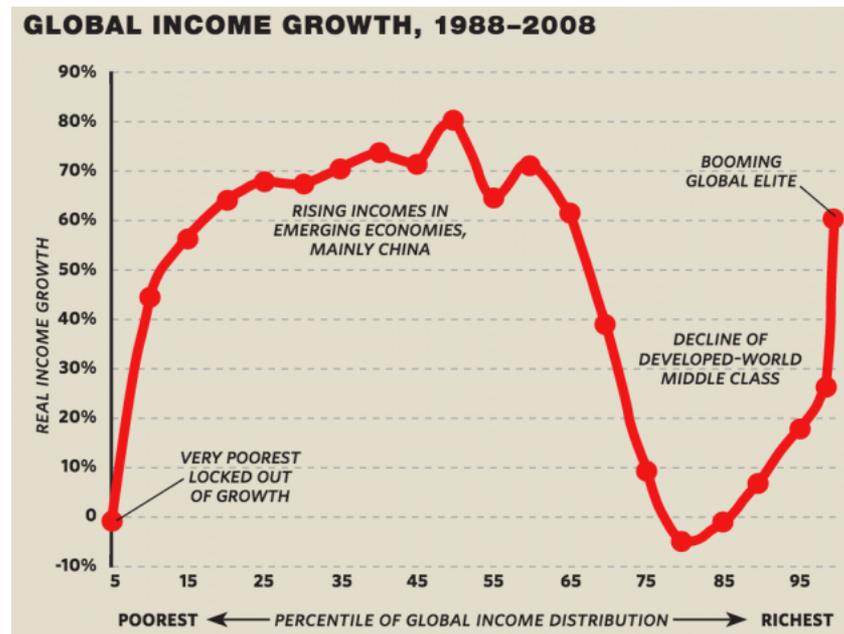
“But if you believe you're a citizen of the world, you're a citizen of nowhere”

The problem of exclusion

Market liberal transnationalism lets the weak collapse.

Leftist transnationalism lets the identitarians collapse.

→ It is rational (!) for weak identitarians to reject transnationalism.



The new stratification of world society

Transnational Elite

National
laborers

National
laborers

National
laborers

National
laborers

National
laborers

The new stratification of world law

Transnational Law

National Law

National Law

National Law

National Law

National Law

National
Law

National
Law

National
Law

National
Law

National
Law

We and the other great powers have been sitting in an international House of Lords, clinging to ancient rights and privileges. The time has come in the historical process when there must be yielding to the Commons.

Jessup 1942a



4. What is to be done?

A New PRIDE for Transnational Law

- 1) **P**oliticize → beyond expertise
- 2) **R**edistribute → beyond hierarchies
- 3) **I**nclude → beyond exclusion
- 4) **D**emocratize → beyond technocracy
- 5) **E**nergize → beyond problem-solving

Thank you very much