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Edited by Eckart Gottschalk, Ralf Michaels, Giesela Ruhl and Jan von Hein

Excerpt

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SECTION I

**REMEMBERING ARTHUR TAYLOR
VON MEHREN**

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The Last Euro-American Legal Scholar?

Arthur Taylor von Mehren (1922–2006)

Jürgen Basedow

I met his spirit before I met him in person. It was at the end of the 1970s, and I was working at the Max Planck Institute for Comparative and International Private Law as a member of the editorial staff of the *International Encyclopedia of Comparative Law*. I had the privilege of reading manuscripts of chapters, which had been finalized by the authors and approved by the volume editors. It was my task to draw the general editor's attention to unclear or contradictory passages of the various texts. Moreover, I had to survey the author's compliance with the basic methodological approach of the *Encyclopedia*, which is the elaboration of model solutions for a given substantive problem from the great variety of national laws. As time went by, I noticed that many authors had great difficulty attaining this objective. For most of them, the point of intellectual departure by necessity appeared to be their own national law, not the societal or economical conflict or the substantive issue that can occur anywhere.

Arthur von Mehren was different. I studied his introduction to the contract volume of the *Encyclopedia* with great attention and growing enthusiasm.¹ I soon realized that it was a masterpiece of functional comparison. To date, I remember how much I was impressed by the treatment of consideration and its equivalence in other legal systems. It did not focus on a single rule of positive law but on the necessity existing in every system of law to demarcate promises that the state will enforce from other promises, which may have a great significance in society without, however, being suited for enforcement by the courts. It struck me that only a lawyer with a cosmopolitan mind and a broad international education has the capacity to approach legal issues from a viewpoint that is not rooted in any particular legal system.

¹ Arthur T. von Mehren, *A General View of Contract*, in 7 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW, CHAPTER 1 (Ulrich Drobnig & Konrad Zweigert, eds., 1982).

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I was not surprised to learn, at a later stage, that Arthur von Mehren had, in fact, received such a broad comparative legal education in Switzerland, Germany, and France in the years following World War II. More details about this and other facts of Arthur von Mehren's life are well-reported in Michael von Hinden's obituary.² It is true that Arthur von Mehren's comparative interest included many parts of the world and, in particular, Japan and Japanese law. But it appears to me that his formative years in Europe had a great impact on his later academic focus. His treatise on the Civil Law System³ gives evidence of his particular scholarly inclination toward the codified systems of continental Europe. At the same time, it represents the scholarly foundation for the growth of a network of personal and academic relations that extended into many European countries. He regularly travelled to visit the Max Planck Institute in Hamburg, the Hague Conference of Private International Law, and The Hague Academy of International Law to mention just a few of his European destinations.

He tried to bridge the Atlantic not only for himself but also for many scholars of subsequent generations. While I was studying at Harvard Law School around 1980, he somehow felt responsible for me although I had not enrolled in his class. After I had told him that I wanted to spend the year on the study of antitrust law, regulated industries, and economics, he recommended me to some of his younger colleagues. He also took the time to invite me to lunch every now and then and to explain the particulars of the American university system and U.S. law with great patience.

In private international law, his name is usually mentioned in the context of the Hague Conference efforts to work out a worldwide recognition of judgements conventions. He spent much time on this project indeed, and I remember his disappointment when it finally turned out that the negotiations would fail. Here again, the particular relations with Europe were the driving force behind Arthur von Mehren's efforts. The bicentennial of the United States had brought about, in the 1980s, an atmosphere in American society that was friendly to the restoration of closer links with Europe. Arthur von Mehren succeeded in convincing the U.S. government that it would be worth it to struggle for the mutual recognition of judgments in civil and commercial matters between the United States and the European Community. When he was sent to Europe, in the early 1990s, to explore the possibilities for bilateral

² Michael von Hinden, *Building Bridges between Legal Systems: The Life and Work of Arthur Taylor von Mehren*, Chapter 3, in this volume.

³ Arthur T. von Mehren, *THE CIVIL LAW SYSTEM: CASES AND MATERIALS FOR THE COMPARATIVE STUDY OF LAW* (1st ed., 1957).

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negotiations on this matter, he had to learn, however, that the European Community did not have the power to negotiate such a treaty at the time. The project, therefore, was transferred to the Hague Conference, which implied a universal scope of negotiation and, at the same time, reduced the chances of success considerably. It would have perhaps been a certain consolation for Arthur von Mehren that 15 years later, after the amendments brought about by the Treaty of Amsterdam and its interpretation by the European Court of Justice,⁴ the Community would now be in the position to respond to the U.S. initiative.

This book is another document witnessing Arthur von Mehren's close links with Europe in general and with Germany in particular. The background of the Joseph Story Research Fellowships is described in Peter L. Murray's contribution to this book.⁵ Twelve young scholars, nine from Hamburg and three from Heidelberg, have had the privilege of learning from Arthur von Mehren while serving as Story Fellows at Harvard Law School. They have contributed their scholarly work to this book, which is dedicated to the memory of Arthur von Mehren. Some of their articles remind us of projects that Arthur had initiated in earlier years; others are inspired by the learning that the respective author received at Harvard Law School. The whole book is a unique document recalling what may be called, "Arthur von Mehren's German School."

With Arthur's death, this School has also come to a sudden end. Although the funds from Kurt Nadelmann's endowment are still available, the present generation of Harvard scholars is apparently less interested in using them for maintaining and strengthening links with continental Europe. Is the coincidence of this event with the general cooling-down of the political climate between Europe and the United States merely accidental? Was Arthur von Mehren the last Euro-American legal scholar? The lifelong efforts of this great individual for closer links between American and European academia should not only receive the posthumous recognition they deserve, they should also be understood as a message directed to present-day scholars to continue a bilateral intellectual exchange in Western legal thinking.

⁴ European Court of Justice, Opinion 1/03, 2006 E.C.R. I-01145 (Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters).

⁵ Peter L. Murray, *Arthur Taylor von Mehren and the Joseph Story Research Fellowship*, Chapter 2, in this volume.

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2

Arthur Taylor von Mehren and the Joseph Story Research Fellowship

Peter L. Murray

Arthur von Mehren's life and academic work will be chronicled by Michael von Hinden.¹ This brief preface will focus instead on the Joseph Story Research Fellowship Program under which Professor von Mehren brought to Harvard the twelve young German legal scholars who have contributed to this volume, where he oversaw their work here during the last years of his wonderfully productive life.

The Story Research Fellowship represent the lives and values of three remarkable individuals, Joseph Story, to whose memory the program was dedicated, Kurt Nadelmann, who endowed the Fellowships, and of course Arthur von Mehren, who created the program in 1992 and mentored the Fellows up to the time of his death in 2006.

Joseph Story looms large in the history of both American jurisprudence and Harvard Law School. Born in 1779 in Salem, Massachusetts, Story studied at Harvard College and practiced law for a time in his native town. In the early 1800s, he became active in Democratic politics and was appointed to the United States Supreme Court in 1811 when he was only 32 years old. A natural scholar, Story wrote voluminously in almost every area of early nineteenth-century legal literature. His erudition led to his appointment as the first Dane Professor of Law at the Harvard Law School (HLS) in 1829. Although the Law School had been founded in 1817, it had struggled for identity and recognition during the first decade of its existence. Story's appointment, and the energy and talent that he brought to the faculty, gave great impetus to the Law School's growth and future eminence.

Story's view of the law was universal. His commentaries frequently included references to European law and several of them were translated into Spanish,

¹ Michael von Hinden, *Building Bridges between Legal Systems: The Life and Work of Arthur Taylor von Mehren*, Chapter 3, in this volume.

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French, Italian, and German. He had particular interest in the conflict of laws and the admiralty law, which is, perhaps, the oldest form of international private law. He served on the U.S. Supreme Court until his death in 1845. His ability to maintain his academic and judicial roles simultaneously for many years bespeaks his extraordinary energy and efficiency. As a Justice, he played a major role in the development of the Court's constitutional jurisprudence in the Marshall era. Story's legal erudition combined with Marshall's intuitive genius to forge many a landmark judgment. A dedicated opponent of slavery, Story was the author of the famous *Amistad* decision in which slaves who had forcibly seized their slave ship were freed and allowed to return to Africa.

Story's legacy at the Harvard Law School has been recognized and honored for many years. A full-sized statue of Joseph Story graces the main entrance of the Langdell Library. The Story Professorship, founded in 1875, has long been one of Harvard Law School's most prestigious chairs. It is entirely appropriate that when Arthur von Mehren was appointed to an endowed chair in 1976, it was to the Story Professorship.

Kurt Nadelmann, whose generosity and vision made the Story Research Fellowships possible, was a great admirer of Joseph Story and wrote on Story's contributions to the American law of conflicts. Nadelmann was born in Berlin in 1900 and was educated at the Universities of Berlin and Freiburg, from which he received his doctorate in 1921. In the 1920s, he served as a judge in Fürstenwalde and Berlin. In 1933, when the Nazis came to power in Germany, he moved to Paris where he was admitted to the French bar as a bankruptcy specialist.

In 1940, Nadelmann came to the United States. He was one of a generation of German émigrés who greatly enriched the American Academy of Comparative and International Law in the latter two-thirds of the twentieth century. After teaching for several years at the University of Pennsylvania and at New York University, Nadelmann joined the HLS Faculty as research scholar and lecturer in 1961. He was a prolific scholar in the areas of comparative law and conflicts of laws, interests that he shared with his colleague and friend, Arthur von Mehren. He remained at HLS until his death in 1984.

Nadelmann endowed the remainder of his estate to Harvard to form a society to be known as the Joseph Story Society, for study and research on international conflict of laws. His testament provided:

I desire that Harvard Law School shall use my bequest hereunder, in its complete discretion and without creating any trust or other fiduciary obligation, for the furtherance and support of said Joseph Story Society and under its auspices, of work in the field of conflict of laws, giving preference to problems involving United States participation in international endeavors toward the progressive unification of the rules of private international law.

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An unincorporated association consisting of Harvard Law Professors *Arthur von Mehren*, Donald Trautman, Henry Steiner, and Detlev Vagts was duly formed to accept the Nadelman bequest. For several years, the fund quietly grew as a portion of the Harvard endowment. Finally in 1991 or 1992, then Dean Robert Clark took up with Arthur von Mehren, Harvard's preeminent expert in private international law, the question of how the Law School might employ the Nadelmann bequest in a manner consistent with the benefactor's vision. At that time, Professor von Mehren was facing mandatory retirement as a member of the last "class" of HLS colleagues reaching the age of 70 before the effective date of the Pepper Amendment, which proscribed the mandatory retirement of university academics. Professor von Mehren had no desire to be retired. He had many academic projects under way, including his work on The Hague Conference on International Private Law, which was then considering a new worldwide convention on international jurisdiction and recognition of judgments. Professor von Mehren was also very familiar with the German academic tradition under which law professors are provided academic assistants whose talent, youth, and energy can leverage their mentors' wisdom and productivity. Many of us have long envied our European colleagues for this kind of academic support, which is not generally available under the American law school model.

According to Dean Clark's recollection, Professor von Mehren was quick to suggest that the funds of the Joseph Story Society could be used to support young German academics who would come to work with him at Harvard in the fields of law referred to in Nadelmann's will. This proposal found Dean Clark's approval and the Joseph Story Research Fellowships were founded.

Recruitment of qualified candidates for appointment was facilitated by Professor von Mehren's many ties to leading German scholars active in the field of international private law. Professor Erik Jayme, and later his successor, Thomas Pfeiffer, conflict of laws colleagues from the University of Heidelberg, regularly suggested young postdoctoral candidates and research assistants. The Max Planck Institute for Comparative and International Private Law in Hamburg proved to be an especially fruitful source of talent. There Professors Ulrich Drobnig, Jan Kropholler, and Jürgen Basedow successively sent a number of talented assistants to serve as Story Fellows with von Mehren at Harvard. The first Story Research Fellow served a 2-year term. His successors have all come for 1-year appointments.

All of the Joseph Story Fellows have been highly talented young German jurists with excellent credentials and at least some academic orientation. Proof of the quality of their performance lies in the many books, articles, and academic papers written and published by Professor von Mehren even in the very

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last years of his life. With due allowance for von Mehren's own prodigious energy, it is safe to say that much of his output of his later years would not have been possible without the help of the Story Fellows.

Professor von Mehren's mentoring of his Story Fellows had a personal as well as an academic side. He was solicitous of their welfare and frequently included them not only in activities of the Law School academic community, but also in family gatherings at his home in Cambridge and at his summer home in the Adirondacks.

This is not to say that the Story Fellows were not able to undertake and perform academic work of their own. Several of them wrote articles and reports that were later published under their own names. Much work was accomplished on dissertations and postdoctoral habilitations. The Story Fellows could not complain about too little work. But it is safe to say that each Fellow could make a solid substantive contribution to Professor von Mehren's projects and also do some worthwhile work of his or her own.

The excellence of the Story Fellowship candidates and the value of their experience at HLS with Professor von Mehren are perhaps best demonstrated by their activities and distinctions in the time since their respective terms at Harvard. As of the publication of this Festschrift, one of the former Story Fellows is a tenure-track professor at Duke University Law School, two are *Privatdozenten*, qualified to serve as professors in Germany but, as of yet, without chairs of their own, three others are working on their habilitations, one is general counsel to a large, multinational corporation, one is a German public notary, and four are attorneys in international firms. Their enthusiastic response to the notion of collectively authoring a Festschrift in honor of Professor von Mehren suggests that all of them feel privileged and enlightened by their Story Fellowship experiences.

Although the Joseph Story Research Fellowship Program at HLS has come to an end with the death of Professor von Mehren, that academic collaboration will bear fruit for many years to come in the form of the present and future work of the former Story Fellows. Of all the many memorials to the life and work of Arthur von Mehren, it is hard to think of one that will be more enduring, or of greater significance, than the present and future careers of the young German law academics that he mentored at HLS.

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3

Building Bridges between Legal Systems

The Life and Work of Arthur Taylor von Mehren

Michael von Hinden

Whether we are dreaming of a world law or thinking of the further development of our own law, to suit it to the worldwide problem of the general security in the present and immediate future, the methods of the jurist must have a basis in comparison.

Roscoe Pound, *Foreword to ARTHUR T. VON MEHREN, THE CIVIL LAW SYSTEM, CASES, AND MATERIALS FOR THE COMPARATIVE STUDY OF LAW*, at vii, viii (1957)

I. INTRODUCTION

When Arthur Taylor von Mehren died on January 16, 2006, the academic community lost a leading scholar of international and comparative law whose work influenced generations of lawyers throughout the world. In addition to educating thousands of law students in the course of a teaching career spanning nearly 60 years, von Mehren was one of the few scholars with a truly global reputation.

The best evidence for the respect and affection von Mehren experienced from friends and colleagues is the overwhelming number of personal tributes published within the few weeks since he passed away. The editors of the *Harvard Law Review* respectfully dedicated the May 2006 issue to him.¹ A recent issue of the *American Journal of Comparative Law* contains warm and illuminating

¹ See Tribute, *In Memoriam: Arthur T. von Mehren*, 119 HARV. L. REV. 1949 (2006); the issue contains contributions by Daniel R. Coquillette, 119 HARV. L. REV. 1949 (2006); Jeffrey D. Kovar, 119 HARV. L. REV. 1952 (2006); Peter L. Murray, 119 HARV. L. REV. 1954 (2006); James A. R. Nafziger, 119 HARV. L. REV. 1958 (2006); Symeon C. Symeonides, 119 HARV. L. REV. 1962 (2006); and Peter D. Trooboff, 119 HARV. L. REV. 1967 (2006).

This article is dedicated to Joan von Mehren who has contributed in so many ways to her husband's extraordinary career. She is also a very successful author in her own right. Cf., e.g., Joan von Mehren, *MINERVA AND THE MUSE, A LIFE OF MARGARET FULLER* (1994).

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tributes by James R. Gordley and Symeon C. Symeonides.² Similar obituaries appeared in European law reviews.³

The aim of this article is to trace back the evolution of an outstanding academic career and to highlight some of the many important contributions to legal scholarship authored by von Mehren.

II. “ALL THE WORLD HIS STAGE”:⁴ LIFE AND CAREER

Arthur von Mehren, born on August 10, 1922 in Albert Lea, Minnesota, had a truly international family background. His father’s family was from the Low Countries, but left during the Spanish occupation for Denmark; his mother’s family originated in Norway and settled in Minnesota. The family was also exceptional in the sense that Arthur had an identical twin brother, Robert. The twins grew up in Minneapolis, where they showed outstanding intellectual capabilities in high school. It seems that they had an extraordinary German teacher, which may serve as an explanation for Arthur’s profound interest in German civilization.

Each of the twins was offered scholarships from both Harvard and Yale. They made a show for the local newspaper of flipping a coin to see who would go to Harvard and who would go to Yale.⁵ Reportedly, Harvard and Yale took the opportunity to engage in a scientific experiment: both offered higher scholarships if each twin went to a different school, in order to find out which university would make better use of the identical gene pools.⁶

Arthur von Mehren entered Harvard College in 1939 and graduated Phi Beta Kappa in 1942, by completing his fourth year in a summer session. Both

² James Gordley, *Arthur Taylor von Mehren (1922–2006)*, 53 AM. J. COMP. L. 527 (2005); Symeon C. Symeonides, *Arthur Taylor von Mehren: A Gentle Giant*, 53 AM. J. COMP. L. 531 (2005).

³ Xavier Blanc-Jouvan, *In Memoriam*, 58 REV. INT. DR. COMP. 214 (2006); Hélène Gaudemet-Tallon & Denis Tallon, *In Memoriam*, 58 REV. INT. DR. COMP. 213 (2006); P. L., *In Memoriam Arthur T. von Mehren*, 24 ASA BULLETIN 251 (2006); Ralf Michaels & Giesela Rühl, *Arthur Taylor von Mehren* (10. August 1922 – 16. January 2006), 70 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT [RABELSZ] 233 (2006); Peter L. Murray & Eckart Gottschalk, *In Memoriam: Arthur Taylor von Mehren*, 105 ZEITSCHRIFT FÜR VERGLEICHENDE RECHTSWISSENSCHAFT [ZVGLRWISS] 251 (2006).

⁴ I borrow this phrase from Stephen B. Burbank, *All the World His Stage*, 52 AM. J. COMP. L. 741 (2004) (reviewing Arthur T. von Mehren, *Theory and Practice of Adjudicatory Authority in Private International Law: A Comparative Study of the Doctrine, Policies and Practices of Common- and Civil-Law Systems*, 295 RECUEIL DES COURS 9, 431 [2002]).

⁵ See Bryan Marquard, *Arthur von Mehren*, 83, *Expert on Nations’ Legal Systems*, BOSTON GLOBE ONLINE, Jan. 23, 2006, available at http://www.boston.com/news/globe/obituaries/articles/2006/01/23/arthur_von_mehren_83_expert_on_nations_legal_systems/.

⁶ See Ralf Michaels, *Profile of Arthur Taylor von Mehren*, 7 INTERNATIONAL LAW FORUM DU DROIT INTERNATIONAL 213 (2005).