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The Role of Comparative Law in the Making of European Private Law

1. Affinitive legal systems

Estonia can now celebrate the tenth anniversary of its Law of Obligations Act, and this is perhaps a not inappropriate occasion to reflect on the role of comparative law in the development of a European private law. After all, the Estonian code on the law of obligations arose out of foundation work conducted in comparative law. Peter Schlechtriem's contribution to that is not forgotten. The commentary on the code, all three volumes of which have since been completed, is likewise rich in references to international material; the team of editors and contributors led by Paul Varul has succeeded in weaving into the text extensive treatment of the Draft Common Frame of Reference (DCFR) in particular. Now that the code of obligations has passed its probation, the task for the legal scholars of Estonia may well lie first and foremost in shadowing and chaperoning the text and consolidating its sensible practical application. For that purpose of reinforcing the Estonian law of obligations, it long ago became more important to concentrate once again on the national code rather than to consult foreign legislation, case law, and literature. Of course, one may well wish to assure oneself of the correctness of the route the code has apparently chosen through the light cast by foreign legal materials and to check whether, even after such a short time, reforms to particular provisions are already needed. Apart from this, however, foreign law remains confined as a rule to the role of a stopgap; it will be enlisted when it pinpoints a solution to questions that could not be sufficiently analysed in this jurisdiction.

Thus, in a case of doubt one may well look to Germany. That makes sense most of all in those instances wherein the German and Estonian legal systems assume a parent–child relationship in which the defining elements of the Estonian code of obligations have been borrowed from German law. The tort-law concept of unlawfulness, the law of unjustified enrichment, and the complicated doctrine of *negotiorum gestio* constitute prominent examples among many. Similar phenomena are to be found in many parts of the European Union—for instance, in the relationship between Portugal and Italy, between Cyprus or the Isle of Man¹ and England, between Belgium and France, between Finland and Sweden, between the Czech Republic and Austria, and between Greece and Germany. Within closely related legal systems, developments are also followed in the country from which the relevant regime or rule is derived. Germany—on the scale of a Europe divided into small domains—is already a ‘large’ country; moreover, at any rate, it possesses comparatively more copious jurisprudence and scholarly legal literature than Estonia. One may well, therefore, long continue to draw inspiration from it—if that is desired.

¹ On which one can now consult the impressive work by M. Zillmer. *Die Rechtsordnung der Isle of Man – mit Schwerpunkt im Wirtschaftsrecht, verglichen mit dem englischen Recht*. Universitätsverlag Osnabrück 2012.

2. Information and opinion about foreign law

That is admittedly ‘only’ one particular form of practical useful application of comparative legal research, but it is at least directed toward a concrete aim and for that reason has sustained value. At the same time, it contributes (albeit on a modest scale) to maintaining networks of interlinkage between the European systems of private law. In no way is this something that can be asserted about every focus on foreign law—not even when it is flagged as comparative law. ‘Comparative law’ is a term originating in the world of nation-states, a description that even today continues to mislead many legal minds. For the most part, they associate the term ‘comparative law’ with the—trivial—notion (born out of the prevailing conditions of the 19th and early 20th centuries) that it consists of juxtaposing at least two national legal systems, ascertaining where the law of A and the law of B are the same and where they differ, and finally determining which of them is ‘better’. A hundred years ago, it was, of course, always one’s own law that was ‘better’, and, if the Law Society of England and Wales is to be believed, there are still regions in the north-west of our union where that deeply rooted conviction is still alive and kicking.² It is part of the standard repertoire of academic writing on the law of delict in my own country to make indignant observations about the ‘general clause’ of the French law on liability; the standard textbooks of French law, by contrast, are so utterly infatuated with the elegance of their own system that as a rule they do not even consider looking outward to other systems. That said, they are still self-confident enough in France not to join in the chorus of legal comparativists whose—perfectly contrary—refrain in the final decades of the last century rang out that the cherries are rosier in the neighbour’s garden (or, as one says in England, the grass is greener on the other side). Some German authors, returning after the Second World War from a period of study in the USA, tended to demonstrate the correctness of their new ideas by showing that the Supreme Court of Alabama saw matters in much the same way they did. It is only now, once we have already reached the threshold of a European sales law, that the pendulum is swinging back. The internationalism peppering the career-advancing dissertation of a young politician turns out not to be so Europhile in nature after all! Legal chauvinism and legal narcissism are spreading.³ Hardly anything ‘European’ has stirred the soul of private-law jurists quite as much as the DCFR and the draft Common European Sales Law derived from it. The commotion is not justified from the standpoint of substance; it is all about emotions. Rules that encroach far more on national sovereignty (e.g., in the law on recognition of foreign judgements or in international insolvency law) pass through the legislative process almost devoid of any echo in the literature—‘anything, just not a European sales law’ is the resounding message in German, French, and English circles.

Anxiety about being swamped by foreign influences and losing a knowledge power base is spreading. Have we who regard ourselves as legal comparativists done something wrong? Have we failed to reflect sufficiently on what our branch of scholarship can and should yield for Europe? Internationalism is important at a personal level because it establishes trust, but at the technical level it bears no fruit as long as it is pursued merely for its own sake. Intellectual tourism, to coin a term, does not generate fresh insights. At best, the sum of legal knowledge is added to only marginally when a particular rule can be identified as Italian, Estonian, or Polish. Such knowledge assists in private international law and international civil-procedure law (and, of course, when the relevant EU regulation has to be interpreted correctly⁴) when in a particular case foreign law falls to be applied. A great deal is demanded of courts nowadays; European rules on jurisdiction that are consumer-friendly and advantageous to injured parties are causing the number of legal proceedings that fall to be decided on the basis of foreign law to escalate on a phenomenal scale. The rules on free movement of companies, meanwhile, also oblige courts to render the most surprising judgements. A recent decision of the Berlin *Kammergericht*, for example, set out what a German *Amtsgericht* has to take

² Law Society of England and Wales. England and Wales: The jurisdiction of choice. Dispute resolution. London 2008. Available at http://www.lawsociety.org.uk/documents/downloads/jurisdiction_of_choice_brochure.pdf. The UK Minister of Justice states there that he is ‘committed to supporting the legal sector’s success on the international stage [and] therefore delighted to introduce this brochure by the Law Society promoting England and Wales as the jurisdiction of choice for the resolution of disputes arising over the world’ (*ibid.*, p. 5).

³ On this point, see C. von Bar. Konkurrenz der Rechtsordnungen und „Law made in Germany“. – *Liber Amicorum Ole Lando*. Copenhagen 2012, pp. 13–25.

⁴ A fine example is provided by Article 13 of the Rome I Regulation, which in English is headed simply ‘Incapacity’. In its German-language version, the provision refers to ‘Rechts-, Geschäfts- und Handlungsfähigkeit’, but in the context of this provision the concept of *Handlungsfähigkeit* has no sensible meaning. What is meant here can only be appreciated against the background of legal concepts such as the *capacità di agire* (‘acquired by adulthood’) of Italian law.

into account when an ‘English PLC’ (whatever the court may have meant by that) aspires to be a founding member of a German GmbH. The ‘PLC’, according to the *Kammergericht*, is ‘represented by its director. However, it is the Company Secretary who is responsible for complying with formal requirements [...]. The Company Secretary is chosen as a rule by the director. Companies with a single director [...] may not also appoint [him] as Company Secretary’.⁵ I have no idea whether that is accurate, but it takes my breath away in view of the sheer extent of the demands made of a poor registrar snowed under with court files in the court of first instance.

If we as a team of academic lawyers interested in foreign legal systems really want to help our courts, then we must stand together and wrench from the Ministers of Justice in our countries the wherewithal—sufficient in terms of staffing, equipment, and funding—to establish on a distributed basis across the European Union a number of centres of information on the law in the member states of said union. These would be centres that can provide reliable information—in the language of the court making the request—on the detail of the legal system in focus, for which that centre is competent to answer. The European Convention on Information on Foreign Law⁶, signed in London under the mantle of the Council of Europe, was well meant, but it simply does not function. In my country, information about foreign law continues to be obtained from universities or other institutions of higher education, a form of ‘passing the buck’ in which the latter are in principle unable to cope with the demand. It is a scandal verging on a denial of justice, and I am shocked by how little attention it attracts. Eradicating the practice, however, will be a difficult task. That is only too apparent from the chorus urging anything but a European sales law. And yet would they therefore at least advocate investing in an efficient and productive system for imparting information? ‘Much too expensive’ they would doubtless say. In our institute in Osnabrück, we have attempted some amelioration by compiling a comprehensive bibliography of more than 25,000 monographs, journal articles, court decisions, and other materials in German on foreign law.⁷ But this too is only modest assistance; either the answer to questions on which the resolution of a case hangs cannot be found in the literature we have listed or the parties and the court are unswerving in continuing to insist on an elaborate expert report. There are still liability insurers in Europe who appear to be unperturbed by the disproportionality between the sum in dispute and the cost of obtaining an expert opinion.

3. Petty internationalism

When the task at hand, determined by the happenstance facts of a particular case, is one of ascertaining certain particular rules of a given foreign legal system, on the basis of which the case is to be resolved, much depends for the parties on the correct answer; in academic terms, however, such serendipities do not as a rule lead anywhere. That holds even for the occasional ‘academic’ article proceeding from such an expert report. What, for example, does one glean from the fact that the rule that civil-law ownership is confined to ‘corporeal objects’ can be found not merely in Germany and Estonia but also in Greece, the Netherlands, and Poland? It may be cause for a little self-affirmation for jurists in those countries perhaps, but what else does it yield? Confronted with a ‘So be it, then’ and a shrug of the shoulders from those of his colleagues who are not interested in comparative law, the proud author of such an article ultimately can only parry with difficulty. A lemon remains a lemon, even if it originates in Sicily rather than Crete. Let us not kid ourselves. A typical comparative legal study, usually confined to a few legal systems, tends (after elaborating on differences in method in resolving the given problem) to end ultimately with the thesis that the legal systems examined are nevertheless similar. In essence it is always the same. Comparative law of this type remains unengaging. It offends no-one—and passes away gracefully in oblivion.

⁵ KG 22.2.2012. – ZIP 2012, pp. 1462, 1463.

⁶ Reproduced in, among other works, the German BGBl, 1974 II, p. 938.

⁷ C. von Bar. *Ausländisches Privat- und Privatverfahrensrecht in deutscher Sprache*. 9. Aufl. Munich: Sellier European Law Publishers 2013.

4. Political correctness

It is downright menacing to purport to be international merely in order to be fashionable or ‘politically correct’. I decline to make manifest poor comparative law that takes a lead from the so-called Bologna process, at the end of which the academic world is suddenly divided into Bachelor and Master from Coimbra to Tartu and not merely from Galway to East Anglia. We would ruin the German system of legal education for good if we were to convert to this system.^{*8} A Belgian colleague recently drew my attention to the new Rwandan Contract Law, a lengthy legislative measure that, he observed, looked as if a jurist trained in the common law had tried to make sense of the Code Napoléon! I have not formed my own opinion on that point, but I discern that matters here in Europe are sometimes somewhat similar, though under different auspices. Too many people are trying with too much haste to understand and copy the common law; and thus it is that we discover the trust suddenly in the heart of the continent in the new Czech civil code.^{*9}

5. Legal families

This brings us to a further stereotype in comparative law: the conviction that the legal systems of this world can be tidily arranged into legal families (or spheres). For a long time now, that assumption has not withstood detailed examination, yet it is so deeply anchored in the human consciousness that there is little prospect of success in pointing out the deficiencies in this system of ordering jurisdictions. The notion of legal families feigns an intellectual certainty where none exists and prompts causal theses to be proffered by authors who are not prepared to exert themselves. Above all, the notion of legal families creates lines of demarcation and thus zones of exclusion. Considered in this light, it also has a political dimension. If, within the European Union, one still intends to think in terms of legal families at all, then these must be mapped out differently from one area of the law to another. In the law of tort or delict, the great European dividing line does not run along the Channel or across the Baltic Sea; it runs along the Rhine. Estonia and Lithuania do not constitute part of a ‘Baltic legal family’; nor can their self-esteem tolerate being simply shoved into the ‘German’ or the ‘French’ legal camp. Such statements are reminiscent of the language of the 19th century; they should not be admitted into the vocabulary of our time. Moreover, within the ‘families’ that ostensibly partition the European Union there are in any case diverse jurisdictions, whether the focus is on the substance of the law; its systematic arrangement; its methodological apparatus; or, quite simply, the culture of legal reasoning that the courts of a country adopt in forming their judgements.^{*10}

6. The European Union as one area of law

If I had to summarise the role of comparative law in the creation of a European private law in a single sentence, I would say this: it is all about taking a closer look. That alone is able to place us in the position—in spite of all the opposition—in which the Union can be conceived as **one** area of law and our national jurisdictions can be understood as local manifestations of an all-encompassing whole. The role of comparative law in the creation of a European private law does not consist in urging a comprehensive harmonisation of our national legal systems; that is or would be either a dream or a nightmare, depending on one’s point of view—a political issue, at any rate. Naturally, it is exciting for many legal comparativists to collaborate in this political work, but it is not their actual task. A uniform law that has solidified into the form of a legislative text is and remains a cumbersome and unwieldy product. Jurists do not identify with it; it generates too little positive emotion. There are many reasons for that, among others the incompleteness of the uniform law and its artificial concentration on cross-border matters. However, European uniform law can easily

⁸ Justifiably critical of the ‘tendencies of German law faculties to increase their attractiveness to foreign lawyers or students, particularly in the field of private law, by lightening their requirements for undergraduate and postgraduate study’. See G. Matsos. *Rechtswissenschaftliche Ausbildung in Deutschland: attraktiver zu machen? – GPR 2012*, p. 225 (editorial).

⁹ §§ 1448–1474 Czech Civil Code (2014). These provisions are copies of Articles 1260–1370 of the Civil Code of Québec (K. Eliáš *et al.* *Nový občanský zákoník s aktualizovanou důvodovou zprávou a rejstříkem*. Ostrava 2012, p. 580 (in Czech)).

¹⁰ For an impressive discussion, see L. Tichý, P. Holländer, A. Bruns (eds). *Oduvodneni Soudního Rozhodnutí – the Judicial Opinion – Begründung von Gerichtsentscheidungen*. Prague 2011 (in Czech).

reach and indeed exceed the quality of national law and arouse the same fascination the autonomous law possesses; the regulations on private international law offer sound testimony to that. A prerequisite for that, however, is sufficient legislative competence, and this is not to be found in the substantive law. It is not the case that one has to circumscribe the legislative competencies of the Union in the interest of preserving quality in the law; rather, it is the restrictions on the legislative competence of the Union that limit the measures that it can achieve. The Union's private law is the victim, not the assailant.

7. A common-law approach to European private law

Scholarly comparative law will not rescue us from this dizzy whirr of multitudinous interests. However, it can sow seeds for improvement by diligently sifting through the existing materials, opening the possibility for each national legal system to track and map out its private law, and putting all interested parties in a position from which one can edge without coercion toward the question of how far they want to embark on a shared journey. To Lord Neuberger of Abbotsbury, at the time Master of the Rolls and now President of the Supreme Court of the United Kingdom, the question was once posed in the middle of Berlin of how or whether European private law should develop. With inimitable enigmatic ambiguity he gave this reply: '[M]y answer is that its development should learn from the common law (just as the common law will, as it has always done, learn from European law). [...] If European law is to develop its full potential in the future, it needs a fresh approach: it needs a common law approach.'¹¹ It may surprise you, but in large measure I agree with him. European legal scholars and the European judiciary are often able to converge in a more flexible and relaxed manner than are European governments and legislative bodies.

The problem, of course, remains of what form a 'common-law approach' in European private law might take. Is there not buried beneath that elegant *bon mot* something akin to the thesis that the best scenario is for nothing at all to happen and that one should leave these things to themselves? European private law is a *mixtum compositum* of the private law of the Union and the autonomous private-law systems of the Member States. The key problems in researching it can be listed quickly: the sheer volume of material; the multitude of languages, systems, and methods; and, last but not least, the lack of research funding with which to penetrate this thicket. There is certainly no lack of clamour as regards all the matters that should be taken into account in development of the European private law—Lord Neuberger's European common law. Our colleague in Heidelberg Christian Baldus, for example, warns us that 'the whole of Europe has an interest in the legal cultures of the South of Europe being able to disseminate their laws (and legal languages) convincingly. They are the great laboratory of juridical Europe'¹². He too is right. But such assertions are no less valid for the West, East, and North; the regions of the Union should not be pitted against one another—not civilians against islanders, nor the West clinging to its traditions against those in the East who already stand on new ground. Let me quote once more Professor Baldus, who in the same article adds, with sensitivity: 'If French private law has continually lost influence since the middle of the nineteenth century, despite its dogmatic level, then that is due to its self-referential introspection and its imprisonment in its own concepts and because of the tardiness and the ties of hierarchy in academic communication.' That too is correct, but it extends further and is also a warning to us all.

First and foremost, therefore, modern comparative law must attempt an intellectual renaissance. In my opinion, it must aspire to penetrate as far as possible **all** the legal systems of the Member States and to project a single 'superimposed portrayal'. We will succeed in laying the foundation for a 'common European private law' only if we decipher our private law piece by piece on a pan-European basis and when we have succeeded in each area of the law, in turn, in construing diversity of national law as a natural plurality of opinion within one and the same legal domain. That is really difficult and demanding—and not merely because it requires one to work on the basis of a far larger array of information than a jurist working only on a national dimension must tackle. Above and beyond that, it requires a completely fresh methodology and, in particular, repeatedly posing familiar questions afresh in a European light, including questions directed at our own system. To pursue as scholars a European 'common-law approach' presupposes a quite different

¹¹ Lord Neuberger of Abbotsbury. Towards a European law? Australian Bar Association Conference Berlin. Available at <http://www.scribd.com/doc/59598543/TOWARDS-A-EUROPEAN-LAW-LORD-NEUBERGER-OF-ABBOTSBURY-MASTER-OF-THE-ROLLS-Berlin-Lecture-July-2011> (most recently accessed on 20.10.2013).

¹² C. Baldus. Europäischer Süden und Europäisches Privatrecht. – *GPR* 2012, p. 105.

infrastructure from that deployed in traditional individual-centric legal research. It requires teamwork, because one researcher alone cannot command all the languages of the Union, nor can one person exploit single-handedly the mountains of information that already exist.

Above all, however, what is needed is the development of a distinct pan-European dogmatic framework or—if the word ‘dogmatic’ sounds alien and antiquated—the development of a legal language and a juridical system that is ‘europeanizable’. Both are possible; we have attempted to show this in a book on the law of extra-contractual liability¹³, and we are currently attempting something similar in the law of things or property. There the task is orders of magnitude more difficult than for the law of delict or tort because—and here I can only allude to the problem—every word, every juridical concept, every scheme of categorisation cries out for careful reconsideration and evaluation: ‘thing’, ‘ownership’, ‘possession’, ‘movables’ and ‘immovables’, ‘absolute right’—none of these terms is self-evident, none of them can be carried over without scrutiny into a ‘European common law’, and none can be grasped by ‘functional comparative law’ in the style of the 1960s. One has to be prepared, therefore, to engage with a sort of meta level, an attempt at a new description of what unites us and what separates us. Such a venture, however, will itself also give rise to negative reactions. It is, of course, also prone to error. But it does cut the first paths through the chaotic jungle of handed-down concepts and specific decisions of legal policy. It is true that this will not be certain to enjoy the same intensity of reception as a classical textbook or manual on a given area of the law of a single national legal system, just as equally such books cannot at present keep up with the pulse of change through new editions correctly tracking current developments; that too entails a burden that at the moment no-one will finance. Nevertheless, I consider it to be by means of such books and the casebooks¹⁴ accompanying them that a first decisive step in the direction of a ‘European common law’ can be taken. It may even be that such studies are also of appreciable relevance for the further development of the real (i.e., legislatively ordained) EU law. The law of property is a good example. Although Article 345 of the Treaty on the Functioning of the European Union precludes a direct impact on the system of property ownership of the Member States, the law of the Union still provides for a variety of indirect connections to categories under property law. Whenever, for example, Union texts refer to a sale, ‘ownership’ is ultimately at stake, although the parties concerned would not actually know precisely what that, in turn, entails. In the law on compensation for productive liability, ownership is no less a prerequisite than in the law on preventing the unlawful transfer of cultural property, and in the EU regulations on private international law it is no less a background feature than in the rules on state aid. Wherever such measures invoke the notion of immovable or *Grundstücke*, they refer tacitly to national laws without even so much as remotely grappling with their conceptual diversity on this point or even being able to do so.

8. Rule-making

This form of comparative legal work, however, is only one of many. In contract law, wherein the Europeanization of law has hitherto achieved the most tangible progress, a manual that fathoms this area of the law in its entire breadth and depth on a European basis has never been published, and I do not know of anyone who would now work on one. To some extent, we have skipped the first step and already taken the second. The Lando Principles and the DCFR made a ‘flying start’ resulting directly in making of pan-European rules. That was indeed a sensible move and, seen from today’s vantage point, proved to be particularly successful. The DCFR currently numbers among the most frequently translated and most cited academic legal texts of this world. There are thus materials for which we can state that—and on this point too Lord Neuberger and I are in complete agreement—‘comparative law is not enough’. We must go beyond it. A synthesis of our national traditions is necessary if we are to identify general principles that underpin the different traditions of the European states. And once that is done, they should be assessed in line with their practical utility, and if implemented they should be capable of effective judicial interpretation. From that point on, the task of legal scholarship is complete; from there on, what is to be forged from the results of the research is a matter for legal policymaking.

¹³ C. von Bar. *The Common European Law of Torts* (Vol. 1: Oxford 1998; Vol. II: Oxford 2000).

¹⁴ A brilliant example is the volume edited by S. van Erp and B. Akkermans in the series *Jus Commune Casebooks for the Common Law of Europe* entitled *Cases, Materials and Text on Property Law* (Oxford 2012).

9. Conclusions

I was assigned the task of formulating a statement of how I see the role of legal scholarship in the construction of a European system of private law. My answer runs as follows: I see comparative law as a conveyor belt to a European future in which local particularities are set in relation to a common juridical composite system. Comparative law will then cease to be a special branch of legal science. As all legal scholarship, it will only be concerned with identifying good and bad legal rules. Expressed differently, it reduces to this: what we today still call comparative law will no longer play out in the body of the text; it will be consigned to the footnotes.