Essays

Structured Error. Case Study on a Discourse Logic of Comparative Law

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Abstract

Taking legal reactions on errors in contract formation (the 'law of errors') as a paradigm, this case study outlines the method of a 'discursive comparative law'. Following a critical view on the prevailing methods of comparative law (I), the essay explores the idea of 'deliberative comparisons' between legal cultures (II). A 'discourse logic' compares structures of legal argumentation in different jurisdictions and reveals its competing ethical and political reasons. From that perspective, contract law turns into a political battlefield of normative legal principles (III). A comparative discursive analysis of the 'law of errors' in Germany, France, Italy and England, however, shows amazingly similar argumentative structures (IV). A second stunning result is the discursive picture of European private law. The unifying European Common Frame of Reference pluralizes the field of normative reasons (V). Here, to structurally demonize legal harmonization per se would be in itself a 'structured error'.

I. Critical Comparative Law – '*error in methodo*'?

To err is human. A Belgian furrier makes an error while signing on to an orally pre-negotiated price with London merchants.[1] A computer system confirms the order of a notebook automatically, listed in a German merchant's online shop at a price of two hundred euros instead of two thousand euros.[2] The French *Musée du Louvre* purchases an old painting from a couple for two thousand Francs and puts it on exhibition shortly thereafter as 'Apollon et Marsyas' by the famous painter Nicolas Poussin valued at several million francs.[3] An

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[1] *Hartog* v *Colin & Shields* [1939] 3 All ER 566.

[2] German Bundesgerichtshof 26 January 2005, 58 *Neue Juristische Wochenschrift*, 976 (2005).

[3] French Cour d'appel Versailles 7 January 1987 (Poussin), *Revue Trimesterielle de droit civil,* 741 (1987).

Italian investor makes a terrible financial investment after receiving bad information from the Bank handling his assets.[4] An employer hires a woman as a nighttime security guard who announces two months later that she can no longer work at night because she is pregnant.[5] *Errare humanum est*. The problem of human error has existed for millennia. However, although the first part of the phrase has come down to us through the centuries, the Latin original saying was actually longer: To err is human, but to insist on errors is diabolical.[6] Even the general idea of 'an' error law with which the mistaken party may be considered exempt from an erroneous contract also serves to highlight this problem. All around the world, people make mistakes – there is no way around the fact. Is there then a corresponding universal idea of error in law? Or is even this idea in and of itself a mistake?

The question of universality is part and parcel of comparative law. But can a comparison really get to the root of something like this? In asking this, we inevitably find ourselves ensnared in a fundamental questioning of the comparative method itself. For decades, the answer on this matter seemed quite clear: 'The basic methodological principle of all comparative law is that of functionality'.[7] A functional comparative law is based on a single, technical function of law. 'The legal systems in every society face essentially the same problems, and solve these problems by quite different means, though very often with similar results'.[8] Errors create problems the world over, problems that law must endeavor to solve. The social problem of error thus comprises a unified approach for the comparison of the legal treatment of the validity of contracts.

[4] Italian Corte di Cassazione 19 October 2012 no 18039, 'Intermediazione e consulenza finanziaria' *Repertorio del Foro italiano*, I, 2928 (2013).

[5] Case 421/92 *Habermann* v *Beltermann*, [1994] ECR I-1657.

[6] '*Errare humanum est, (sed) perseverare diabolicum*': attributed to Seneca yet never attested, but cf M. Cicero, *Orationes Philippicae* (Cambridge: Cambridge University Press, 2003), 12.5: '*Cuiusvis hominis est errare, nullius nisi insipientis in errore perseverare*'.

[7] K. Zweigert and H. Kötz, *An Introduction to Comparative Law,* translated by T. Weir (Oxford: Oxford University Press, 1998), 34. For an overview cf also R. Michaels, 'The Functional Method of Comparative Law' in M. Reimann and R. Zimmermann eds, *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006), 339.

[8] K. Zweigert and H. Kötz, n 7 above.

After decades of largely theoretical abstinence, in recent years the 'method question' has increasingly inched more and more into the center of a reinvented comparative law debate.[9] For some time it was quite clear that comparative law, as the law itself, is always bound to the concepts of space and time.[10] Those who in the past delved into the issue of historical comparative law describe the emergence of different 'legal traditions',[11] while others classify jurisdictions into 'legal families'.[12] But the skepticism with respect to the emergence of the new methods goes deeper. The functionalist method seems to underestimate the pluralism of 'legal cultures'.[13] The most extreme opposing methodological position sees comparative law merely as an attempt to rehash descriptions of untranslatable legal cultures. The fact that English Common Law never formed a single 'law of errors' is then, following this argument, an indelible part of a cultural way of life. However, here too one can see a structural added value: 'Comparative legal studies is deconstruction'.[14] De-construction concerns itself with breaking down the constructions of a particular legal system, its paradoxes and ideological backgrounds.

Yet comparative law is not exhausted in comparative 'aesthetics of rationality', but rather, at least implicitly, always inherently

[9] P.G. Monateri, *Methods of Comparative Law* (Cheltenham: Elgar, 2014); J. Husa, *A New Introduction to Comparative Law* (Oxford: Hart, 2015); G. Samuel, *An Introduction to Comparative Law and Method* (Oxford: Hart, 2014); M. Siems, *Comparative Law* (Cambridge: Cambridge University Press, 2014).

[10] R. Pound, 'Comparative Law in Space and Time' 4 *American Journal of Comparative Law,* 70 (1955).

[11] Cf for example R. Zimmermann, *The Law of Obligations. Roman Foundations of the Civilian Tradition* (Oxford: Oxford University Press, 1996).

[12] R. David and J. Brierley, *Major Legal Systems in the World Today* (New York: Free Press, 1978); K. Zweigert and H. Kötz, n 7 above, Part B.

[13] For the cultural method in comparative law cf M. Hoecke and M. Warrington, 'Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law' 47 *International Comparative Law Quarterly*, 495 (1998); E. Örücü and D. Nelken eds, *Comparative Law. A Handbook* (Oxford: Hart, 2007); P. Legrand and R. Munday eds, *Comparative Legal Studies. Traditions and Transitions* (Cambridge: Cambridge University Press, 2003); C. Varga ed, *Comparative Legal Cultures* (Aldershot: Dartmouth, 1992).

[14] P. Legrand, 'Paradoxically Derrida' 27 *Cardozo Law Review*, 631, 717 (2005); on the deconstruction of the idea of law in general see J. Derrida, 'Force of Law' 11 *Cardozo Law Review*, 920 (1990).

involves a much more far-reaching social project.[15] The dispute over methods then takes a political turn, as the debate on a European Civil Code illustrates wonderfully.[16] Functional comparative law implicitly incorporates a tendency towards legal harmonization of the identified problem. Cultural comparative law calls for a pluralism of legal systems and therefore fights against a standardization of legal cultures. A key methodological issue in the controversial debate about a European harmonization and unification of law revolves around 'legal transplants'.[17] Does it make sense and is it at all possible to adopt individual legal characteristics from one jurisdiction to another?[18]

The passionate debate about functional unity or cultural differences often overlooks how many pluralistic contexts and diverging ideological backgrounds already exist within a particular legal system itself. With respect to a 'critical comparative law'[19] therefore, matters generally not only concern the overcoming of 'ethnocentrism' and 'legocentrism', but also the political dimension of law in a society generally. Traditionally, 'comparatists see their task as being essentially unpolitical, or neutral [... and avoid] radical questions about the role of law in society'.[20] All basic concepts of

[15] A. Riles, 'Introduction' in A. Riles ed, *Rethinking the Masters of Comparative Law* (Oxford: Hart, 2001), 11-15.

[16] Cf M. Bussani and U. Mattei eds, *The common core of European private law* (The Hague: Kluwer, 2003) and A. Hartkamp et al eds, *Towards A European Civil Code* (Nijmegen: Kluwer, 2004); versus P. Legrand, 'Against a European Civil Code' 60 *Modern Law Review*, 44 (1997).

[17] A. Watson, *Legal Transplants* (Athens, GA: University of Georgia Press, 1974); R. Michaels, 'One Size Can Fit All. On the Mass Production of Legal Transplants', in G. Frankenberg ed, *Order From Transfer. Studies in Comparative (Constitutional) Law* (Cheltenham: Elgar 2013), 56-80.

[18] Prominent sceptical voices are: P. Legrand, 'The Impossibility of Legal Transplants' 4 *Maastricht Journal of European & Comparative Law*, 111 (1997); G. Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' 61 *Modern Law Review*, 11 (1998).

[19] G. Frankenberg, 'Critical Comparisons: Re-Thinking Comparative Law' 26 *Harvard International Law Journal*, 411 (1985); for the remaining actuality of Frankenberg's account see P. Zumbansen, 'Comparative Law's Coming of Age? Twenty Years After Critical Comparisons' 6 *German Law Journal*, 1073 (2005).

[20] J. Hill, 'Comparative Law, Law Reform and Legal Theory' 9 *Oxford Journal of Legal Studies*, 101 (1989), 107.

private law arise and stand in pluralistic normative contexts and are diversely ethical and political. 'Critical comparison extracts from beneath the claims to legal rationality competing political visions and contradictory normative ideals'.[21] In this sense, the following draft of a 'discursive comparative law' seeks to explore, through examples occurring in the legal provisions on error, a critical path between a technical-functional and cultural method.

II. Deliberative Comparisons

Discursive comparative law compares structures of argumentation and reasoning in different jurisdictions from the perspective of a discourse theory of social norms. For a discourse theory, generally speaking, the exchange of rational reasons constitutes the essence of a social order. The validity of a social order depends on its democratic legitimacy, and along with it, that the subjects agree to standards or that they can criticize them, with reason.[22] Law institutionalizes special formal structures of this argumentative debate about reasons.[23] Laws, customary law, precedents, dogmatic theories and methods structure the legal discourse on social conflict. A differentiated reconstruction of argumentative structures allows the legal-theoretical distinction between 'rules' and 'principles'.[24]

'Legal rules' are binary standard sets that assign an event a legal consequence and are mutually exclusive. 'Legal Principles', however, are more general normative reasons that apply simultaneously and must be weighed against each other in case of conflict. A clear

[21] G. Frankenberg, 'Critical Comparisons' n 19 above, 452.

[22] J. Habermas, *Between Facts and Norms*, translated by William Rehg (Cambridge, MA: MIT Press, 1998); T. Scanlon, *What We Owe To Each Other* (Cambridge, MA: Harvard University Press, 2000); R. Forst, *The Right to Justification*, translated by Jeffrey Flynn (New York: Columbia University Press, 2011).

[23] R. Alexy, *A Theory of Legal Argumentation*, translated by R. Adler and N. McCormack (Oxford: Oxford University Press, 2009).

[24] J. Esser, *Grundsatz und Norm* (Tübingen: Mohr, 1956); R. Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977), chapters 2-4; R. Alexy, 'On the Structure of Legal Principles' 13 *Ratio Juris*, 294 (2000).

structure of argument arises when one understands the interplay of both standard categories on two levels.[25] With each social conflict, normative reasons collide that are weighed as legal principles, expressed or implied, by a legal decision. Legal rules define abstract primacy relations between conflicting principles.[26] In each individual case, the actual weighting affects those administering the law. Thus, in the light of legal precedence, the judge weighs reasoning, and makes decisions (decides). Legal rules structure this weighing by setting 'burdens of justification'. The rules of a legal system thus shape the argumentative structure of the balancing of each individual case.

The structuring of this assessment can be formalized and compared as 'discourse logic'. The philosophical logic represents linguistic statements in a conceptual scheme.[27] A 'discourse logic' structures and formalizes normative assessments between principles.[28] The logical starting point of any assessment is the collision of at least one principle with another principle (P1 >< P2). In the event of a mistake when concluding a contract, the interest of the declarant and his true will stand in direct opposition to the recipient, and his reliance in terms of actual expression (*Will* >< *Reliance*). In a legal process, the judge weighs the conflicting principles on the basis of the facts of each case, one against the other, and takes a concrete decision of priority (*Will* > *Reliance*). Legal rules establish conditional primacy relations between principles. The rule of challenging a declaration of intent essentially regulates that, under the condition of a particular error, the *Will* of the declarant takes precedence over the *reliance* of the recipient.

[25] B. Lomfeld, *Die Gründe des Vertrages* (Tübingen: Mohr, 2015), 36-55; A. Sieckmann, *Regelmodelle und Prinzipienmodelle des Rechtssystems* (Baden-Baden: Nomos, 1990).

[26] R. Alexy, *A Theory of Constitutional Rights*, translated by J. Rivers (Oxford: Oxford University Press, 2009), chapter 3; R. Alexy, 'On Balancing and Subsumtion' 16 *Ratio Juris*, 433 (2003).

[27] W.V. Quine, *Methods of Logic* (New York: Holt, Rinehard & Winston, 1956), Introduction.

[28] For an introduction into 'discourse logic' see B. Lomfeld, n 25 above, 44-55 and 306-309.

Avoidance = Relevant Error → *Will* > *Reliance*[29]

In so doing, the legal principles establish these as the fundamental, normative value standards to the pluralistic, ethical foundations of any society. Collisions between principles can document real ethical conflicts, or at least a dissent on normative grounds. Any settlement or application of law is seen as argumentative balancing ('deliberation') of conflicting reasons.[30]Any legal decision is thus 'political', as it opts for and against certain normative (ethical) reasons. In so doing, a deliberative legal theory seeks to stay neutral, in as far as is possible, with respect to pluralistic ethics. It only tries to reconstruct legal decisions as a 'political' balancing between pluralistic values in a society.

At any rate, in any legal democratic system, legal decisions require justification. The respective rules justify concrete legal consequences. The decision as to whether the rule is applicable can always only be justified by resorting to other (conflicting) reasons. Each legal system can thus be reconstructed in 'discourse logic' as specific structures of burdens of justification between conflicting principles. Discursive or deliberative comparative law seeks to compare balancing structures. Thus, initially, it is necessary to determine the 'ethical' background justification of legal doctrine and 'political' considerations in any legal culture. In this respect, discursive comparative law can be understood as critical legal theory.

[29] The formal symbols of 'discourse logic' are the following:
>< collides with (collision of principles)
> outweighs (primacy-relation)
→ if... than (conditional primacy relation = rule)
+ and (cumulative weights of principles)
= implies, equals, corresponds (relation, principles)
≠ no (normative negation of a reason).

[30] The concept related to the tradition of 'deliberative democracy', cf J. Habermas, 'Three Normative Models of Democracy' 1 *Constellations,* 1 (1994); S. Benhabib, 'Deliberative Rationality and Models of Democratic Legitimacy' 1 *Constellations,* 26 (1994); J. Rawls, 'The Idea of Public Reason Revisited' 64 *University of Chicago Law Review*, 765 (1997); cf also the representative essay collections of J. Bohman and W. Rehg eds, *Deliberative Democracy* (Cambridge, MA: MIT Press, 1997) and J. Elster ed, *Deliberative Democracy* (Cambridge University Press, 1998). Even French poststructuralist J.F. Lyotard, *Le différend* (Paris: Gallimard, 1983) uses the concept of a ›deliberative politics‹ (§210) to mark the pluralistic competition between different discourses (§234).

By attempting an integrated discourse logic, however, a functional comparability is also constructed simultaneously that takes a forefront position in the following analysis of legally relevant mistakes. Here, the cultural differences of each national law are less appreciated because comparable political conflicts are highlighted. The deliberative comparison designs a critical-functional method of comparative law.

III. The 'Erroneous' Neutrality of the Law and the Battle of Legal Principles

What is an error? From a deliberative perspective, *Will* and *Reliance* collide with respect to errors in legal principles. The party in error does not freely form or express her will, but does so, rather, under the influence of a mistake. Her partner in the contract relies on the actual statement, as in the case of a slip of the pen, for example, or an error in signing. The recipient trusts the written reply, while the party in error does not even take note of what he has said. Contract law establishes a structure of argumentation for balancing the principles of *will* and *reliance*. What is allowed as a relevant mistake? To what extent, exactly, can the erring individual be permitted to allow her impaired will to prevail over the reliance of the contracted partner? What obligations for disclosure exist? The conflict of *will* versus *reliance* lurks in the background of each contract formation. National regulations for disputes take on quite different forms. While the legal structures of balancing vary, the collision of justifications remains the same.

In this dogmatic, abstract description, the principles of conflict sound purely technical. Behind every technical regulation, however, is also concealed a social conflict and along with it, a political balancing, or assessment.[31] The normative background becomes clearer when one considers contractual theories for each of which principles stand, or have stood. According to the (at least) historically strong theory of *Will*, in Germany and France, a contract either

[31] For an illustration of that claim see prominently D. Kennedy, 'The Political Stakes in ›Merely Technical‹ Issues of Contract Law' 10 *European Review of Private Law*, 7 (2010).

stands or is void per the sole intentions of the parties.[32] An error must consequently lead to the nullification of the contract. On the other hand, the contrarian 'declaration theory' establishes the contractual promise solely according to its objective appearance.[33] The declarant must be able to maintain the objective effectiveness of his statement. An undetectable error remains irrelevant. Historically, these two approaches were already considered at odds as '*verba vel voluntas*' in Roman law.[34]

Will and *reliance* can be read as two opposing 'ethical' reasons underpinning the contract.[35] The will theory is normatively derived from a liberal ethics of freedom. Whoever promises something commits himself with this promise through his intentional autonomy itself. The normative legal principle of *will* accordingly requires that the law should respect and support this individual, intentional self-determination. An objective ('declaration') theory, on the other hand, takes the social context of the conclusion of the contract as a starting point. The contractual obligation arises from the social expectations of the individual making the promise, whose reliance must not be disappointed. Law should therefore accordingly protect *reliance* as social security. An extreme version of this, for example, is the 'factual contract' that exists for an individual entering a subway, the

[32] The most prominent development of a purist will theory was in Germany with C.F. von Savigny, *System des heutigen römischen Rechts* (Berlin: Veit & Comp, 1840), §140 and B. Windscheid, 'Wille und Willenserklärung' 63 *Archiv für civilistische Praxis,* 72 (1880). In France the strong focus on ›volonté‹ appeared already as natural law construction with R. Pothier, *Traité des obligations* (Paris: Debure l'aîné, 1764), 6. A vivid reception of mostly the German will tradition in England is analyzed by F. Pollock, *Principles of Contract* (London: Stevens & Sons, 1876), Introduction.

[33] For the German 'Erklärungstheorie' see O. Bähr, 'Über Irrungen im Kontrahieren' 14 *Jherings Jahrbücher der Dogmatik des bürgerlichen Rechts,* 393 (1875); in France: R. Saleilles, *De la déclaration de volonté* (Paris: Pichon, 1901); E. Gounod, *Le principe de l'autonomie de la volonté en droit privé francais* (Paris: Rousseau, 1912). In the whole Common Law Tradition the ›objective theory‹ became the normal starting point of interpretation; cf O.W. Holmes, *The Common Law (*Reprint New York: Dover Publications, 1991), 309.

[34] Cf R. Zimmermann, n 11 above, 587.

[35] For an in depth analysis of the enlisted legal principles of contract law (the 'reasons of contract') with an encompassing comparative discussion of philosophical, historical and recent contract theories see B. Lomfeld, n 25 above, 73-228.

realization of which no longer depends upon the will of the individual acting. In this case, the protection of the actual reliance surpasses a general protection for transport safety in the interest of the *stability* of the social (economic) system. The collision of *will* versus *reliance* reflects the political debate about an individualistic liberal order as opposed to a social (or even collective) social order.

However, *will* and *reliance* are not the only legal principles that are cavorting about in contract law. What about when a contract is retroactively annulled? Is the erring party liable or must he or she provide compensation for any losses or damages? In this instance, a problem of material justice arises. From an egalitarian perspective, a principle of '*equivalence'* requires that the law support the substantive equality between the parties and should thus compensate the one who has demonstrated reliance. A libertarian position can interfere with the universality of this compensation claim. Compensation would then only be justified if the erring party has to answer for her error. The legal principle of individual '*responsibility'* is thereby the other side of free, voluntary self-determination.

Disclosure liabilities and consumer protection mark a new paradigmatic conflict in error discourse: *risk* versus *fairness*. What information each party must disclose during the initiation of a contract? What information is part of economic competition? According to an economically understood *'risk'* principle, information flows into the competitive market in the form of strategic advantage. The parties set up informational advantages to maximize their individual benefits and also to thereby socially allocate resources in an optimal way as well. From the perspective of welfare economics theory, however, the law should also ensure allocative *'efficiency'*. On the other hand, behind disclosure obligations is mainly positioned an egalitarian principle of *fairness*. The law should thus ensure a procedural equality of opportunity.

In sum, eight principles of 'law of errors'[36] can be classified into

[36] The Common Core of European Private Law (cf n 16 above) working group also stated eight aims of respective legal provisions; cf R. Sefton-Green ed, *Mistake, Fraud and Duties to Inform in European Contract Law* (Cambridge: Cambridge University Press, 2005), 14: 'i. Protecting the consent of the parties'; 'ii. Upholding the security of transactions'; 'iii. Controlling contractual fairness', divided into 'procedural fairness' and 'substantive fairness'; 'iv. Upholding the moral duty to tell

four basic ethical poles or political philosophies:[37] *Will* and (self) *responsibility* represent a liberal or libertarian philosophy of freedom. *Reliance* and *stability* demonstrate or comprise values of a communitarian or sociological theory. *Efficiency* and strategic *risk* reflect the utilitarian philosophy of economic theory. *Equivalence* and *fairness* are associated with egalitarian theories of justice.

IV. Political Structures of 'Laws of Error' (Germany, France, Italy, England)

Viewed from a historical perspective, one might expect a significant divergence between national laws. Contractual rights inspired by natural law such as the French 'Code Civil' and the Italian 'Codice Civile' base their laws around the principle of will. Likewise, the German 'Bürgerliches Gesetzbuch' (BGB) squarely places *will* at the center of the error question in good, idealistic, rational legal tradition. Quite different, however, is the much more pragmatic Common Law of the economically coalesced Commonwealth. Emerging from commercial conventions, the objective effectiveness of a declaration emerging in the course of trade and lending the impression of 'a reasonable business man' comprise fundamental maxims. In fact, something like universal 'law of error' in England is, conceptually, not such a clear matter to define. Legal concepts such as 'mistake' and 'misrepresentation' do not necessarily follow a uniform pattern. This part of contract law seems to confirm the historical-functional classification in 'legal families':[38] 'Common Law' versus Roman and Germanic 'Civil Law'.

Firstly, a discursive comparative law analyzes foundational 'discursive structures' and upsets this classificatory certainty: For

the truth' and 'v. Protecting or compensating the innocent reliance of a mistaken party'; 'vi. Imposing or regulating standards of behaviour'; 'vii. Setting objective standards in relation to the content of the contract'; 'viii. Allocating risks under the contract'.

[37] B. Lomfeld, n 25 above, 73-228; cf also M. Hesselink, 'Five Political Ideas of European Contract Law' 7 *European Review of Contract Law*, 295 (2011) differentiates 'utilitarian', 'liberal-egalitarian', 'libertarian', 'communitarian' and 'civic' ideas of contract law.

[38] Cf n 12 above.

both 'Common Law' as well as continental 'Civil Law', *reliance* represents the starting point of argumentation. In continental law, error is a reason for contesting a contract. The argumentative structure of a challenge, however, logically presupposes a prima facie primacy of *reliance*. Only a priority presumption of validity of the declaration can underpin the legal construction of an avoidance of the contract and make sense. Since a challenge requires special justification, the party defending the *will* principle thus has the burden of justification. On the other hand, the discursive structure of Common Law does not follow a pure objective theory. In the context of 'mistake' and 'misrepresentation', different reasons can serve to eliminate the validity of a contract. In this respect, Common and Civil Law do share the same basic point of view. The reliance of the contract prevails as long as no reasons against its validity are put forward. This 'avoidance structure' can be described as a common discourse logic of error.

[Discourse Logic of Error][39]
(1) [Default] *Reliance* > *Will*
(2) AVOIDANCE = Legally relevant error → *Will* > *Reliance*
(3) Confirmation = *Reliance* > *Will*
(4) Time limit = *Reliance* > *Will*
(5) Compensation = *Equivalence* > *Reliance*

As a basic point of view, the *reliance* of the recipient prima facie prevails over the *will* of the declarant (1). The declarant must especially justify the precedence of his undisturbed *will* (2). With legally recognized reasons for avoidance, *will* then supersedes that *reliance*. The contract is void. This basic structure of a legal challenge is readjusted by the influence of other rules. Here, again, the argumentation follows a common discourse logic of balancing between *will* and *reliance* under different legal jurisdictions and legal institutions. If the party in error confirms the contract even after becoming aware of her mistake, he renews the *reliance* and may no longer cancel the contract (3). Reasons for a challenge must be submitted immediately after subjective acknowledgement of the error, otherwise *reliance* serves to prevent, per tacit approval, the

[39] For the meaning of the symbolic operators compare n 29 above.

contract being set aside (4). After being successfully set aside, services are already provided must be refunded or replaced (5). In so doing, the parties should be in as similar a position as possible as they would have been previously without conclusion of the contract (*restitutio in integrum*).

This interplay of the balance between *will* and *reliance* reveals a new discursive, but again uniform functionality of various jurisdictions. In the second step, discursive comparative law considers the 'political grammar' of the applicable argumentation and exposes the unity of the structure culturally and politically. In almost all jurisdictions, a legal concept of 'relevance' of error emerges which opens up balancing, or considerations, to the widest range of valuations. The actual weighting of individual reasons and the result of the balancing is then no longer uniform and often much debated in the jurisdictions themselves.

1. Germany[40]

The BGB very largely follows Savigny's will-based error doctrine.[41] According to it, an error is a 'state of consciousness in which the true representation of the object is concealed or repressed

[40] Relevant provisions of the German 'BGB' (translation provided by the German Federal Ministry of Justice, 2013, available at www.juris.de) are:

§119 '(1) A person who, when making a declaration of intent, was mistaken about its contents or had no intention whatsoever of making a declaration with this content, may avoid the declaration if it is to be assumed that he would not have made the declaration with knowledge of the factual position and with a sensible understanding of the case. (2) A mistake about such characteristics of a person or a thing as are customarily regarded as essential is also regarded as a mistake about the content of the declaration'.

§121 '(1) Avoidance must be effected [...] without undue delay after the person entitled to avoid obtains knowledge of the ground for avoidance [...] (2) Avoidance is excluded if ten years have passed since the declaration of intent was made'.

§122 '(1) If a declaration of intent is [...] avoided [...] the person declaring must, if the declaration was to be made to another person, pay damages to this person [...]'.

§142 '(1) If a voidable legal transaction is avoided, it is to be regarded as having been void from the outset'.

§144 '(1) Avoidance is excluded, if the voidable legal transaction is confirmed by the person entitled to avoid'.

[41] M.J. Schermaier, '§§116-124', in M. Schmoeckel, J. Rückert and R. Zimmermann eds, *Historisch-kritischer Kommentar zum BGB* (Tübingen: Mohr, 2003), 58.

by an untrue one'.[42] Accordingly, §119 BGB allows disputes without regarding the receiver of the statement. His responsibility or knowledge of the error is irrelevant; it is all about the trouble-free self-determination of the declarant. Paradoxically, the German Supreme Court used a parallel will argument in considering the case of a system error leading to the wrongly published online prices of computer 'notebooks'.[43] Neither did the *responsibility* of the online system controller play any role, nor its strategically inherited *risk* or its *more efficient* risk-control. German legal practice is characterized by an extremely libertarian basic understanding of its 'law of errors'.

Different criteria of weighting could, however, be tacked onto the open-ended terms of 'sensible understanding' and 'essential characteristics' in §119 BGB. An economical reading as such elevates the allocative *efficiency* to a decisive reason underpinning a relevant error and assumes that 'the parties entering into a contract always have an interest in an unwasteful (efficient) contract.'[44] The error with respect to the 'characteristics' of the worker, not being pregnant, would be relevant from an economic perspective. In contrast, the European Court of Justice in context of the European Directives on equal treatment denied the employer's possibility to appeal.[45] *Fairness* outweighs *efficiency*.

[Discourse Logic of the German Law of Errors]
(1) *Reliance* > *Will* [142(1) BGB]
(2) AVOIDANCE = Relevant error [119 BGB] → *Will* > *Reliance*
(2a) 'he would not have made' [119(1) BGB] = *Will*
(2b) 'sensible understanding' [119(1) BGB] = *Efficiency/ Fairness*
(2b) 'essential characteristics' [119(2) BGB] = *Efficiency/ Fairness*
(3) Confirmation [144 BGB] → *Reliance* > *Will*
(4a) 'without undue delay' [121(1) BGB] → *Reliance* > *Will*
(4b) Within 'ten years' [121(2) BGB] → *Stability* > *Will*
(5a) Unjust enrichment [812 BGB] → *Equivalence* > *Reliance*
(5c) Reliance interest [122 BGB] → *Reliance* > *Will*

[42] F.C. von Savigny, n 32 above, §145.
[43] German Bundesgerichtshof 26 January 2005 n 2 above.
[44] M. Adams, 'Irrtümer und Offenbarungspflichten im Vertragsrecht' 186 *Archiv für civilistische Praxis*, 453 (1986), 489.
[45] Case 421/92 *Habermann* v *Beltermann* n 5 above.

The time requirement for an immediate challenge is supplemented in German law by an objective contestation period of ten years (§ 121 BGB). Services that have already been provided in a contested contract can be reclaimed through the law of unjust enrichment. A special peculiarity is represented by the claim of the recipient on reliance damages in §122 BGB. The balancing of the negative interest corrects the consequences that arise from will-centered error terminology. If *responsibility* rests with the erring individual himself, he needs to compensate for enforcing his *will* upon the *reliance* of others.

2. France[46]

French contract law is much in line with a liberal interpretation of *will*. Whether or not both parties share the error or the declarant is mistaken is ultimately irrelevant.[47] Even if the error arose spontaneously or was provoked, it makes no difference; the aspect of *responsibility* does not matter. The error is, however, only considered notable if it relates to the 'very substance of the thing' (Art 1110 *Code Civil*). To these required substantial qualities can be included, for example, the authorship of an image, as in the 'Poussin' case.[48] In this case, it is *fairness* that ultimately supports the open valuation as to what constitutes a 'substantial quality'. In essence, the State Museum's structural power of information is thereby compensated. If, on the other hand, a party knowingly enters into taking a strategic *risk* such as acquiring an image 'attributed to Fragonard' and purchases it, the assessment of error aligns with this fact accordingly.[49] *Risk* displaces (or chases away) error ('*L'aléa*

[46] Relevant provisions of the French ›Code Civil‹ (translated by G. Rouhette and A. Rouhette-Berton, 2006, available at www.legifrance.gouv.fr) are:

Art 1109. 'There is no valid consent, where the consent was given only by error […]'.

Art 1110. 'Error is a ground for annulment of an agreement only where it rests on the very substance of the thing which is the object thereof […]'.

Art 1117. 'An agreement entered into by error […] is not void by operation of law; it only gives rise to an action for annulment or rescission […]'.

[47] M. Fabre-Magnan, *Les obligations* (Paris: PUF, 2004), 272.

[48] Cour d'appel Versailles 7 January 1987 n 3 above.

[49] French Cour de Cassation 24 March 1987 (Verrou de Fragonard), *Bulletin civil*, I, 105.

chasse l'erreur'). A general obligation to clarify authorship does not exist[50] and economic competition for better information displaces material justice.

[Discourse Logic of French Law of Errors]
(1) *Reliance* > *Will* [1117 CC]
(2) AVOIDANCE = Error [1109 CC] → *Will* > *Reliance*
(2b) 'on the very substance' [1110 CC] = *Fairness*
(3a) Confirmation [1338 CC] → *Reliance* > Will
(3b) Risk chases error ['Fragonard'] → *Risk* > *Will*
(3b) Inexcusable error → *Risk* > *Will*
(4b) Within 'five years' [1304 CC] → *Stability* > *Will*
(5a) Restitution → *Equivalence* > *Reliance*

An assessment or weighting of strategic *risk* also undertakes jurisprudence with the argument that the error made must be 'excusable'.[51] Finally, a confirmation by the statement recipient prevents nullification (Art 1338 *Code Civil*) and after five years the challenge is objectively excluded (Art 1304 *Code Civil*). The entitlement to a restitution arises with the retroactive nullification of the rescission.[52]

3. Italy[53]

In the literature, the constitutive reason underlying contract is

[50] French Cour de Cassation 3 May 2000 (Baldus), *Bulletin civil*, I, 131.
[51] French Cour de Cassation 3 July 1990, *Revue Dalloz*, 507 (1991).
[52] J. Carbonnier, *Droit Civil* (Paris: PUF, 2004), 1022.
[53] Relevant provisions of the Italian *codice civile* are:
Art 1338. Knowledge of reasons for invalidity. 'A party who knows or should know the existence of a reason for invalidity of the contract and does not give notice to the other party is bound to compensate for the damage suffered by the latter in relying without fault, on the validity of the contract'.
Art 1427. Mistake, duress and fraud. 'A contracting party whose consent was given by mistake, [...] can demand annulment of the contract [...]'.
Art 1428. Relevance of mistake. 'Mistake is cause for annulment of a contract when it is essential and recognizable by the other contracting party'.
Art 1431. Recognizable mistake. 'A mistake is considered recognizable when, with respect to the content, the circumstances of the contract, or the quality of the contracting parties, it would have been detected by a person of normal diligence'.
Art 1432. Preservation of corrected contract. 'The mistaken party cannot

predominantly a subjective principle of freedom rooted in natural law.[54] However, the practice of Italian 'law of error' is significantly and distinctly more social in most aspects. The declarant must of course also challenge under Italian law, otherwise, *reliance* precedes *will* (Art 1427 Civil Code). The error must also be 'essential' in substance and 'recognizable' for the other party (Art 1428 Civil Code). Though the injury of a duty to inform does not by itself lead to classifying the error as 'essential' (Art 1429 Civil Code), *fairness* is an important factor.[55] With recognition, Italian law places social due diligence squarely upon the declarant recipient (Art 1431 Civil Code). He bears the *risk* of a negligently unrecognized error and is even obligated to pay compensation to the erring party in matters of doubt (Art 1338 Civil Code). Thus, Italian law provides clear limits to the libertarian rule of *will*. Without negligence of the recipient the contract persists. In the event of mutual error, jurisprudence dispenses with this requirement accordingly.[56]

[Discourse Logic of Italian Law of Errors]
(1) *Reliance* > *Will* [1427 cc]
(2) AVOIDANCE = Relevant Error [1428 cc] → *Will* > *Reliance*
    (2b) 'essential' [1429 cc] = *Fairness*
    (2d) 'recognizable' [1428, 1431 cc] = *Risk*
(3a) Confirmation [1444 cc] → *Reliance* > *Will*
(3c) Adaption of contract [1432 cc] → *Equivalence* ≥ *Will*
(4b) Within 'five years' [1442 cc] → *Stability* > *Will*
(5a) Restitution [1149 cc] → *Equivalence* > *Reliance*
    (5b) Damages [1338 cc] → *Responsibility* > *Reliance*

One of the most interesting regulations is the ability to adapt the contract ('*mantenimento*'). If the other party offers to fulfill the contract as intended by the erring party, then the power to contest

demand annulment of the contract if, before it can derive injury from it, the other party offers to perform it in a manner which conforms to the substance and characteristics of the contract that the mistaken party intended to conclude'. (translation by J.H. Merryman, *The Italian Civil Code and Complementary Legislation* (New York: Oceana, 2010), 26, 39).

[54] G. Alpa, *I Principi Generali* (Milano: Giuffrè, 1993), 295.

[55] Corte di Cassazione n 4 above.

[56] C.M. Bianca, *Diritto Civile. Il Contratto* (Milano: Giuffrè, 2000), 348.

no longer applies (Art 1432 Civil Code). The erring party shall be positioned no better by her error than she should or would have been without the error and can withdraw from the contract.[57] The recipient then has the option to make a decision as to whether he considers the originally intended contract to be materially *just* or not. Again, a social inclusion here restricts the libertarian freedom to unilaterally terminate the contract. The upholding of the contract, however, not only serves *equivalence*, but also helps in upholding the original *will*.

4. English Common Law

The basic principle, at least in English Common Law, is an objective theory of contract formation.[58] Only objective appearance counts.[59] Social *reliance* basically precedes the *will*. An error must significantly disrupt the agreement between the parties.[60] A unilateral 'mistake' is only legally relevant if the recipient was also aware of the mistake[61] or ought to have known it.[62] In the case of a written agreement of the pre-negotiated offer, the merchant should have detected the error immediately and clarified the matter. It is his or her strategic *risk* to act, or not to act.

In addition to 'mistake', Common Law recognizes a further challenge for 'misrepresentation', which requires an additional *responsibility* on the part of the receiver. A 'fraudulent misrepresentation' can also include a statement about which the declarant is in doubt.[63] The transitions to

[57] Cf Corte di Cassazione 23 February 1981 no 1081, *Giustizia Civile Massimario*, II, 415 (1981).

[58] *Smith* v *Hughes* [1871] LR 6 QB 597: 'If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into a contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms' (Judge Blackburn).

[59] O.W. Holmes, n 33 above, 309: 'The law has nothing to do with the actual state of the parties' minds. In contract, as elsewhere, it must go by externals, and judge parties by their conduct'.

[60] G. Treitel, *The Law of Contract* (London: Sweet & Maxwell, 2003), 304.

[61] *Hardman* v *Booth* [1863] 1 H&C 803.

[62] *Hartog* v *Colin & Shields* n 1 above.

[63] *Derry* v *Peek* [1889] 5 TLR 625.

'negligent misrepresentation'[64] are fluid. In essence, it always ultimately comes down to the allocation of strategic *risk* for information. According to US-American Common Law, the relevance of error should explicitly decide who has borne the 'risk of mistake'.[65] With a focus placed squarely upon *risk*, the economically utilitarian orientation of Common Law becomes quite apparent.

[Discourse Logic of English Common Law of Errors]
(1) Objective appearance [*Smith* v *Hughes*] = *Reliance* > *Will*
(2) AVOIDANCE = Mistake → *Will* > *Reliance*
(2b) knew [*Hardman* v *Booth*] ≠ *Reliance*
(2c) ought to have known [*Hartog* v *Colin*] = *Risk*
(*2) AVOIDANCE = Misrepresentation → *Risk* > *Reliance*
(*2d) negligent [*Howard Marine* v *Dredging*] = *Risk*
(*2e) fraudulent [*Derry* v *Peek*] = *Responsibility*
(3) Affirmation [*Long* v *Lloyd*] → *Reliance* > *Will*
(4) Lapse of time [*Leaf* v *International Galleries*] → *Stability* > *Will*
(5) Restitution [*Kleinwort Benson* v *Lincoln*] → *Equivalence* > *Reliance*

Additional discourse structures of Common Law resemble those of continental laws. A contract can no longer be contested if the erring party to the contract confirmed it, through his behavior, after having learned about the faulty information.[66] The challenge must take place immediately after learning of the new situation and within a time frame that a prudent investigator would typically require in order to gain a clear picture of things. A period of five years was deemed too long to acquire knowledge of the false authorship of a painting.[67] Restitution of services and reliance damages are possible, even when ascribed to legal errors.[68] However, what is meant or intended is less damaging to the recipient party, but more so to the erring party, who errs because of his *reliance* on the false presentation by the recipient.

[64] *Howard Marine and Dredging Co Ltd* v *Ogden & Sons (Excavations) Ltd* [1978] 2 WLR 515.
[65] Cf *Restatement (Second) of Contracts* (American Law Institute, 1981), §154.
[66] *Long* v *Lloyd* [1958] 1 WLR 753.
[67] *Leaf* v *International Galleries* [1950] 2 KB 86.
[68] *Kleinwort Benson* v *Lincoln* [1998] 3 WLR 1095; cf also G. Treitel, n 60 above, 940.

V. Pluralizing Unity (European Common Frame of Reference)

Despite a uniform discursive basic structure, the balancing practices of individual jurisdictions vary. In particular, open legal terms on the relevance of error offer a gateway for pluralistic reasons from a communitarian, an economic or an egalitarian perspective. The range of variation and inconsistencies would be even much greater if we considered not only the prevailing opinions of the respective legal practice. Already, the identified differences make it clear that the reconstruction of a unified discursive basic structure is by no means an obstacle to a plurality of reasons in balancing.

A common culturalist argument against unification of law is always that it will lead to an impoverishment of the pluralism of law.[69] Looking at the design of a European private law in the Draft Common Frame of Reference (DCFR)[70] from the perspective of a discursive comparative law, this objection goes nowhere. A European private law pluralizes the reasons, even in the act of balancing. The DCFR cumulatively compiles almost all normative elements in the individually researched national laws into a pluralistic system, together. Thus, in the regulation covering the avoidance of contract (Art II.7: 201)[71] one finds at the side of the German argument of

[69] Cf the discussion at n 13-16 above.

[70] The DCFR was prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group) based on several requests of the European Parliament, cf *Official Journal of the European Communities*, C 158/400 (1989). Its Interim Outline Edition was published as C. Bar, E. Clive and H. Schulte-Nölke eds, *Principles, Definitions and Model Rules of European Private Law* (Munich: Sellier, 2009).

[71] Art II.7: 201 DCFR: '(1) A party may avoid a contract for mistake of fact or law existing when the contract was concluded if: (a) the party, but for the mistake, would not have concluded the contract or would have done so only on fundamentally different terms and the other party knew or could reasonably be expected to have known this; and (b) the other party; (i) caused the mistake; (ii) caused the contract to be concluded in mistake by leaving the mistaken party in error, contrary to good faith and fair dealing, when the other party knew or could reasonably be expected to have known of the mistake; (iii) caused the contract to be concluded in mistake by failing to comply with a pre-contractual information duty or a duty to make available a means of correcting input errors; or (iv) made the same mistake. (2) However a party may not avoid the contract for mistake if: (a) the mistake was inexcusable in the circumstances; or (b) the risk of the mistake was assumed, or in the circumstances should be borne, by that party'.

causality of *will* the English-inspired *responsibility* of the receiver and the central balancing in of risk as applied in France and Italy. In employing a special reasoning for injury of 'information duties' the DCFR injects the egalitarian basis of *fairness* prominently into the balancing.

[Discourse Logic of the European DCFR]
(1) DEFAULT [7:212(1)] = *Reliance* > *Will*
(2) AVOIDANCE [7:201(1)] = *Will* + ... > *Risk*
(2a) Missing causality [7:201(1)(a)] ≠ *Will*
(2b) Substantial error [7:201(1n)(a)] = *Efficiency/Fairness*
(2c) Knowledge (of recipient) [7:201(1)(a)] ≠ *Reliance*
(2d) Negligent ignorance [7:201(1)(a)] = *Risk*
(2e) Causation of error [7:201(1)(b)(i)] = *Responsibility*
(2f) Information Duty [7:201(1)(b)(ii), (iii)] = *Fairness*
(3) EXCEPTIONS = ... > *Will*
(3a) Confirmation [7:211] → *Reliance* > *Will*
(3b) Risk allocation [7:201(2)] → *Risk* > *Will*
(3c) Adaption [7:203] → *Equivalence* ≥ *Will*
(4) TIME LIMITS [7:210] = *Stability* > *Will*
(5) COMPENSATION = ... > *Reliance*
(5a) Restitution [7:212(2)] → *Equivalence* > *Reliance*
(5b) Damages [7:214] → *Responsibility* > *Reliance*
(5c) Reliance interest [7:204] → *Reliance* > *Will*

Pluralism prevails in the whole discursive structure of the European 'law of errors'. The DCFR considers not only a 'confirmation' (Art II.7: 211), but also the risk allocation between the parties (Art II.7: 201(2)) as well as the French 'inexcusable error' and the Italian legal concept of an 'adaption' (Art II.7: 203).[72] The very

[72] Art II.7: 203 DCFR. '(1) If a party is entitled to avoid the contract for mistake but the other party performs, or indicates a willingness to perform, the obligations under the contract as it was understood by the party entitled to avoid it, the contract is treated as having been concluded as that party understood it. This applies only if the other party performs, or indicates a willingness to perform, without undue delay after being informed of the manner in which the party entitled to avoid it understood the contract and before that party acts in reliance on any notice of avoidance. (2) After such performance or indication the right to avoid is lost and any earlier notice of avoidance is ineffective. (3) Where both parties have made the same mistake, the

open period of 'within a reasonable time' (Art II.7: 210) allows for both subjective and objective limits of contestation. In addition to 'restitution' by the 'rules on unjustified enrichment' (Art II.7: 212 (2)), the DCFR also allows for 'damages for loss' by the erring party (Art II.7: 214), independent of an actual contestation and acknowledges a general 'liability for loss caused by reliance on incorrect information' (Art II.7: 204).[73] In the last regulation particularly, it is clear that European contract law considers the error as disturbance of a more comprehensive social information-relationship during the pre-negotiations to the contract.

From the perspective of such a pre-contractual social information relationship, it proves to be particularly relevant who originally bears the *risk* for information and to whom the reasons of *fairness*, or a duty to inform, apply. The preliminary negotiations of the London merchant bind him in a social obligation.[74] In the case of the online merchant, the economic thought of more *efficient* risk-control is part of due of diligence, according to which the *risk* of his error is no longer as simple to pass on, as is the case in the libertarian German *will* regime.[75] The French *Musée du Louvre* has an obligation to inform the other party about the true authorship of the work of Poussin, due to its structurally superior knowledge.[76] Under European contract law, for reasons of *fairness*, the Italian investors were able to establish an argument on the basis of the Bank's breach of information obligations.[77] In the case of pregnant night security

court may at the request of either party bring the contract into accordance with what might reasonably have been agreed had the mistake not occurred'.

[73] Art II.7: 204 DCFR. '(1) A party who has concluded a contract in reasonable reliance on incorrect information given by the other party in the course of negotiations has a right to damages for loss suffered as a result if the provider of the information: (a) believed the information to be incorrect or had no reasonable grounds for believing it to be correct; and (b) knew or could reasonably be expected to have known that the recipient would rely on the information in deciding whether or not to conclude the contract on the agreed terms. (2) This Article applies even if there is no right to avoid the contract'.

[74] *Hartog* v *Colin & Shields* n 1 above.

[75] German Bundesgerichtshof 26 January 2005 n 2 above.

[76] French Cour d'appel Versailles 7 January 1987 (Poussin) n 3 above.

[77] Italian Corte di Cassazione 19 October 2012 n 4 above.

guard, the economic *risk* of the employer must be balanced against the *fair* and equal treatment of women.[78]

Overall, the DCFR expands or broadens the classic collision in the 'law of errors' between liberal *will* and social *reliance*, and around the explicit balancing between economic *risk* and egalitarian *fairness*. In so doing, European contract law is assigning distributive justice a new and more prominent role in the balancing of the validity of a contract.[79] The example of 'law of errors' thus demonstrates how standardization of laws can pluralize legal discourse. However, this pluralistic design of European contract law was preceded by a long political struggle between different groups of comparative law experts.[80]

A blind functionalist belief in always finding a 'better solution' through application of purely technical comparative law 'is based on an uncritical acceptance of the ideological foundations of Western legal systems' and misses 'the most important question [...]: is the train on the right track?'[81] A development of this broader normative question requires an open political debate. While discursive comparative law reconstructs the discursive logic of the functional structures of a legal system, it also allows for a reflexive level of normative criticism. In this respect, the discourse theory of contractual rights should be understood as a critical legal theory, which tries to 'uncover the political underpinnings of legal doctrines and decisions, thus working towards a political theory of law'.[82]

Comparative analysis is indeed 'a powerful political act', but it does not have to result in a 'constitutive aporia'.[83] It may just as easily inspire the democratic utopia of a 'pluralist internationalization'.[84] At

[78] Case 421/92 *Habermann* v *Beltermann* n 5 above.

[79] H. Eidenmüller, 'Party Autonomy, Distributive Justice and the Conclusion of Contracts in the DCFR' 5 *European Review of Contract Law*, 109 (2009).

[80] Cf M.W. Hesselink et al, 'Social Justice in European Contract Law: a Manifesto' 10 *European Law Journal*, 653-674 (2004); cf also n 16 above.

[81] J. Hill, n 20 above, 107.

[82] G. Frankenberg, n 19 above, 452.

[83] P. Legrand, 'Comparative Law, in D. Clark ed, *Encyclopedia of Law and Society* (Los Angeles: Sage 2007), 221 and 223.

[84] M. Delmas-Marty, *Comparative Legal Studies and Internationalization of Law* (Paris: Collège de France, 2015).

any rate, the neutrality of a technical and functional comparative law is a fiction. In this case, one can certainly say, to err is human, too, after all. *Sed in errare perseverare diabolicum*. To insist on errors, however, would be diabolical.